NO. COA09-859

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v.

ANTWAN LASHON DUMAS
and
MARCELLO BRIAN PARKS.

Stanly County
Nos. 07 CRS 54177-80
07 CrS 54201-04

Appeal by Defendants from judgments entered 14 January 2009 by Judge Christopher M. Collier in Stanly County Superior Court. Heard in the Court of Appeals 3 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Brian R. Berman, for the State in response to Defendant Antwan Lashon Dumas.

Attorney General Roy Cooper, by Assistant Attorney General Katherine A. Murphy, for the State in response to Defendant Marcello Brian Parks.

Bryan Gates, for Antwan Lashon Dumas, Defendant-Appellant.

Charlotte Gail Blake, for Marcello Brian Parks, Defendant-Appellant.

ERVIN, Judge.

Defendants Antwan Lashon Dumas and Marcello Brian Parks appeal from judgments imposed by the trial court sentencing Defendant Parks to a minimum term of 65 months and a maximum term of 87 months imprisonment in the custody of the North Carolina Department of Correction and sentencing Defendant Dumas to a minimum term of

77 months and a maximum term of 102 months imprisonment in the custody of the North Carolina Department of Correction based upon Defendants' convictions for four counts of robbery with a dangerous weapon. After careful consideration of Defendants' challenges to their convictions in light of the record and the applicable law, we find no error in the proceedings leading to the entry of the trial court's judgments.

I. Factual Background

A. Substantive Facts

On 3 December 2007, shortly after midnight, Smith Banemanivong, Brian Sides, Ly Vo, and Winson Phoumsanath were standing in a parking lot outside a Sonic Drive-In restaurant in Albemarle, North Carolina, waiting for Mr. Banemanivong's girlfriend to finish work. All four individuals noticed two men, later identified as Defendants Dumas and Parks, walking together in the parking lot. Although Defendants initially went past Mr. Banemanivong, Mr. Sides, Mr. Vo, and Mr. Phoumsanath, Defendants subsequently turned around and walked toward them.

As Defendants came near, Mr. Banemanivong left the group and approached them. Defendant Dumas told Mr. Banemanivong that his car had broken down and asked to use a cell phone. After Mr. Banemanivong handed his cell phone to Defendant Dumas, Defendant Dumas fumbled with it. When Mr. Banemanivong reached for the phone in an attempt to help, Defendant Dumas pulled out a semi-automatic pistol and held it to Mr. Banemanivong's chest. As this was

occurring, Defendant Parks was about 10 feet behind Defendant Dumas and Mr. Banemanivong, "looking around."

Defendant Dumas then told Mr. Sides, Mr. Vo, and Mr. Phoumsanath to hand over their money and cell phones. The four men threw cell phones and money on the ground, and Defendant Dumas ordered them to get down. At or about that point, someone said, "[l]et's go."[1] Defendant Dumas picked up the cell phones and money, and Defendants disappeared together behind the Sonic. After Defendants departed, Mr. Sides, who had managed to retain his cell phone, called the police.

A Sonic surveillance camera recorded the events that occurred in the parking lot. After the robbery, officers from the Albemarle Police Department and at least some of the victims viewed the surveillance video. Although officers from the Albemarle Police Department made several attempts to copy the video, and even sent an information technology specialist out to the Sonic restaurant for that purpose, a hard drive malfunction prevented the Albemarle Police Department from copying the video.

B. Procedural History

On 3 March 2008, the Stanly County grand jury returned bills of indictment charging both Defendants with four counts of robbery with a dangerous weapon. On 19 March 2008, Defendant Dumas filed

[1] The evidence concerning the identity of the Defendant who said, "[l]et's go," conflicted. Mr. Banemanivong testified that Defendant Dumas made the statement in question. Other witnesses attributed the statement to Defendant Parks. However, one of the witnesses who claimed that Defendant Parks made the statement indicated that he said, "[l]et's go," before Defendant Dumas picked up the stolen items.

a request for voluntary discovery. The State responded to Defendant Dumas' discovery request on 30 July 2008 without apprising him of the existence of the surveillance video. Defendants did not learn of the existence of the surveillance video until they received supplemental discovery responses during the week of 10 November 2008, at which point they discovered a prosecutor's handwritten notes which stated that an officer stated that one or more unidentified persons "could see it all on video." By this date, however, the surveillance video no longer existed.

