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NO. COA11-265
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 09 CRS 236545-46

COLIN LAMONT MCCLELLAN

Appeal by defendant from judgments entered 30 July 2010 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Anna M. Davis and Special Deputy Attorney General Victoria L. Voight, for the State.

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

CALABRIA, Judge.

Colin Lamont McClellan ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of robbery with a dangerous weapon ("RWDW") and conspiracy to commit RWDW. We find no error.

I. Background

On 27 July 2009, at around 10:30 p.m., Corinthian Burch ("Burch") was walking down Mecklenburg Avenue in Charlotte, North Carolina, on his way home from a friend's house. As Burch was walking down the street, he noticed defendant and two other young men, Yuharold Vann ("Vann") and Davonte Leaks ("Leaks") walking towards him on the opposite side of the street. Defendant separated from the group, crossed the street and approached Burch. As he approached, defendant drew a gun and pointed it at Burch. At this time, Vann and Leaks also crossed the street and joined defendant. Defendant passed the gun to Vann, then walked around and stood behind Burch. Vann kept the gun pointed at Burch and asked him what he had. Burch had a MP3 player in his pocket and paintball gear in a gym bag. When Burch refused to empty his pockets, defendant and Vann searched him. While this occurred, Leaks acted as a look-out. Defendant, Vann, and Leaks took Burch's paintball gear and MP3 player and walked off in the direction of the Plaza.

A few minutes later, Burch flagged down an officer with Charlotte Mecklenburg Police Department, Officer Kristen Daugherty ("Officer Daugherty"). Burch reported to Officer Daugherty three young black males approached him, pointed a gun at him and then took his paintball gear and MP3 player. Burch

stated that "one had on a black t-shirt and long khaki style shorts, one had a white wife beater style tank top...[and] blue athletic shorts on and then one with a red shirt who was heavy set." Officer Daugherty radioed the description to law enforcement officers in the area. Within five to ten minutes, the officers found suspects matching the description they received.

Officer Daugherty and Burch went to the location where the robbery had occurred, then proceeded to a bus stop for a show-up. By this time, it was around 11:00 p.m. and about thirty minutes had elapsed. The officers gathered a total of seven males in the bus shelter. While Burch remained seated in Officer Daugherty's patrol car, the males were instructed to step outside. Officer Daugherty then cast a light on them and Burch was shown the first four males. Burch identified suspects two, three and four with 100% certainty as the individuals who robbed him. Suspect two wore a black t-shirt and long khaki shorts, suspect three wore a white wife beater tank top and blue gym shorts and suspect four, the heavysset one, wore a black shirt and long denim shorts. Burch identified defendant, suspect two, as the one that "ran up and put the gun on me." When Burch was shown the first suspect, the one wearing a grey

tank top and long denim shorts, he initially thought suspect one could be one of the robbery suspects. However, after seeing suspects two, three and four, Burch ruled out suspect one as a possible participant.

During the show-up, Officer Jose Aguirre retrieved a gun from Vann matching the description of the one used to rob Burch. Once Burch identified the suspects, they were formally arrested. Following the show-up, Burch gave Officer Daugherty a statement about the incident which she transcribed then he confirmed and signed. Burch's personal property was never recovered.

Defendant was subsequently arrested and charged with RWDW and conspiracy to commit RWDW. The jury returned guilty verdicts for both charges. Defendant was sentenced to consecutive sentences of a minimum of 60 and a maximum of 81 months for RWDW and a minimum of 20 and a maximum of 33 months for conspiracy to commit RWDW in the North Carolina Department of Correction. Defendant appeals.

II. Show-Up

Defendant alleges the trial court committed plain error in allowing the introduction of testimony and evidence obtained as a result of the show-up. Specifically, defendant contends the

show-up was unduly suggestive and violated defendant's constitutional rights. We disagree.

Defendant failed to object at trial, therefore he has not preserved this issue for appellate review, and the issue may only be reviewed for plain error. See *State v. Lawson*, 159 N.C. App. 534, 538, 583 S.E.2d 354, 357 (2003). Plain error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done" or an error which "had a probable impact on the jury's finding that the defendant was guilty." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

A show-up is "the practice of showing suspects singly to witnesses for purposes of identification...." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). A two-part test has been established to determine whether a defendant's due process rights were violated during an identification proceeding. *State v. Leggett*, 305 N.C. 213, 220, 287 S.E.2d 832, 837 (1982). The first question is whether the show-up was too suggestive, if "answered affirmatively, the second inquiry" is whether "the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification." *Id.*

While a show-up may be suggestive, it is not "*per se* violative of a defendant's due process rights" where "under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *Turner* at 364, 289 S.E.2d at 373 (citations omitted). The factors of reliability are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Id.* at 365, 289 S.E.2d at 373-74 (citation omitted). The factors must be weighed against "the corrupting effect of the suggestive procedure itself." *State v. Pigott*, 320 N.C. 96, 100, 357 S.E.2d 631, 634 (1987) (citation omitted).

