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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-119

Filed: 6 October 2020

Sampson County, Nos. 16 CRS 52224-25

STATE OF NORTH CAROLINA,

v.

DEMERY McLYMORE, Defendant

Appeal by Defendant from Judgments entered 11 September 2019 by Judge William Bland in Sampson County Superior Court. Heard in the Court of Appeals 26 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sage A. Boyd, for the State.

Erica Washington for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Demery McLymore (Defendant) appeals from Judgments entered on 11 September 2019 upon his conviction of Robbery with a Dangerous Weapon and Possession of a Firearm by a Felon. The Record before us, including evidence presented at trial, tends to show the following:

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On 3 September 2016, a group of teenagers—Jadhon Smith (Smith), Quamaine Williams (Williams), Carsell Bennett (Bennett), Roderick Newman-McDoe (McDoe), Jaquan Alexander (Alexander), and Akili Underwood (Underwood)—went to a party in Roseboro, North Carolina. Upon their arrival at the party, a man with dreadlocks accosted the group brandishing a small silver handgun. The man searched the teens’ pockets for money—taking a phone and \$10.00 from McDoe—and demanded Smith take off his shoes, which the man also took. The man then ordered Bennett, who owned the car the group took to the party, to drive the man to Dogwood Circle in Clinton, North Carolina. Bennett drove the man to Dogwood Circle, where the man got out of the car and walked off. Bennett returned to the party in Roseboro and rejoined his friends.

At approximately 8:00 p.m. that same evening, after the alleged robbery, a person flagged down Sampson County Sheriff’s Deputy Jeremy Honeycutt (Deputy Honeycutt).¹ This person told Deputy Honeycutt that the person’s nephew had been robbed at the Roseboro party. Deputy Honeycutt went to the location of the Roseboro party where he encountered the group of six teens. The group was excited and talking over each other, and Deputy Honeycutt separated the teens to interview them individually. During Deputy Honeycutt’s investigation, at least one of the teens

¹ By the time of trial, Deputy Honeycutt was no longer employed as a Sampson County Sheriff’s Deputy and was now an Officer with the Clinton Police Department. For ease of reading we refer to “Deputy Honeycutt” as his designation on the evening these events transpired.

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identified the man with the gun as Demery McLymore. Deputy Honeycutt took the information he gathered from the teens and contacted a detective with the Clinton Police Department. Deputy Honeycutt also contacted Clinton Police Sergeant Matthew Bland (Sergeant Bland), who was on patrol in the vicinity of Dogwood Circle. Deputy Honeycutt told Sergeant Bland to be on the lookout for Defendant as he had been identified as a suspect in the teens' robbery and the suspect was last seen in the Dogwood Circle area.

Also, at approximately 10:50 p.m. that evening, Sergeant Bland responded to an assault call in the vicinity of Dogwood Circle. While there, he noticed a man moving through the surrounding housing complex carrying what appeared to be a shotgun. Sergeant Bland pursued the man with the shotgun to a house where he encountered another male subject. After securing the subject, Sergeant Bland continued to 624 Williams Street—a house near the same block where he secured the unarmed male subject—as he was uncertain if the subject with the shotgun had fled into the house. Sergeant Bland asked the occupant if anyone with a weapon had entered; the occupant said no one had. Sergeant Bland asked if he could search the house to make sure and the occupant consented. Sergeant Bland made his way to a bedroom in the residence where he encountered a man in bed with a woman. Aside from having no shirt on, the man matched the description of the Roseboro armed robbery suspect. Sergeant Bland asked the man his name, and the man replied

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“Demery McLymore.” Sergeant Bland detained the man based on Deputy Honeycutt identifying McLymore as a suspect in the Roseboro robbery.

At trial, Sergeant Bland testified Defendant was, in fact, the man who identified himself as Demery McLymore. Upon searching Defendant, Sergeant Bland found \$32.41 in currency, an unspent shotgun round, and thirty-six unspent .380 caliber handgun rounds in Defendant’s pockets. On 13 March 2017, a Sampson County Grand Jury indicted Defendant on one count each of Robbery with a Dangerous Weapon, First Degree Kidnapping, and Possession of a Firearm by a Felon.

Prior to trial, Defendant filed a Motion *in limine* to prohibit the six teens from identifying Defendant in court arguing to allow Defendant to be identified by the teens for the first time at trial, three years after the alleged incident, violated Defendant’s due process rights and amounted to a “Show-Up” identification without the protections of N.C. Gen. Stat. § 15A-284.52. Defendant contended any such identification would be unreliable, non-probative, and unduly prejudicial. Rather than decide the Motion *in limine* in blanket fashion, the trial court decided to allow *voir dire* of the testifying teens to make individual determinations as to their testimony. Of the six teens involved in the alleged robbery incident, four testified—Alexander and Underwood did not testify. At trial, Bennett was not able to specifically identify Defendant. Following *voir dire*, the trial court allowed

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Defendant's Motion *in limine* to prevent McDoe from identifying Defendant in court. Defendant waived his objection to Smith's in-court identification and the trial court overruled Defendant's objection as to Williams's in-court identification. Both Smith and Williams testified they previously knew Defendant and identified Defendant as the man who robbed them.