The cases against Defendants came on for trial at the 12 January 2009 criminal session of the Stanly County Superior Court. At that time, the State filed a motion to join the cases against both Defendants for trial, which the trial court allowed. On the same date, Defendants filed a Joint Motion to Suppress Introduction of Evidence and to Dismiss Indictments in which they alleged that the indictments returned against them should be dismissed because the State had failed to disclose the surveillance video, which they contended constituted exculpatory evidence, in a timely manner and that the testimony of any witness who had watched the surveillance video should be suppressed. Although the trial court denied Defendants' motions, it ordered the witnesses to testify only about "their personal, independent recollection" of the events of that night and allowed Defendants to "cross examine them about the timing when they saw the video, and also inquire as to what happened to the video."

On 14 January 2009, the jury returned verdicts convicting both Defendants of four counts of robbery with a dangerous weapon. At the sentencing hearing, the trial court determined that Defendant Dumas had one prior record point and should be sentenced as a Level II offender and that Defendant Parks had four prior record points and should be sentenced as a Level II offender. The trial court consolidated all four of Defendant Dumas' robbery convictions for judgment and sentenced Defendant Dumas to a minimum of 77 months and a maximum of 102 months imprisonment in the custody of the North Carolina Department of Correction. Similarly, the trial court consolidated all four of Defendant Parks' robbery convictions for judgment and sentenced Defendant Parks to a minimum term of 65 months and a maximum term of 87 months imprisonment in the custody of the North Carolina Department of Correction. Both defendants noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

On appeal, (1) Defendant Parks contends that the trial court erred by denying the motion to suppress the testimony of the witnesses who viewed the surveillance video, (2) both Defendants argue that the trial court erred by denying their motion to dismiss predicated on the nondisclosure and destruction of the surveillance video, (3) Defendant Dumas contends that the trial court erred by admitting the in-court identification testimony of Mr. Banemanivong, and (4) Defendant Parks contends that the trial court erred by denying his motion to dismiss for insufficient evidence.

We do not believe that any of Defendants' challenges to their convictions have merit.

A. Motion to Suppress Relating to Surveillance Video

Defendant Parks contends that the trial court abused its discretion in denying his motion to suppress the testimony of witnesses who viewed the surveillance video. In essence, Defendant Parks contends that the State violated its obligations under the statutory provisions governing discovery in criminal cases and that the trial court abused its discretion by failing to sanction the State's discovery violation by suppressing the testimony of any witness who viewed the surveillance video. Put another way, Defendant argues that the trial court selected an inadequate remedy for the State's discovery violation. We disagree.

N.C. Gen. Stat. § 15A-910(a) provides that

> [i]f at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
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> (1) Order the party to permit the discovery or inspection, or
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> (2) Grant a continuance or recess, or
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> (3) Prohibit the party from introducing evidence not disclosed, or
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> (3a) Declare a mistrial, or
>
> (3b) Dismiss the charge, with or without prejudice, or
>
> (4) Enter other appropriate orders.

"We review the trial court's selection of a remedy [pursuant to § 15A-910(a)] for a [discovery] violation . . . for abuse of discretion." *State v. Remley*, __ N.C. App. __, __, 686 S.E.2d 160, 162 (2009) (citing *State v. McClary*, 157 N.C. App. 70, 75, 577 S.E.2d 690, 693, *appeal dismissed and disc. review denied*, 357 N.C. 466, 586 S.E.2d 466 (2003)).

> It is within the trial court's sound discretion whether to impose sanctions for a failure to comply with discovery requirements, including whether to admit or exclude evidence, and the trial court's decision will not be reversed by this Court absent an abuse of discretion. An abuse of discretion results from a ruling so arbitrary that it could not have been the result of a reasoned decision or from a showing of bad faith by the State in its noncompliance.