In the instant case, there is no evidence that the show-up was impermissibly suggestive. The robbery took place around 10:30 p.m. As soon as Officer Daugherty had a description of the suspects, it was sent to officers in the area. By 11:00 p.m., only thirty minutes later, the officers found seven males in the area matching the description they received. Officer Daugherty brought Burch to view them for identification purposes. Although the officers knew only three males had robbed Burch, they

gathered seven males. It is true that Burch was absolutely, "100% certain" that suspects two, three, and four were the perpetrators, therefore, he stopped identifying suspects after the first four. Because of his certainty, there was no need to view or further detain the other men. There is no evidence that the officers suggested to Burch that suspects two, three, and four were guilty as opposed to one, five, six or seven.

Defendant relies on *State v. Pinchback* to support his claim that the show-up was impermissibly suggestive, however the instant case is distinguishable. 140 N.C. App. 512, 537 S.E.2d 222 (2000). In *Pinchback*, the victim was robbed by two black men in a red Toyota Tercel. *Id.* at 515, 537 S.E.2d at 224. The victim gave law enforcement a physical description of the men as well as a description of the vehicle. *Id.* Law enforcement then apprehended two black males in a red Toyota Tercel and the victim identified the men as his attackers. *Id.* There, not only was the victim shown only two suspects, but the defendant did not even match the physical description given by the victim. *Id.* at 515, 519, 537 S.E.2d at 224, 226. Unlike the victim in *Pinchback*, Burch had the opportunity to view seven different men who actually matched the physical descriptions of the men that Burch reported to Officer Daugherty.

Even assuming, *arguendo*, that the show-up was suggestive, the facts show that there was sufficient reliability in Burch's identification of defendant, as it satisfied the five reliability factors set out in *Turner*. Burch paid attention to his surroundings and the location of his attackers at the time of the theft. The suspect approached Burch and pointed the gun while facing him head on, thus giving Burch ample opportunity to view the suspect at the time of the crime. Burch testified that he would not empty his pockets because he did not feel comfortable "putting [his] head down." Burch also correctly indicated to Officer Daugherty that the suspect wore a black t-shirt and khaki shorts, the same clothing defendant was wearing at the show-up. In addition, when identifying defendant, Burch stated he "was 100% sure" that defendant was the one that robbed him. Furthermore, the time between the robbery and the identification process was within thirty minutes.

Defendant points to three facts as evidence that the show-up was unreliable: Burch's initial statement that one of the attackers was wearing a red t-shirt and none of the suspects identified at the show-up wore a red t-shirt, Burch's uncertainty about the first suspect, and the fact that all seven of the males were not shown at the show-up. While Burch did

tell Officer Daugherty that one of the suspects wore a red t-shirt, he also stated that the suspect wearing a red t-shirt was the heavysset one. Burch identified the heavysset suspect as Vann. Burch's identification of Vann as one of the suspects is not an issue in the instant case. Additionally, Officer Daugherty informed Burch that rather than paying attention to clothing, he should look at facial features, since many times in these situations the suspects discard clothing subsequent to the crime.

As to Burch's uncertainty about the first suspect, his uncertainty only further proves the reliability of his later identification of defendant and other two suspects. When Burch saw the first suspect, he stated that this man could be part of the group that robbed him. Therefore, Burch refused to give a positive identification because he was unsure. After confronting the next three suspects, whom he identified with 100% certainty, he confirmed that the first suspect was not involved. Burch identified only the three suspects whom he was certain about as the group that robbed him. Defendant's last contention is that since all seven males were not shown, the show-up was unreliable. However defendant is mistaken. This contention does not affect the reliability of Burch's identification.

Since there were only three attackers and Burch was absolutely positive about the identifications, there was no need to show the other three men. Defendant's arguments are not persuasive.

The show-up did not violate defendant's constitutional rights as it was not impermissibly suggestive or unreliable. Plain error did not occur when the court allowed the evidence from the show-up to be presented at trial. This argument is without merit.

III. Hearsay

Defendant alleges the trial court committed plain error in admitting and publishing State's exhibit number 2 to the jury as this was inadmissible hearsay. We disagree.

In the instant case, after the show-up, Burch gave Officer Daugherty a statement about the incident which she transcribed then he confirmed and signed. During Officer Daugherty's testimony, the State offered the victim's written statement into evidence. The trial court asked defendant if he objected and defendant stated he did not object. However, when the State moved to publish the written statement to the jury, defendant objected. The trial court overruled the objection, indicating that the statement had already been received into evidence without objection.

