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NO. COA09-297

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

Edgecombe County
No. 07 CRS 54106

GEORGE RANDOLPH DAVIS, JR.

Appeal by defendant from judgment entered 23 September 2008 by Judge William C. Griffin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 30 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn L. Strange, for the State.

Haral E. Carlin, for defendant-appellant.

CALABRIA, Judge.

George Randolph Davis, Jr. ("defendant"), appeals from a judgment entered upon a jury verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant contends that the trial court committed plain error when it permitted a police officer to testify that he found a photograph of defendant in a police database, and then abused its discretion when it admitted hearsay evidence that a non-testifying witness identified defendant from the photograph. We find no prejudicial error.

On 13 October 2007, Michael Scott ("Mr. Scott) and his god brother, Harvey Pittman ("Mr. Pittman"), were sitting on the porch at their apartment complex. Defendant approached the two men and began to argue with Mr. Pittman about money. Mr. Scott testified that he had known defendant for more than seventeen years and had no prior history of trouble with him, but Mr. Scott soon also became involved in the argument. When Mr. Scott began to walk away from defendant in an effort to end the argument, defendant pushed him from behind and then shot him twice in the spine. As Mr. Scott lay on the ground, he saw defendant aim at him several times and miss. As a result of the injuries sustained from the shooting, Mr. Scott is unable to walk and two bullets were lodged in his back.

Officer Bobby Connie ("Officer Connie") of the Rocky Mount Police Department ("R.M.P.D.") responded to the shooting. Officer Connie saw Mr. Scott lying on his back in the street and Mr. Scott told Officer Connie that defendant shot him. Officer Connie called EMS and waited with Mr. Scott until they arrived.

At trial, Officer Connie testified, "When they were working on [Mr. Scott] I went back to my patrol vehicle, pulled up George Davis we had one in the system that had a photo." Mr. Scott identified defendant from the photograph. Defendant did not object to that testimony. Officer Connie also testified that he showed defendant's photo to Mr. Pittman, who also identified defendant as the shooter. Mr. Pittman did not testify. Defendant objected to Officer Connie's testimony that Mr. Pittman identified defendant, and the trial court overruled the objection. The State also

introduced into evidence photographs of bullet holes in the home nearby where the shooting took place.

On 7 April 2008, the Edgecombe County grand jury indicted defendant for assault with a deadly weapon with intent to kill inflicting serious injury. The case came on for trial in Edgecombe County Superior Court on 23 September 2008. Defendant made motions to dismiss at the close of the State's evidence and at the close of all the evidence. The trial court denied defendant's motions. The jury returned a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced to a minimum of 116 months to a maximum of 149 months in the North Carolina Department of Correction. Defendant appeals.

Defendant argues that the trial court committed reversible error when it permitted Officer Connie to testify that he consulted a police database to find a photograph of defendant. We disagree.

Since defendant did not object to Officer Connie's testimony, our review is limited to plain error. Plain error is "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) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). 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).

In the instant case, when Officer Connie testified about Mr. Scott's identification of defendant, he stated:

Q: Was he talking?

A [Officer Connie]: He told me who had done it at the time, as well as Mr. Pittman.

Q: What did Mr. Scott say about who did it?

A: He stated that George Davis had shot him.

Q: Okay. Upon getting that information, what did you do?

A: I just kept him calm until I got fire and EMS there. When they were working on him I went back to my patrol vehicle, pulled up George Davis we [sic] had one in the system that had a photo.

Mr. Scott independently identified defendant in court prior to Officer Connie's testimony about the photograph, and the State never introduced the photograph into evidence.

Mr. Scott testified that he knew defendant for more than seventeen years prior to this incident and was certain of his identification. More importantly, Officer Connie found substantial evidence corroborating Mr. Scott's account of the shooting when he examined the scene. Accordingly, we conclude that defendant has failed to demonstrate sufficient prejudice to establish plain error. Any negative inference the jury could have drawn from Officer Connie's testimony about the source of defendant's photograph did not rise to the level of plain error in light of the overwhelming evidence of defendant's guilt. This assignment of error is overruled.

Defendant also argues that the trial court abused its discretion when it permitted Officer Connie to testify that Mr. Pittman identified defendant from the photograph, because the

testimony was hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2007). Hearsay is inadmissible except as provided by statute or the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2007).

However, "[u]nless [the admission of hearsay] infringes upon a criminal defendant's constitutional rights, the defendant has the burden of showing that he was prejudiced by the error and that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed." *State v. Sills*, 311 N.C. 370, 378, 317 S.E.2d 379, 384 (1984); N.C. Gen. Stat. § 15A-1443(a) (2007).

Assuming, *arguendo*, that Officer Connie's statement constituted hearsay, we conclude that defendant has failed to satisfy his burden of demonstrating that the jury would have reached a different result had the evidence not been admitted. By the time Officer Connie testified, Mr. Scott had already positively identified defendant. It has already been determined that Mr. Scott's identification was reliable. Accordingly, we find that defendant has failed to demonstrate prejudicial error in light of the overwhelming evidence of his guilt. *See State v. Thaggard*, 168 N.C. App. 263, 608 S.E.2d 774 (2005). This assignment of error is overruled.

No prejudicial error.

Judges WYNN and STROUD concur.

Report per Rule 30(e).