Remley, __ N.C. App. at __, 686 S.E.2d at 162 (quoting *McClary*, 157 N.C. App. at 75, 577 S.E.2d at 693). "However, prior to imposing any of the above sanctions, the trial court must 'consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply' with the discovery requirements." *State v. Jaaber*, 176 N.C. App. 752, 755, 627 S.E.2d 312, 314 (2006) (quoting N.C. Gen. Stat. § 15A-910(b)). "Constitutional rights are not implicated in determining whether the State complied with [] discovery statutes." *State v. Cook*, 362 N.C. 285, 290, 661 S.E.2d 874, 877 (2008). "There is no general constitutional or common law right to discovery in criminal cases." *Cook*, 362 N.C. at 290, 661 S.E.2d at 877 (quoting *State v. Haselden*, 357 N.C. 1, 12, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003)); *see also Weatherford v.*

Bursey, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 42 (1977) (stating that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one. . . .").

Assuming, without in any way deciding, that the State violated the relevant discovery statutes by failing to disclose the existence of the surveillance video,[2] we are unable to conclude that the trial court abused its discretion in refusing to suppress the testimony of witnesses who viewed the surveillance video. Although Defendant Parks contends that no other viable remedy besides suppressing the testimony of the witnesses who viewed the surveillance video would provide an adequate remedy for the State's failure to disclose the existence of the video prior to the week of 10 November 2008, the trial court clearly did not agree with Defendant Parks' contention. Instead of suppressing the testimony of the witnesses who had viewed the surveillance video, the trial

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[2] The validity of Defendant Parks' contention that the State violated the relevant discovery statute by failing to disclose the existence of the surveillance video is not intuitively obvious. According to N.C. Gen. Stat. § 15A-903(a)(1), the State is required to disclose "matter or evidence obtained during the investigation[.]" *See State v. Thompson*, 187 N.C. App. 341, 353, 654 S.E.2d 486, 494-95 (2007) (stating that the State "is under a duty to disclose only those matters in its possession"); *State v. Morris*, 156 N.C. App. 335, 341, 576 S.E.2d 391, 395, *cert. denied*, 357 N.C. 510, 588 S.E.2d 379 (2003)(stating that, under the prior version of N.C. Gen. Stat. § 15A-903, the defendant was not entitled to discovery of the requested materials because the State never possessed or controlled them or intended to use them as evidence against the defendant). In view of the fact that the State never had the surveillance video in its possession, it is not entirely clear that the State violated N.C. Gen. Stat. § 15A-903(a)(1) by failing to disclose the existence of that item prior to the week of 10 November 2008. However, we will assume the existence of a discovery violation for the purpose of discussing Defendant's argument in the text.

court ordered that the State's witnesses limit their testimony "to their personal, independent recollection" of the robbery and allowed Defendants to both cross-examine the witnesses who had seen the surveillance video concerning the time when they saw it "and also [to] inquire as to what happened to the video." The effect of the trial court's order was to prevent any of the State's witnesses from testifying about the surveillance video on direct examination while allowing Defendants to cross-examine the State's witnesses concerning that subject, giving Defendants the opportunity, if they wished to take advantage of it, to establish the extent to which the witnesses' testimony could have been influenced by the surveillance video and to show that the surveillance video was unavailable through no fault of Defendants. In reaching this decision, the trial court clearly considered the materiality of the evidence relating to the surveillance video, the possible prejudice to Defendants resulting from the State's alleged noncompliance with the relevant discovery statutes, and the materiality of the surveillance video in light of the totality of the circumstances. As a result, we are unable, based on the information contained in the record, to say that the approach adopted by the trial court, which protected Defendants from any effort by the State to make offensive use of the surveillance video while allowing Defendants to use the surveillance video for defensive purposes, could not have been the result of a reasoned decision. Thus, we conclude that the trial court did not abuse its discretion by failing to suppress the testimony of all witnesses who had seen the

surveillance video. *See Remley*, __ N.C. App. at __, 686 S.E.2d at 162 (holding that no abuse of discretion occurred where the trial court "considered any possible prejudice to defendant and the various possibilities as to remedies[,]" despite the fact that the trial court "would not dismiss the charges or prohibit the State from introducing the statement").