Following Bennett's testimony, Deputy Honeycutt took the witness stand. On direct examination, Deputy Honeycutt recounted the events surrounding his investigation of the Roseboro robbery. Deputy Honeycutt testified that he saw the group of teens once he arrived at the Roseboro location, and when he asked the teens what happened "[t]hey started talking to me telling me everything." Defendant's counsel objected to the testimony stating, "Objection to what they told him, Your Honor." The trial court instructed Deputy Honeycutt: "All right. At this point, just explain they talked to you." After recounting the teens' excited demeanor during Deputy Honeycutt's interview, the State asked Deputy Honeycutt what he did with the information he learned from the teens. Deputy Honeycutt replied that he contacted the on-call detective at the Clinton Police Department and relayed all of the information he had regarding the alleged robbery. The State then asked if the teens had identified Defendant as a potential suspect; Deputy Honeycutt replied they had. Defendant did not renew any objection to this testimony.

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Later, the State called Sergeant Bland to testify as Defendant's arresting officer. Sergeant Bland recounted responding to the assault call, seeing the man with the shotgun, and the rest of the events culminating in Sergeant Bland arresting Defendant. Of note, Sergeant Bland testified, without objection, he detained Defendant after Defendant identified himself as "Demery McLymore" "because earlier in the night, Deputy Honeycutt . . . had contacted me by phone and told me to be on the lookout for him, and said that he was a person—a suspect in a robbery that occurred in Roseboro." Sergeant Bland then described the money and ammunition he found on Defendant.

On 11 September 2019, the jury returned guilty verdicts on the charges of Robbery with a Dangerous Weapon and Possession of a Firearm by a Felon. Defendant, through counsel, gave oral Notice of Appeal from these convictions in open court prior to sentencing. The trial court sentenced Defendant to 22 to 36 months for the Possession of a Firearm by a Felon charge, and 111 to 146 months for the Robbery with a Dangerous Weapon charge—the sentences to run consecutively. Following sentencing, the trial court again acknowledged and entered Defendant's appeal from the Judgments entered.

Issue

Defendant's sole issue raised on appeal is whether the trial court erred by allowing Deputy Honeycutt to testify Defendant was identified as the suspect during

Deputy Honeycutt's initial interview of the teens on the night of the robbery in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Analysis

On appeal, Defendant contends the trial court should not have admitted Deputy Honeycutt's testimony that the group of teens identified Defendant as a suspect in the armed robbery. Defendant asserts the trial court's error violated his Sixth Amendment right to confront witnesses, U. S. Const. amend. VI (Confrontation Clause), when testimonial evidence is offered at trial. For the reasons that follow, we disagree.

I. Confrontation Clause

As a threshold matter, we must address whether Defendant has preserved any appellate argument on Confrontation Clause grounds. Generally, we review alleged violations of constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). However, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds [for relief] if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1). More specifically, our Courts consistently recognize "[c]onstitutional issues not raised and passed upon at trial will not be considered for

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the first time on appeal.” *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001).

At trial, Defendant objected to Deputy Honeycutt’s testimony the teens were “telling me everything.” But, Defendant’s counsel did not specifically state a constitutional basis for the objection; counsel merely stated, “Objection to what they told him, Your Honor.” Moreover, Defendant did not make any objection when Deputy Honeycutt generally agreed Defendant was “identified as a suspect.” Even were we to view Defendant’s initial objection to Deputy Honeycutt’s testimony as applicable to the testimony regarding the identification of Defendant, this objection was made on evidentiary grounds and there is no indication on the Record before us of any argument raising the constitutional issue under the Confrontation Clause. *See State v. Lemons*, 352 N.C. 87, 91, 530 S.E.2d 542, 544 (2000) (“While defendant clearly objected to the admission of . . . statements . . . on evidentiary grounds, we are unable to find any indication that at trial defendant cited the Sixth Amendment or any constitutional grounds as the basis for his objection to the admission of . . . [these] statements into evidence.”). Thus, Defendant failed to raise any constitutional question at trial concerning Deputy Honeycutt’s testimony that Defendant was “identified as a suspect.” Therefore, Defendant has not preserved this constitutional question for appellate review.

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Recognizing this possibility, Defendant also requests we undertake plain error review of this question. We decline to do so because Defendant is unable to meet the showing of prejudice required under plain error review. For an error to constitute plain error, “a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

Here, Defendant has not shown Deputy Honeycutt’s general testimony Defendant was “identified as a suspect” had a probable impact on the jury’s verdict and that the jury would have probably reached a different verdict without the testimony. This is particularly so considering the additional evidence presented at trial. For example, two of the teens—Smith and Williams—specifically identified Defendant as the perpetrator at trial, each testifying they were able to identify Defendant because they knew Defendant prior to the incident. Moreover, after Deputy Honeycutt testified to the teens’ statements and what he did after taking those statements, Sergeant Bland testified to essentially the same thing. Sergeant Bland testified Deputy Honeycutt told him to be on the lookout for Defendant as the teens had identified Defendant as a suspect in the armed robbery. Sergeant Bland then expressly stated this conversation was the reason he arrested Defendant after

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Defendant identified himself to Sergeant Bland. Defendant did not object to Sergeant Bland's testimony at trial and does not contend on appeal Sergeant Bland's testimony was error.

Thus, Defendant has failed to show the constitutional issue raised on appeal was preserved at trial and, further, failed to establish any error in admitting Deputy Honeycutt's testimony was so prejudicial to warrant plain error review. Therefore, Defendant has failed to show the trial court committed reversible error in this case.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no reversible error in Defendant's trial.

NO ERROR.

Judges TYSON and BROOK concur.

Report per Rule 30(e).