An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA 05-800

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 03 CRS 200251, 205719

DERRICK FRAZIER,
Defendant.

Appeal by defendant from judgment entered 13 April 2004 by Judge James E. Lanning in the Superior Court in Mecklenburg County. Heard in the Court of Appeals 27 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant-appellant.

HUDSON, Judge.

In January 2003, the Mecklenburg County grand jury indicted defendant for robbery with a dangerous weapon and common law robbery. At trial on 27 October 2003, the jury found defendant guilty of both charges. The court sentenced defendant to consecutive prison terms of 18 to 22 months for the common law robbery and 99 to 128 months for the robbery with a dangerous weapon. Defendant appeals. We conclude there was no error.

The evidence tends to show that truck drivers Robert Lassiter and Kevin Moody were robbed on separate nights in November and December 2002. Early on the morning of 25 November 2003, Lassiter called Charlotte police and reported that he had been robbed by a

man posing as a driver who approached while Lassiter was sleeping in his truck and tried to sell surplus cigarettes. After Lassiter talked with the man for a few minutes, the assailant came into his truck and tried to get Lassiter's wallet. When Lassiter fought back, the assailant called out to someone to bring him a gun, whereupon Lassiter let go of the wallet and the assailant departed. Lassiter testified that the wallet contained over $3,000.00. He remembered the man as being tall, African-American, and wearing a dark jacket, dark pants, and a cap pulled down. Charlotte police robbery detective Randy Carroll thought Lassiter's description of the assailant and his *modus operandi* sounded like defendant.

Detective Carroll telephoned Lassiter, who lived out of town, and told him he would send a photographic lineup and requested that Lassiter call him when it arrived. Detective Carroll testified that he gave Lassiter some instructions over the phone on how to review and compare the photos and cautioned him that his assailant's picture might not be among the photos in the lineup. Lassiter testified that Detective Carroll did not give him any instructions. Detective Carroll prepared a photographic lineup of six subjects, including defendant, and sent them to Lassiter. Lassiter later called Detective Carroll and told him that he had received the photos and that he recognized his assailant in photograph number 5, which was the photo of defendant. Lassiter testified that he covered up part of photo number 5 to simulate a hat, as his assailant wore a cap, but that he did not do this to any other photos. Pursuant to Carroll's instructions, Lassiter

signed his name on the back of the photo he recognized and returned it to the detective.

On the evening of 24 December 2003, another truck driver, Kevin Moody, reported to Charlotte police that he had been robbed by a man posing as a truck driver trying to sell surplus cigarettes. Moody reported that his assailant showed a gun and Moody gave him his money. Moody identified defendant from a photographic lineup.

Defendant first argues that the trial court erred in denying his request to conduct a *voir dire* examination of Mr. Lassiter before he testified about the photo lineup identification, which defendant contends was impermissibly suggestive. We conclude that defendant waived this argument. Generally, a trial court should conduct a hearing in the absence of the jury in order to determine the admissibility of identification testimony. *State v. Thomas*, 35 N.C. App. 198, 200, 241 S.E.2d 128, 130 (1978). However, in *State v. Barnes,* our Supreme Court held that a denial of defendant's request to *voir dire* a witness about identification procedures is not error if it comes after the witness has already identified the defendant in the presence of the jury. 333 N.C. 666, 685, 430 S.E.2d 223, 234 (1993). Our appellate rules also require that a defendant make a timely objection at trial in order to preserve the matter for appellate review. N.C. R. App. P. 10(b)(1)(2004). *See also* N.C. Gen. Stat. § 15A-1446(a) (2003); *Polk v. Biles*, 92 N.C. App. 86, 373 S.E.2d 570 (1988). Here, our review of the record indicates that, as in *Barnes*, the witness identified defendant in

the presence of the jury without objection prior to defense counsel's request to *voir dire* the witness. We also note that even if defendant had properly preserved this argument, "[t]he trial court's failure to hold a *voir dire* is harmless where the evidence shows that the identification 'originated with the witness's observation of defendant at the time of the crime and not from an impermissibly suggestive pretrial identification procedure.'" *State v. Smith*, 134 N.C. App. 123, 129, 516 S.E.2d 902, 907 (1999), (citing *State v. Flowers,* 318 N.C. 208, 216, 347 S.E.2d 773, 778 (1986)). Here, the witness observed defendant during the crime and was able to describe him. We overrule this assignment of error.

In his next argument, defendant contends that he was denied effective assistance of counsel at sentencing. We note that a defendant "is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range." N.C. Gen. Stat. § 15A-1444(a1) (2003). However, defendant does not challenge the sufficiency of the evidence to support his sentence, but rather, asserts that his counsel was ineffective.

It is well-established that sentencing is a critical stage in the criminal process where defendant is entitled to effective assistance of counsel. *See, e.g., State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 218 (1985). In order to show ineffective assistance of counsel, a defendant must establish both that defense counsel made errors so serious that counsel was not functioning as

the "counsel" guaranteed by the Sixth Amendment and that but for counsel's errors, the result of the proceeding probably would have been different. *Strickland v. Washington*, 446 U.S. 658, 694, 80 L.Ed.2d 674, 702 (1984). Furthermore, "[a] court must indulge a strong presumption that counsel's conduct falls within the broad range of what is reasonable assistance." *State v. Fisher,* 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986).

Defendant argues that his counsel was not adequately familiar with the facts of his case, that he misstated defendant's record, and that he failed to introduce evidence of mitigating factors. Our review of the record indicates that defendant's counsel did make an attempt, if not through offering formal evidence, to have the court consider mitigating factors, by arguing these factors at the sentencing hearing. Although defense counsel misstated defendant's record, the court corrected counsel. After reviewing the record, we conclude that defense counsel's performance was not deficient. As defendant received a sentence within the presumptive range, we are not persuaded that counsel could have effected a different outcome by having greater familiarity with the facts or presenting evidence of the mitigating circumstances. We overrule this assignment of error.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).