B. Motion to Dismiss Relating to Surveillance Video

Secondly, Defendants both contend that the trial court erred by failing to dismiss the charges against them based on alleged violations of their constitutional rights pursuant to N.C. Gen. Stat. § 15A-954(a)(4). According to Defendants, the charges against them should have been dismissed based on the fact that the State failed to disclose the existence of the surveillance video and the fact that the surveillance video was subsequently destroyed. In Defendants' view, the failure of the State to disclose the existence of and to preserve the surveillance video constituted a violation of the State's obligation to disclose exculpatory evidence guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. We disagree.

N.C. Gen. Stat. § 15A-954(a)(4) provides that, upon a defendant's motion, the trial court "must dismiss the charges stated in a criminal pleading if it determines that . . . [a] defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the

prosecution." "As the movant, defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case." *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008). On appeal, "we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted)). "The decision that defendant has met the statutory requirements of N.C. [Gen. Stat.] § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law" which is subject to review under a *de novo* standard. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294. "Under a *de novo* [standard of] review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (quotation omitted).

In *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). "Evidence favorable to an accused can be either impeachment evidence or exculpatory

evidence." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296 (citing *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481 (1985), *cert. denied*, 488 U.S. 924, 102 L. Ed. 2d 323 (1988)). "Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296 (quotation omitted). Proof of "materiality" requires a showing "that the government's suppression of evidence would undermine confidence in the outcome of the trial." *Id.* (internal quotations omitted and citation omitted). However, when the evidence is only "potentially useful" or when "no more can be said [of the evidence] than that it could have been subjected to tests, the results of which might have exonerated the defendant," the State's failure to preserve the evidence does not violate the defendant's constitutional rights unless a defendant can show bad faith on the part of the State. *State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108 (1994), *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 289 (1988), *reversed and vacated by* 173 Ariz. 502, 844 P.2d 1152 (1993)). After a careful review of the record, we conclude that Defendants have made no showing that the State "suppressed" evidence contrary to *Brady*, that the evidence in question was exculpatory or material, or that the State failed to preserve "potentially useful" evidence in bad faith.[3]

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[3] As the State notes, the trial court did not make findings of fact or conclusions of law in denying Defendants' dismissal motion. However, given that the facts underlying the disclosure

First, we cannot conclude that the State "suppressed" the surveillance video because the State never actually possessed that item in the first place or took any steps to prevent Defendants from obtaining access to it. Under *Brady*, the State is required "to disclose only those matters in its possession. . . ." *Thompson*, 187 N.C. App. at 353, 654 S.E.2d at 494. In addition, "*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation." *State v. Scanlon*, 176 N.C. App. 410, 436, 626 S.E.2d 770, 788 (2006). Shortly after the robbery, representatives of law enforcement and a number of the State's witnesses viewed the surveillance video. At a later time, the Albemarle Police Department made several attempts to copy the surveillance video, including sending a technology specialist to the Sonic restaurant in an attempt to achieve that end. However, these efforts to copy the surveillance video were unsuccessful due to a malfunction in Sonic's equipment. The record does not contain any indication that the subsequent destruction of the video of the robbery resulted from any action on the part of anyone acting on

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and subsequent destruction of the surveillance video do not appear to be in dispute, we believe that we are in a position to reach the merits of Defendants' claim despite the absence of such findings and conclusions. *See State v. Baldwin*, 161 N.C. App. 382, 386-87, 588 S.E.2d 497, 502 (2003) (stating that, "although the general rule is that the trial court must make findings of fact and conclusions of law after hearing a motion to suppress," because "there was no dispute regarding the events of the search or the items seized" and "[b]ecause the conflict was in the interpretation of the scope of the search warrant and not a conflict in the evidence, the trial court was not required to make findings of facts").

behalf of the State. Defendants were, at all times, able to contact Sonic directly, attempt to ascertain whether a surveillance video existed, and make independent efforts to preserve it for use at trial. However, the record does not contain any indication that Defendants made any attempt to contact Sonic between the week of 10 November 2008, when the existence of the surveillance video was discovered, and the beginning of the trial. Based on these facts, we cannot conclude that the State suppressed the evidence in question or that the State in any way interfered with Defendant's ability to independently obtain access to the surveillance video.

