

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-783
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 12 CRS 081774-75

JORDAN MARQUEL CHEEK,
Defendant.

Appeal by defendant from judgments entered 27 February 2013 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 18 November 2013.

Roy Cooper, Attorney General, by Victoria L. Voight, Special Deputy Attorney General, for the State.

S. Hannah Demeritt, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Jordan Marquel Cheek appeals from judgments entered upon his convictions of first-degree burglary and robbery with a dangerous weapon. Because the victim's identification of defendant and the testimony of a co-defendant implicating defendant in the crimes provided sufficient evidence to withstand a motion to dismiss, we find no error.

On the night of 25 June 2012, three men unlocked a screen door and entered the home of Curtis Benjamin Calvin while he watched television in his living room. Brandishing a shotgun, the first man ordered Calvin not to move. The second man, identified by Calvin as defendant, followed the gunman inside. The third man went straight to the back part of the house and "started tearing stuff and throwing things around and searching." Although the third man wore a bandana over his face, neither of the other two men covered their faces.

The first man, whom Calvin described as being "in control" of the situation, sat down on the couch, loaded the shotgun, and pointed it at Calvin. Calvin immediately offered the men the money in his wallet, which was in a dresser drawer in his bedroom. When Calvin returned to the living room with his wallet, the first man demanded additional property, including weapons and jewelry. He directed Calvin to the bedroom at gunpoint, and handed the shotgun to defendant. Defendant pointed the gun at the side of Calvin's head. Calvin spit on defendant, grabbed the barrel of the shotgun, and broke it open just after the gun discharged, blowing a hole in the wall. As Calvin wrestled with the third man, defendant struck Calvin across the head with the gun barrel. The men fled with Calvin's

money and a knife they obtained during the struggle and drove away in a waiting car.

Police arrived within minutes of the incident. Calvin spoke to an officer and provided a description of the incident and the three men. He selected defendant's photograph from a lineup the following day, telling the detective that he was "70 percent sure" defendant was one of the men. He also recognized both the first man and defendant when he saw them at a court proceeding prior to trial. Calvin testified that, after "looking at [defendant and] watching him move" in the courtroom, he was "absolutely sure" defendant was the second man.

Jaylin Maleek Bailey-Murphy testified at defendant's trial pursuant to a plea agreement. In addition to describing his own role in the burglary in a manner consistent with Calvin's account of the first gunman, Bailey-Murphy implicated defendant as the second man who held the shotgun on Calvin at the time it discharged. He identified the third man as Ring Bol.

In his sole argument on appeal, defendant assigns error to the trial court's denial of his motion to dismiss at the conclusion of the evidence. Specifically, he asserts that Calvin's identification of him as the second man was not

reliable to establish his identity as one of the participants in the break-in at Calvin's residence on 25 June 2012. Because defendant does not contest the State's proof as to the elements of first degree burglary and armed robbery,

the specific question before us is "whether, upon viewing all the evidence in the light most favorable to the State and upon granting the State every reasonable inference to be drawn from the evidence, a reasonable juror might accept the evidence as adequate to support the conclusion this defendant was in fact the perpetrator of this . . . crime."

State v. Israel, 353 N.C. 211, 216-17, 539 S.E.2d 633, 637 (2000) (citation omitted) (quoting *State v. McElrath*, 322 N.C. 1, 10, 366 S.E.2d 442, 447 (1988)).

We find Calvin's identification of defendant, as corroborated by the testimony of Bailey-Murphy, more than adequate to allow a reasonable juror to find defendant guilty of the charged offenses. See *State v. Mobley*, 86 N.C. App. 528, 532, 358 S.E.2d 689, 691 (1987) ("Jones, the eyewitness, identified defendant as the perpetrator of the offense. That evidence was enough to take the case to the jury."); see also *State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619-20 (1988) (upholding sexual assault conviction based on uncorroborated victim identification); *State v. Cooke*, 318 N.C.

674, 678, 351 S.E.2d 290, 292 (1987) (upholding conviction based on identification by child victims). Issues related to the credibility of Calvin and Bailey-Murphy were for the jury to resolve. See *State v. Covington*, 315 N.C. 352, 360, 338 S.E.2d 310, 315 (1986) ("It is well settled that, as a general rule, the jury determines the credibility of witnesses and the weight to be accorded their identification testimony.").

We note that defendant raised no objection to the evidence that Calvin identified him at a photographic lineup on 26 June 2012 or to Calvin's in-court identification of defendant at trial. Nor has defendant argued that the admission of this evidence constitutes plain error. Therefore, the admissibility of Calvin's identification of defendant is not before this Court for review. *State v. Jordan*, 319 N.C. 98, 100, 352 S.E.2d 672, 672-73 (1987).

Defendant's attempt to cast doubt on the reliability of Calvin's identification is both immaterial and without merit. On review from the denial of a motion to dismiss, the State enjoys the benefit of all favorable evidence, competent or incompetent, admitted at trial. *Israel*, 353 N.C. at 216, 539 S.E.2d at 637. Moreover,

the probative force of identification testimony is for the jury in all cases

except "where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred."¹

State v. Davis, 297 N.C. 566, 572, 256 S.E.2d 184, 188 (1979) (quoting *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967)). "Where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury" *Miller*, 270 N.C. at 732, 154 S.E.2d at 906.

The evidence had no tendency to establish Calvin's identification of defendant as inherently incredible. Calvin estimated the duration of the burglary as "about 12 minutes" and averred that defendant remained in the living room throughout the incident, arriving "shortly after the first man broke in" and being "the second one [to go] out the door leaving." See *Mobley*, 86 N.C. App. at 531-32, 358 S.E.2d at 691 (upholding admissibility of larceny victim's identification of defendant

¹Defendant makes no argument that the eyewitness identification was somehow tainted by the procedures used in the 26 June 2012 photographic lineup. See *State v. Hammond*, 307 N.C. 662, 667, 300 S.E.2d 361, 364 (1983) ("Identification evidence must be excluded . . . where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification.").

based on five to eight seconds of observation). Calvin also noted that his living room was relatively small - ten feet by thirteen feet in dimension - and was "fully illuminated" by two lamps, an overhead light, and the television at the time of the burglary. Calvin testified he was able to "see [well] in the room that night." Even leaving aside the corroboration provided by Bailey-Murphy, the accuracy of Calvin's identification was properly left to the jury. The fact that Calvin was "70 percent sure" in selecting defendant's photograph from the lineup was for the jury to consider in weighing his testimony.² See *State v. Moses*, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999), cert. denied, 528 U.S. 1124, 145 L. Ed. 2d 826 (2000).

Finally, defendant points to his own testimony denying involvement in the incident, as well as the testimony of his two alibi witnesses. However, the trial court could not properly consider such evidence in ruling on a motion to dismiss insofar as it was inconsistent with the State's proffer. See *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 626-27 (2011) ("The

²Although defendant also cites to research articles casting doubt on eyewitness identifications, none of these materials were presented to the trial court or included in the record on appeal and thus cannot be considered on appeal. See *West v. E.D. Reddick, Inc.*, 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981) ("Matters discussed in a brief but not found in the record will not be considered by this Court.").

defendant's evidence, unless favorable to the State, is not to be taken into consideration." (quoting *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971)).

No error.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).