

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-781

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v.

Henderson County
Nos. 00CRS51991, 2809

STEVE ALLEN SPROUSE

Appeal by defendant from judgment entered 25 September 2000 by Judge J. Marlene Hyatt in Henderson County Superior Court. Heard in the Court of Appeals 18 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Karen E. Long, for the State.

Scott H. Shelton for defendant-appellant.

EAGLES, Chief Judge.

The Henderson County grand jury indicted defendant on a charge of felonious breaking and entering on 24 April 2000 and later indicted him for having committed the offense as a habitual felon. On 25 September 2000, a jury found defendant guilty of felonious breaking and entering. Defendant admitted his habitual felon status. The trial court sentenced defendant to a term of 135 to 171 months imprisonment. From the trial court's judgment, defendant appeals.

At trial, the State presented evidence tending to show the following: On 11 April 2000, Marie Stinnett (victim) arrived at her home with her sister, Anna Parton (Ms. Parton). Both women noticed a strange vehicle parked in the victim's driveway. Upon seeing that the glass in her back door was broken, the victim entered her home and screamed "[g]et out of my house, and who's here." She "saw just a glimpse of somebody going out the front door[,]" and only noticed that the individual was a man with short hair and wearing a jacket.

Ms. Parton ran around the house to get the vehicle's license plate number after she heard somebody coming out of the front door. She ran within a foot of the man as he was opening the vehicle's door. Ms. Parton then proceeded to call out the vehicle license plate number to the victim, who was on her porch speaking to the 9-1-1 dispatch on a portable telephone. She described the man whom she had observed for thirty to forty-five seconds as being five feet eight inches in height and about 185 pounds. His hair was black with gray, and he had a full mustache that was black with some gray.

During a voir dire Deputy Dwayne Frickel testified that he developed a list of suspects as a result of his investigation of the suspected breaking and entering. He prepared a photographic lineup that included defendant's photograph and had the victim and Ms. Parton view it. The lineup contained photographs of six white males, all of whom were approximately forty years of age with dark hair, mustaches and similar facial features. Ms. Parton identified

defendant's photograph, but the victim was unable to identify the perpetrator in the lineup. Deputy Frickel testified initially that the only identifying markings in the photographs were the letters "BCSD" on a placard held by each of the men in a booking room of the Buncombe County Sheriff's Department. During questioning by defense counsel, Deputy Frickel acknowledged the words "Asheville, North Carolina" were on all of the placards except for defendant's photograph.

At the conclusion of the voir dire, the trial court found that the photographic lineup was shown to the victim and Ms. Parton two days after the alleged crime occurred. The lineup contained photographs of six white males of approximately the same age, with the same length of hair, and with the same facial hair, including mustaches. Defendant's photograph did not have "Asheville, North Carolina" under BCSD. One witness was able to identify defendant, while the other witness marked "not sure." On the basis of these findings of fact, the trial court concluded "the pretrial identification procedure involving defendant was not so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate the defendant's right to due process of law." The trial court then denied defendant's motion to suppress the photographic identification.

Deputy Frickel subsequently testified in open court that he checked the license plate number given to him by the two women, he discovered the vehicle was registered to defendant's father-in-law, Joseph Earl Corn. As a result of his investigation, Deputy Frickel

prepared the photographic lineup and presented it to the victim and Ms. Parton on 13 April 2000. While the victim indicated she could not positively identify the perpetrator in the lineup, Ms. Parton immediately selected defendant's photograph. Ms. Parton described the six men in the photographs as "[m]en that look about the same" with similar hair color, mustaches and hair length. A jury subsequently found defendant guilty of felonious breaking and entering. Defendant admitted his habitual felon status.

Defendant contends the trial court erred by admitting the photographic lineup, witness identification sheet and identification testimony into evidence. He argues this evidence was impermissibly suggestive and conducive to misidentification due to the failure to make the markings on his photograph identical to the other five photographs. We disagree.

"[I]n the context of photographic lineups, a positive identification must be suppressed only if the photographic lineup itself is both (1) 'impermissibly suggestive' and (2) so suggestive that 'irreparable misidentification' is likely." *State v. Roberts*, 135 N.C. App. 690, 693, 522 S.E.2d 130, 132 (1999), *disc. review denied*, 351 N.C. 367, 543 S.E.2d 142 (2000). Although defendant argues the photographic lineup was impermissibly suggestive due to the absence of the words "Asheville, North Carolina" from his photograph, he inexplicably has not made the photographic lineup part of the record on appeal. However, the trial court made findings at the voir dire hearing as to the similarities of the six photographs aside from the absence of the words "Asheville, North

Carolina" on defendant's photograph. After a thorough review of the record, transcript, and the trial court's findings of fact, we conclude defendant's contention that the lineup was impermissibly suggestive is without merit.

The circumstances here also do not show there was a substantial likelihood of irreparable misidentification. Ms. Parton viewed the perpetrator for approximately thirty to forty-five seconds, her description of the perpetrator was consistent with defendant's appearance, she immediately identified defendant, and she viewed the photographic lineup only two days after the crime. See *State v. Pigott*, 320 N.C. 96, 99-100, 357 S.E.2d 631, 633-34 (1987). Accordingly, the trial court did not err in denying defendant's motion to suppress the pre-trial identification.

While defendant next attempts to argue that the in-court identification testimony should have been excluded by the trial court, he has not preserved this issue for appellate review with an appropriate assignment of error. See N.C. R. App. P. 10(a) (scope of review is limited to assignments of error set out in the record on appeal). His contention is without merit, nevertheless, because when "the lineup itself was not impermissibly suggestive . . . , the in-court identification could not possibly be suppressed as the fruit of a poisonous tree." *Roberts*, 135 N.C. App. at 694-95, 522 S.E.2d at 133.

Defendant has failed to argue his second assignment of error, and it is therefore deemed abandoned. N.C. R. App. P. 28(b)(5).

In his final assignment of error, defendant asks this Court to "review the record herein for any further errors in this matter." However, "[t]he submission . . . of isolated 'Anders issues' for the appellate court to research is not a viable course of action." *State v. Barton*, 335 N.C. 696, 712, 441 S.E.2d 295, 304 (1994). Accordingly, we find no error.

No error.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).