Secondly, even assuming that the State had an obligation to disclose the existence of the surveillance video, Defendants have made no showing that its contents were exculpatory or material. On the contrary, the record is completely silent as to what the contents of the surveillance video actually were. In the absence of some indication of the nature of the video's contents, we cannot say that it contained information that would have been helpful to Defendants or that "there is a 'reasonable probability' of a different result had the evidence been disclosed." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296 (quotation omitted).[4] Thus, we are unable to conclude that the surveillance video was either exculpatory or material as those terms are used in *Brady*-related jurisprudence.

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[4] For this reason, the surveillance video is much different than a clearly exculpatory poster depicting the defendant in an assault on a government officer or employee case in a beaten condition over a caption reading "[a]fter he sued the D.A.'s office." *Williams*, 362 N.C. at 630, 669 S.E.2d at 293.

The absence of any indication as to what the contents of the surveillance video were means that the surveillance video was, at most, potentially, rather than actually, exculpatory. As a result, Defendant's claim arising from the nondisclosure and subsequent destruction of the surveillance video should be analyzed under the rubric enunciated in *Youngblood*, *see State v. Graham*, 118 N.C. App. 231, 235-36, 454 S.E.2d 878, 880-81, *review denied*, 340 N.C. 262, 456 S.E.2d 834 (1995), instead of being subjected to conventional *Brady* analysis. Since Defendants have not alleged, much less proven, that the surveillance video was destroyed by anyone acting on behalf of or at the behest of the State or that the destruction of the surveillance video resulted from any bad faith on the part of the State, we cannot conclude that the State violated Defendants' due process rights. *State v. Thorne*, 173 N.C. App. 393, 396 fn.1, 618 S.E.2d 790, 793 fn.1 (2005) (stating that "[w]e note parenthetically defendant's concession that the videotape was not lost or destroyed in bad faith obviates any due process claim that his right to present evidence under the United States or North Carolina Constitution has been violated") (citing *Youngblood*, 488 U.S. 51, 102 L. Ed.2d 281)). Thus, since Defendants' due process rights were not violated, the trial court did not err by denying Defendants' motion to dismiss pursuant to N.C. Gen. Stat. § 15A-954(a)(4).

C. Admission of In-Court Identification

Thirdly, Defendant Dumas contends that the in-court identification of him as the perpetrator of the robbery by Mr.

Banemanivong should have been excluded since it stemmed from the use of impermissibly suggestive procedures.[5] We disagree.

An identification should be suppressed on due process grounds if "the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 697 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002) (citations omitted). In deciding whether an identification should be suppressed on due process grounds, a trial court should first "determine whether the identification procedures were impermissibly suggestive," and then "determine whether the procedures created a substantial likelihood of irreparable misidentification." *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698 (citations omitted). If the identification procedures were not impermissibly suggestive, there is no need for further inquiry. *State v. Leggett*, 305 N.C. 213, 220, 287 S.E.2d 832, 837 (1982). "[T]he viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so 'unnecessarily suggestive and conducive to irreparable mistaken

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[5] Although Defendant Dumas argues that the identification of Mr. Banemanivong was prompted by leading questions, he incorrectly cites Mr. Banemanivong's second identification of Defendant Dumas, rather than his first identification of Defendant Dumas, in support of this contention. After carefully examining the record of the proceedings which occurred at the time that Mr. Banemanivong initially identified Defendant Dumas as the perpetrator of the robbery, we are unable to conclude that his initial identification was made in response to a leading question.

identification' as would deprive defendant of his due process rights." *State v. Covington*, 290 N.C. 313, 324, 226 S.E.2d 629, 638 (1976)(citation and quotation omitted).

At trial, Mr. Banemanivong identified Defendant Dumas as the one "wearing the white pants and the collar shirt with a striped shirt" and stated that he was the perpetrator of the robbery. At the conclusion of Mr. Banemanivong's direct examination, the State asked Mr. Banemanivong whether "the person who held the gun to your chest and demanded . . . your money" was the person that Mr. Banemanivong identified as Mr. Dumas; Mr. Banemanivong replied that there was no doubt in his mind that it was Defendant Dumas.

