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NO. COA09-294

NORTH CAROLINA COURT OF APPEALS

Filed: 17 November 2009

STATE OF NORTH CAROLINA

v.  
JAMES MARION MASSEY,  
Defendant.

Mecklenburg County  
Nos. 07CRS038440, 38442  
07CRS226975-76

Appeal by defendant from judgments entered 3 November 2008 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals 26 October 2009.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Thomas R. Miller, for the State.*

*James N. Freeman, Jr., for defendant-appellant.*

STROUD, Judge.

Defendant James Massey appeals from judgments entered after a jury found him guilty of three counts of robbery with a dangerous weapon and he pled guilty to one count of carrying a concealed weapon. Defendant contends that the trial court erred when it denied his motion to dismiss the armed robbery charges and committed plain error when it allowed two of the victims to testify describing their out-of-court identifications of defendant. We find no error.

At about 2:30 p.m. on 14 June 2007, defendant entered the office of the apartment complex where Mildred Cruz, Melanie Hinson,

and Eva Judith Santiago worked. Defendant complained that he had lost money in a washing machine. When the women asked what apartment he lived in, defendant pointed a gun at them and demanded their money and other belongings. Defendant took money, credit cards, jewelry, and a cell phone from the women, as well as an office DVD player. Defendant told the women to lie down on the floor and count to seventy, and then left. Defendant did not have anything covering his face during the robbery.

After defendant left, Ms. Cruz called the apartment's corporate office to report the robbery, and the corporate office contacted police. Ms. Cruz described defendant to the corporate office as a tall, thin black man wearing a do rag, a black shirt, long pants, and dark tennis shoes. The corporate office relayed Ms. Cruz's description to police. Police arrived at the apartment complex around 2:43 p.m.

A short time later, officers stopped defendant in a nearby apartment complex because he matched Ms. Cruz's description. Defendant was also wearing a camouflage jacket over his black shirt. When officers ordered defendant to stop, he initially ignored them. After officers repeatedly told defendant to stop, he put his hands on his head and allowed officers to search him. Officers found a gun secured in defendant's waistband. Although officers had not yet told defendant why they had detained him, defendant told them that he had nothing to do with the robbery.

Officers took defendant into custody at about 3:00 p.m. A groundskeeper told the victims that police caught the robber.

Within ten minutes, officers began to drive the victims, one at a time, in a police car to identify defendant as the robber. Ms. Santiago, the first victim officers brought to defendant, was not able to identify him. Ms. Cruz, however, identified defendant as the robber. Ms. Cruz testified that officers held defendant as she identified him, but she could not remember if he was in handcuffs. Ms. Cruz was sure of her identification. Ms. Hinson also separately identified defendant as the robber through the same procedure and was certain of the identification. Defendant did not object to the testimony about the identification procedure, and all three victims also identified defendant in court.

Defendant testified that he was at his mother's home on 14 June 2007 between 1:00 a.m. and about 3:00 p.m., when he left for work. Defendant's mother and brother also testified that defendant was home during that day until he left for work at 3:25 p.m.

The trial court denied defendant's motion to dismiss. The jury found defendant guilty of three counts of robbery with a dangerous weapon, and defendant pled guilty to one count of carrying a concealed weapon. The trial court consolidated the concealed weapon charge with one of the robbery with a dangerous weapon charges and imposed three consecutive terms of 76 to 101 months in prison. Defendant appeals.

Defendant first argues that the trial court erred when it denied his motion to dismiss the armed robbery charges, where there was insufficient evidence of his identity as the perpetrator of the offenses. We disagree.

Our Supreme Court has held that,

[w]hen a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.

*State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). "The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d. 252 (2004).

Viewing the evidence in the light most favorable to the State, the trial court properly denied defendant's motion to dismiss. Police apprehended defendant shortly after the robbery in a nearby apartment complex. Other than the camouflage jacket, defendant and his clothing matched the description provided by Ms. Cruz. All three victims could see defendant's face during the robbery. Two of the three victims positively identified defendant immediately after the robbery, and all three independently identified him again in court. Although defendant offered evidence of an alibi, the conflict between the State's case and defendant's evidence was for the jury to resolve. *State v. Walker*, 332 N.C. 520, 533, 422 S.E.2d 716, 724 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993). Accordingly, we conclude that the trial court properly denied the motion to dismiss.

In defendant's other argument, he contends that the trial court committed plain error when it permitted the State to introduce evidence that two of the victims identified defendant in a "showup" conducted shortly after the robbery. We disagree.

Plain error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotations and citations omitted). Under plain error analysis, a defendant is entitled to reversal "only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate a defendant's right to due process. *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983). The test is "whether the totality of circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Leggett*, 305 N.C. 213, 220, 287 S.E.2d 832, 837 (1982).

Our courts, however, have held that:

[E]ven if the pretrial procedure is suggestive, that suggestiveness rises to an impermissible level only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification. The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1)

the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

*State v. Grimes*, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1983).

Applying those factors to the facts of this case, the trial court did not commit plain error when it permitted the State to introduce the testimony describing the two victims' out-of-court identifications of defendant. The robbery happened during the middle of the afternoon, defendant's face was not obscured, and Ms. Hinson and Ms. Cruz both identified defendant within a short time after the robbery. Ms. Cruz's description closely matched defendant. Two of the victims expressed certainty regarding their identifications of defendant after the robbery. Accordingly, we conclude that this case does not present a "very substantial likelihood of irreparable misidentification," and that the trial court did not commit plain error in allowing the State to present testimony regarding two of the victims' identifications. We find no error.

Defendant's remaining assignment of error not brought forth or argued on appeal is deemed abandoned. N.C.R. App. P. 28(a).

No error.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).