NO. COA06-1141

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2007

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 05 CRS 80271-72

STANLEY BALDWIN



Appeal by defendant from judgments entered 9 December 2005 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 4 June 2007.

*Attorney General Roy Cooper, by Special Deputy Attorney General Joyce S. Rutledge, for the State.*

*Eric A. Bach for defendant-appellant.*



MARTIN, Chief Judge.

Defendant Stanley Baldwin was charged with two counts of common law robbery. The State's evidence tended to show that after work on 27 May 2005, Carol Boyd met Janet Willard at Willard's office building to attend a baseball game in downtown Greensboro. Willard informed Boyd that she wanted to leave a couple of items in her vehicle before going to the game, so the two women left Ms. Willard's office and walked to the parking garage. Boyd and Willard exited a staircase and into the parking garage lobby level. After they entered the elevator to go up to the fourth floor, a

black male, later identified as defendant, walked out of the staircase and stood in the entrance of the elevator so that the elevator doors would not close. Another black male, walked out of the staircase and stood behind defendant. Defendant said to the two women, "You're going to follow my instructions. Give me your money." The two women complied. Defendant asked, "Is this all you have?" and the women responded affirmatively. Defendant walked off and let the elevator doors close.

Afterwards, Boyd went to the first floor to look for help while Willard went to the fifth floor and asked a security guard to call the police. Willard then met Boyd near the elevators on the first floor. Greensboro Police Officer Johnson responded to the call and took statements from Willard and Boyd. Willard described the robber as a thirty-four-year-old black male, approximately 6'2" to 6'3" in height, weighing 230 pounds. She stated that defendant wore baggy jeans and, on his head, defendant had a black "do-rag" with "WWJD" printed on the do-rag multiple times. Boyd described the robber as a 6'2" black male weighing about 185 to 200 lbs. She also noted that defendant wore a "do-rag" on his head and that the "do-rag" had "WWJD" printed on it several times.

A week later, on 3 June, Willard planned to join friends for dinner downtown. As she was looking for a parking space, Willard observed defendant, without his "do-rag", standing between two parked cars using a cell phone. Willard stopped her vehicle and was about to call the police when she noticed Officer Johnson enter the parking lot. Willard flagged down Officer Johnson and told him

she was 75% sure that the man standing in the parking lot was the man who robbed her. She also told Johnson that she would need to see the man close up to be sure.

Willard waited inside the restaurant while Officer Johnson spoke to the suspect. The suspect provided a North Carolina photo I.D. card to Officer Johnson during their conversation. Once officers responded to Officer Johnson's call for assistance, the officers arrested the suspect. A search of the suspect yielded a black "do-rag," with "WWJD" lettering, in a jacket pocket. Officer Johnson went into the restaurant and asked Willard to describe the robber. Officer Johnson then showed Willard the suspect's photo I.D. and Willard recognized the photo as defendant, the man who robbed her. Willard also recognized the "do rag" as the one worn by the man who robbed her.

Defendant was transported to the Criminal Investigations Division, where he was interviewed by Detective Eric Miller. Although defendant initially stated that he knew nothing about the robbery of Janet and Carol on 27 May, he eventually said: "If they said I did it, I did it, but I don't remember it." On 8 June 2005, Detective Miller showed Boyd a photo-lineup of six photographs and she identified defendant as the robber within "a few seconds." At trial, both Willard and Boyd identified defendant in the courtroom as the man who had robbed them in the parking garage.

A jury found defendant guilty on both counts. At the sentencing hearing, the State introduced defendant's prior record level worksheet, which contained two convictions: a 1980 New York

conviction for Rape and a 1986 New York conviction for Robbery. Defendant was assessed six points for the rape conviction and four points for the robbery conviction, for a total of ten points, which made defendant a prior record level IV. The trial court sentenced defendant to two consecutive sentences of 19-23 months, which sentences are within the presumptive range for a Class G felon at a prior record level IV. Defendant appeals.

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Defendant first contends the trial court erred in allowing Janet Willard to make an in-court identification of defendant because the single photo out-of court identification was impermissibly suggestive. Defendant, however, did not move to suppress the identification, nor did he object at trial. Further, defendant's motion *in limine* does not raise the issue of Willard's identification. Defendant, therefore, asks this Court to review the trial court's failure to suppress Willard's in-court identification under a plain error standard. N.C. R. App. P. 10(c)(4).

"A plain error is one 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002)(quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)), *cert. denied,* 539 U.S. 949, 156 L. Ed. 2d. 640 (2003). It is to be applied cautiously and only in the exceptional case where the error is so prejudicial, "that justice cannot have

been done." *State v. Baldwin*, 161 N.C. App. 382, 388, 588 S.E.2d 497, 503 (2003) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

On appeal, we employ a two-part analysis to determine whether a pretrial identification procedure is impermissibly suggestive:

> First, the Court must determine whether the identification procedures were impermissibly suggestive. Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification. The test under the first inquiry is whether the totality of the circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice. In analyzing whether identification procedures are impermissibly suggestive, North Carolina courts look to various factors including: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty shown by the witness, and the time between the offense and the identification.

*State v. Johnson*, 161 N.C. App. 68, 72-3, 587 S.E.2d 445, 448 (2003) (internal citations and quotation marks omitted), *disc. review denied and appeal dismissed*, 358 N.C. 239, 594 S.E.2d 27 (2004).

We conclude the police did not use a suggestive pre-trial identification procedure. Here, Willard observed defendant during the crime and was able to describe him. A week later, it was Willard who identified defendant in the parking lot and reported her identification to Officer Johnson. Based upon Willard's identification, police questioned defendant, obtained his photo

identification, and showed the photo to Willard. Thus, the photo identification took place after Willard had identified defendant as her robber. More importantly, defendant has not shown that the jury would have reached a different verdict without Willard's identification considering defendant's statement to police and Carol Boyd's unchallenged identification of defendant as the robber. Therefore, we conclude that the trial court did not err by allowing Willard's in-court identification of defendant.

Defendant also contends the trial court improperly calculated his prior record level points. Defendant asserts that the State failed to prove that his prior out-of-state convictions listed on his sentencing worksheet were substantially similar to North Carolina felonies pursuant to N.C.G.S. § 15A-1340.14(e) (2006).

For the purposes of determining prior record levels for felony sentencing, "a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . ." N.C. Gen. Stat. § 15A-1340.14(e)(2006). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists," N.C. Gen. Stat. § 15A-1340.14(f) (2006), and

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is *substantially similar* to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e)(emphasis added). A defendant's prior conviction may be proven by any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f)

The State points out that defendant's prior record level worksheet shows that the State and defense counsel "stipulate[d] to the accuracy" of the worksheet, "including the classification and points assigned to any out-of-state convictions[.]". Based on defendant's signed prior record level worksheet, the State asserts that defendant stipulated to the existence of the prior out-of-state convictions and whether these convictions were "substantially similar" to offenses in North Carolina.

This Court, however, has held that "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006). This Court further stated that "'[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.'" *Id.* at 253, 623 S.E.2d at 603 (quoting *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979)).

We are bound by prior decisions of a panel of this Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We must, therefore, conclude that the stipulation in the worksheet regarding defendant's out-of-state convictions was ineffective. *See State v. Palmateer,* ___ N.C. App. ___ , ___ , 634 S.E.2d 592, 593 (2006)(remanded for re-sentencing despite a clear stipulation specifically referencing the out-of-state convictions). Accordingly, we remand for resentencing.

No error in defendant's trial;

Remanded for resentencing.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).