Defendant Dumas has not challenged any pretrial procedure in which Mr. Banemanivong identified Defendant Dumas as impermissibly suggestive. Instead, Defendant Dumas' only challenge to the admission of Mr. Banemanivong's identification testimony is that Mr. Banemanivong saw Defendant Dumas "sitting across from him in the courtroom;" the courts in this jurisdiction have repeatedly held that "[t]his alone is insufficient to show that such a confrontation tainted the in-court identification." *State v. Hussey*, 194 N.C. App. 516, 522, 669 S.E.2d 864, 867 (2008). As a result, we are unable to conclude that the in-court identification procedure utilized here was impermissibly suggestive and, for that reason, need not determine whether the procedure which Defendant Dumas seeks to challenge created a substantial likelihood of irreparable misidentification. *Leggett*, 305 N.C. at 220, 287

S.E.2d at 837. Thus, the trial court did not err by allowing Mr. Banemanivong's in-court identification of Defendant Dumas.

D. Motion to Dismiss for Insufficiency of the Evidence

Finally, Defendant Parks contends that the trial court erred by denying his motion to dismiss. In essence, Defendant Parks contends that the record does not contain sufficient evidence to support a finding that he acted in concert with Defendant Dumas to commit the armed robberies for which he was convicted. In support of this argument, Defendant Parks notes that there was no evidence that he committed any of the acts that were necessary for a completed robbery to occur and that the record did not support a finding that he knew that Defendant Dumas was going to rob Mr. Banemanivong, Mr. Sides, Mr. Vo, and Mr. Phoumsanath. We disagree.

"When considering a motion to dismiss for insufficiency of the evidence, the court must examine the evidence in the light most favorable to the State; and the State is entitled to every reasonable inference to be drawn from evidence." *State v. Gary*, 348 N.C. 510, 522, 501 S.E.2d 57, 66 (1998) (citing *State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997). In ascertaining whether the evidence is sufficient to support a conviction, the court must determine whether the State has presented "substantial evidence . . . of each essential element of the offense charged. . . ." *State v. Earnhardt*, 307 N.C. 62, 65, 296 S.E.2d 649, 651 (1982)(citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971)). "Substantial evidence is defined as that amount of relevant evidence that a reasonable mind might accept as adequate

to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981) (internal quotations and citations omitted). In order for a defendant to be convicted on an acting in concert theory, "[i]t is not [] necessary for [him] to do any particular act constituting at least part of a crime . . . so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

At trial, the State introduced evidence that Defendants Parks and Dumas were walking alone together near the Sonic after 12:00 a.m. All four of the State's witnesses testified that Defendant Parks and Defendant Dumas walked across the parking lot together, turned together and approached the State's witnesses, that Defendant Parks was "looking around" while Defendant Dumas was taking wallets and cell phones from the State's witnesses, that someone said "[l]et's go," and that Defendant Parks and Defendant Dumas left and walked around the corner of the Sonic restaurant together. When this evidence is viewed in the light most favorable to the State, it is sufficient to support a rational inference that Defendant Parks was acting together with Defendant Dumas pursuant to a common plan or purpose to rob the State's witnesses. *See State v. Lovelace*, 272 N.C. 496, 158 S.E.2d 624 (1968)(holding that the defendant's presence outside the door of a restaurant with the other defendant at 1:45 a.m. while the other defendant held the

hammer and screwdriver and when both men had been drinking was sufficient evidence to uphold trial court's denial of motion to dismiss for insufficiency of evidence under the doctrine of acting in concert). The fact that the record also contains other evidence tending to show that Defendant Parks did not help Defendant Dumas pick up the money and the cell phones, that Defendant Parks looked uncomfortable during the robbery, and that Mr. Phoumsanath believed that Defendant Parks refused to participate in the robbery goes to the weight and credibility of the State's evidence rather than to its sufficiency, when taken in the light most favorable to the State, to support a conviction. As a result, the trial court did not err by denying Defendant Parks' dismissal motion.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendants received a fair trial that was free from prejudicial error. For that reason, the trial court's judgments should remain undisturbed.

NO ERROR.

Judges STROUD and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).