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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1262

Filed: 20 November 2018

Guilford County, Nos. 14CRS74998 & 14CRS074999

STATE OF NORTH CAROLINA

v.

KENDRICK LOUIS ROBINSON, Defendant.

Appeal by Defendant from Judgment entered 7 April 2017 by Judge V. Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 8 August 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin O. Zellinger, for the State.*

*Jarvis John Edgerton, IV, for Defendant-Appellant.*

INMAN, Judge.

Defendant Kendrick Louis Robinson (“Defendant”) appeals from a judgment entered following a jury verdict finding him guilty of attempted robbery with a dangerous weapon and felony first-degree murder. Defendant argues that the trial court erred in allowing a witness to make an in-court identification of Defendant as

the perpetrator. After careful review, we hold that Defendant has failed to demonstrate error.

**I. FACTUAL AND PROCEDURAL HISTORY**

The evidence introduced at trial tends to show the following:

On 29 April 2014, Ayodeji Olatoye (“Olatoye”) was visiting North Carolina A&T student Jermane Clark (“Clark”) at an apartment in Greensboro, North Carolina. Around 10:45 that evening, Clark told Olatoye that he had arranged to sell some marijuana to a woman; sometime later, after Clark had joined Olatoye outside for a phone call, a woman and two men approached the pair. Clark spoke with the three newcomers, confirming that they were interested in buying marijuana, and, following a few minutes of conversation, went inside a nearby house to procure the drugs. In the interim, Olatoye engaged in small talk with the three potential purchasers. Clark returned a short time later, drugs in hand, and offered to weigh the marijuana. The three declined his offer, but one man asked to smell the drugs to confirm their quality. Clark tossed the bag of marijuana to the man; immediately upon doing so, the other unknown male in the group pulled a handgun and placed it against Clark’s head. Clark attempted to grab the gun and a scuffle ensued. In the course of the fight, the gunman managed to shoot Clark in the chest. The shooter and his two companions immediately fled, while Olatoye sought safety inside a house. Olatoye then ran back outside to Clark, called 9-1-1, and applied chest compressions until first responders

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could arrive. A few minutes later, a police officer reached the scene and attempted CPR. EMS appeared shortly thereafter and Clark was pronounced deceased upon his delivery to Moses Cone Hospital.

Olatoye gave a description of the unidentified woman and two men to police on the scene immediately after the shooting, describing the shooter as between 5'8" and 5'10" tall, with close-cut head and facial hair, and wearing a black hoodie or jacket, black pants, and black shoes.

Olatoye was taken to the police station from the scene of the crime and presented with a photo lineup consistent with the North Carolina Eyewitness Identification Reform Act of 2007. Although the lineup included a black-and-white picture of Defendant, Olatoye eliminated that photo as the shooter and identified a different person with 60 percent certainty.

Defendant was arrested a day later on 1 May 2014, and a color picture of his face was published in a newspaper. Olatoye saw the picture in the newspaper shortly following the arrest and was completely certain Defendant was the shooter. But he did not report this revelation to the police.

Defendant filed a pre-trial motion to exclude an in-court identification by Olatoye as violating his right to due process under the Sixth and Fourteenth Amendments to the United States Constitution. The trial court conducted a *voir dire* examination of Olatoye, who, in addition to testifying to the above details, told the

trial court that the shooting occurred on a lit street and that he had a clear view of everyone's faces. The trial court orally stated detailed findings of fact and conclusions of law and denied Defendant's motion. When the in-court identification was made in the presence of the jury, Defendant's counsel timely objected. The trial court overruled the objection consistent with its ruling on the motion to suppress.

Following the presentation of evidence, closing arguments, instruction, and deliberations, the jury found Defendant guilty of attempted robbery with a dangerous weapon and first-degree murder. The trial court arrested judgment on the robbery charge and sentenced Defendant to life without parole for first-degree murder. Defendant gave notice of appeal in open court.

## II. ANALYSIS

Defendant's sole argument on appeal posits that the trial court committed prejudicial error in allowing the State to introduce Olatoye's in-court identification of Defendant, insisting that the circumstances surrounding the identification were so unduly suggestive and unreliable as to violate Defendant's due process rights under the United States Constitution. To reach that conclusion, Defendant contends that the newspaper's publication of his photograph in the article about his arrest was so unduly suggestive that it irreparably tainted Olatoye's in-court identification.<sup>1</sup> The State disagrees, asserting that no constitutional violation occurs where, as here, the

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<sup>1</sup> Defendant does not argue that the pretrial photo line-up was unduly suggestive.

suggestive confrontation is not the result of state action. We agree with the State and hold that the trial court did not err.

*A. Standard of Review*

We review a trial court's decision on a motion to suppress identification evidence to determine "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (2003) (citation). Those findings are binding on this Court if supported by competent evidence. *Id.* at 736, 574 S.E.2d at 699. Unchallenged findings are similarly binding, *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011), while Defendant's constitutional alleged constitutional violation is subject to *de novo* review. *State v. Whittington*, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014).