When a party fails to make a timely objection to the admission of testimony at trial, the issue is not preserved for review. *State v. Linton*, 145 N.C. App. 639, 643, 551 S.E.2d 572, 575 (2001). However, the issue may be examined under plain error review. *Id.*

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." *State v. Riddle*, 316 N.C. 152, 159, 340 S.E.2d 75, 79 (1986) (citing N.C. Gen. Stat. § 8C-1, Rule 801(c) (Cum. Supp. 1985)). Prior statements, which would normally be regarded as hearsay, are admissible "when offered for the limited purpose of impeachment or corroboration...." *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998). Corroborative evidence tends "to strengthen, confirm, or make more certain the testimony of another witness." *State v. Adams*, 331 N.C. 317, 328-29, 416 S.E.2d 380, 386 (1992) (citation omitted).

In *State v. Guice*, a witness's written statement was read aloud by the responding officer in court. 141 N.C. App. 177, 201-02, 541 S.E.2d 474, 489-90 (2000). This Court held that it was not improper for the trial court to allow the officer to read the statement, and the Court noted it was not aware of any

"authority holding that the declarant is the only party entitled to read aloud a prior consistent statement that corroborates their in-court testimony, and we decline to so hold." *Id.* at 202, 541 S.E.2d at 490. In *State v. Harris*, the Court held that a prior written statement was "admissible to corroborate the previous testimony of both the victim and the investigating officer" as both described the events in question. 308 N.C. 159, 168, 301 S.E.2d 91, 97 (1983). The Court also emphasized the fact that the defendant had the opportunity to cross-examine the declarant about the written statement. *Id.* at 168, 301 S.E.2d at 98.

In the instant case, Burch's written statement corroborated Officer Daugherty's testimony. The statement was introduced during Officer Daugherty's testimony and confirmed the information from her testimony regarding Burch's rendition of the events on the night of 27 July 2009. It verified the place where Burch was robbed, the circumstances of the robbery, a description of the suspects and the manner in which the show-up was conducted. Officer Daugherty had already testified to this information, without objection, prior to the introduction of the written statement. The introduction of the statement served to corroborate Officer Daugherty's testimony and show that her

interpretation of the events matched Burch's account. In addition, defendant had the opportunity to cross-examine Burch about the statement during cross-examination.

Even assuming, *arguendo*, that the introduction of Burch's written statement was error, it was not prejudicial and therefore does not amount to plain error. Officer Daugherty testified, without objection, about the incident, including information solely obtained by Burch. She stated that Burch flagged her down, told her he had been robbed, and described the three young black males that robbed him. Defendant did not object to any of this testimony at trial and does not raise the issue of its introduction on appeal.

Defendant contends that a slight discrepancy in Burch's testimony makes the introduction of Burch's written statement prejudicial. Burch testified on two separate days during the trial. On the first day, he became ill and went to the hospital. Comparing Burch's testimony on the first day to the second day, there was a discrepancy in his testimony about the type of shorts defendant was wearing on the night of the robbery. When questioned about the discrepancy, Burch said that his "head was not in it.... [he] was getting mixed up...getting people mixed up in my head." Burch confirmed that he did not

review notes or statements between the first and second days of his testimony.

Burch's written statement confirms that suspect two, defendant, was wearing a black t-shirt and khaki shorts. His statement clearly aligns with Officer Daugherty's testimony and Burch's testimony on the second day. Publishing the written statement to the jury did not add any new information for the jury to review, nor did it prejudice defendant. While it may have bolstered the identification of defendant, by again stating suspect two was wearing a black t-shirt and khaki pants on the night of the robbery, the other testimony presented at trial was sufficient to prove this fact. Although there was a discrepancy between the statement and Burch's testimony on the first day, it was clear that Burch was ill that day. When he testified in the presence of the jury that he had gone to the hospital the previous day, he explained that his "head was not in it" because he was ill during his testimony. The jury was presented with sufficient evidence to determine whether defendant was correctly identified as Burch's attacker.

Defendant failed to object to the introduction of Burch's written statement at trial and also has failed to show that he

was prejudiced by the introduction and publication of the written statement to the jury. This argument has no merit.

IV. Conclusion

The trial court did not err by admitting evidence of the show-up procedure. Defendant has failed to show that he was prejudiced by the introduction of Burch's written statement to law enforcement and therefore no plain error occurred when the statement was introduced at trial and published to the jury. We find no error.

No error.

Judge BRYANT concurs.

Chief Judge MARTIN concurs in the result only.

Report per Rule 30(e).