*B. Unconstitutional Out-of-Court Identification Procedures*

Additional considerations arise when a defendant asserts an in-court identification "is tainted by an out-of-court identification made under constitutionally impermissible conditions[.]" *State v. Tuttle*, 33 N.C. App. 465, 468, 235 S.E.2d 412, 414 (1977). Specifically, "[i]n order to exclude the in-court identification testimony, it must appear not merely that the pretrial procedures were illegally suggestive and conducive to mistaken identification, but also that such procedures were so suggestive and conducive to mistaken identification that any in-court identification

is irreparably tainted.” *Id.* at 468, 235 S.E.2d at 414 (citations omitted). Five factors, derived from *Manson v. Brathwaite*, 432 U.S. 98, 53 L. Ed. 2d 140 (1976), guide this analysis:

- (1) the opportunity of the witness to view the criminal at the time of the crime;
- (2) the witness’s degree of attention;
- (3) the accuracy of the witness’s prior description of the criminal;
- (4) the level of certainty demonstrated by the witness at the confrontation; and
- (5) the length of time between the crime and the confrontation.

*State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983) (citing *Manson*, 432 U.S. at 114, 53 L. Ed. 2d at 154) (additional citations omitted). But even when the pretrial procedure is impermissibly suggestive, “an in-court identification may still be permitted if the trial court determines by clear and convincing evidence that the in-court identification is of independent origin.” *State v. Pulley*, 180 N.C. App. 54, 64-65, 636 S.E.2d at 239 (2006) (citations omitted).

*C. No Constitutional Violation Occurred In Absence of State Action*

Defendant does not argue that the pre-trial identification procedure employed by police led to Olatoye’s in-court identification of him as the perpetrator. Rather, he argues only that the newspaper publication tainted Olatoye’s testimony.

The United States Constitution is a check on government and, in keeping with that purpose, the Supreme Court of the United States has “emphasized . . . that due process concerns arise [in the context of eyewitness identification] only when *law enforcement officers* use an identification procedure that is both suggestive and

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unnecessary.” *Perry v. New Hampshire*, 565 U.S. 228, 238-39, 181 L. Ed. 2d 694, 706-07 (2012) (emphasis added) (citations omitted). Indeed, “the [Supreme] Court has linked the due process check, not to suspicion of eyewitness testimony generally, *but only to improper police arrangement* of the circumstances surrounding an identification.” *Id.* at 242, 181 L. Ed. 2d at 709 (emphasis added) (citation omitted). Thus, “[t]he due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the [Supreme] Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct.” *Id.* at 228, 181 L. Ed. 2d. at 708 (citing *Brathwaite*, 432 U.S. at 112-113, 53 L. Ed. 2d at 152-53) (emphasis in original). This is consistent with “a primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . , [which] is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.” *Id.* at 241, 181 L. Ed. 2d at 708 (citing *Brathwaite*, 432 U.S. at 112, 53 L. Ed. 2d at 152).

Our state’s Supreme Court has likewise recognized the centrality of state action to the exclusion of identification evidence on due process grounds. In *State v. Fisher*, 321 N.C. 19, 361 S.E.2d 551 (1987), a defendant sought to prohibit the introduction of an in-court identification by an eyewitness who later saw images of the defendant under arrest and in handcuffs on television and in the newspaper. 321

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N.C. at 23-24, 361 S.E.2d at 553-54. Holding the in-court identification was admissible, our Supreme Court “[f]irst . . . note[d] that the Fourth Circuit has intimated that suggestive pretrial identification procedures that do not result from state action do not violate defendant’s due process rights.” *Id.* at 24, 361 S.E.2d at 554 (citing *United States v. Davis*, 407 F.2d 846 (4th Cir. 1969)).

This Court followed *Fisher* in *State v. Jones*, 216 N.C. App. 225, 715 S.E.2d 896 (2011), in which a public-school principal sought to help a student whose home had been robbed by printing out photographs of potential suspects, including the defendant. 216 N.C. App. at 233, 715 S.E.2d at 902. After holding that the principal was not acting as a state actor, we held that, absent any state action, the defendant’s due process rights were not implicated, citing *Fisher*. *Id.* at 234, 715 S.E.2d at 903.

We acknowledge that Olatoye’s viewing of Defendant’s image in the newspaper calls the reliability of his in-court identification into question. However, “[t]he [United States] Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, *not by prohibiting introduction of the evidence*, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.” *Perry*, 565 U.S. at 237, 181 L. Ed. 2d at 705 (emphasis added).

Finally, even if we were to assume *arguendo* that Olatoye’s in-court identification implicated Defendant’s due process rights, the trial court’s



unchallenged findings of fact support its conclusion that the evidence did not demonstrate a substantial likelihood of misidentification. In reviewing the five relevant factors, the trial found that: (1) Olatoye was “eight to ten feet” from the shooter; (2) “the area was lit by street lamps[;]” (3) the shooter was “in full face view” of Olatoye; (4) Olatoye engaged in small talk with the shooter for two to three minutes; (5) Olatoye was in the shooter’s presence for five to seven minutes total; (6) Olatoye “had ample opportunity to view” the shooter; (7) Olatoye was not distracted for at least the two to three minutes he spoke with the shooter; (8) Olatoye was certain in his in-court identification of Defendant; and (9) Olatoye’s description of the shooter, given to police at the scene minutes after the murder, was consistent with Defendant’s build, gender, race, facial characteristics, and hairstyle at the time of the crime. The trial court weighed these unchallenged findings against the passage of time between the shooting and the in-court identification and Olatoye’s failure to identify Defendant in the pre-trial photo lineup, ultimately concluding that, based on the totality of these circumstances, the in-court identification did not violate Defendant’s due process rights. On *de novo* review, we hold that the totality of the circumstances established by the trial court’s unchallenged findings do not demonstrate a constitutional violation. Defendant’s argument is overruled.

### **III. CONCLUSION**

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For the foregoing reasons, we hold that the trial court did not err in denying Defendant's motion to suppress Olatoye's in-court identification evidence.

NO ERROR.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).