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NO. COA09-1638

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v.

NICOLE PETERSON ROSS

Stokes County  
Nos. 06 CRS 52342, 52343  
07 CRS 50531

Appeal by defendant from judgments entered 23 July 2009 by Judge Anderson D. Cromer in Stokes County Superior Court. Heard in the Court of Appeals 13 September 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Christine A. Goebel, for the State.*

*Law Offices of J. Darren Byers, P.A., by J. Darren Byers, for defendant-appellant.*

MARTIN, Chief Judge.

Defendant appeals from judgments dated 23 July 2009 and entered pursuant to jury verdicts finding her guilty of two counts of possession with intent to sell or deliver cocaine, two counts of selling and delivering cocaine, and one count of conspiracy to sell and deliver cocaine. The trial court entered judgments pursuant to the jury verdicts and consolidated the convictions into three sentences. The court sentenced defendant to two consecutive terms of imprisonment of fifteen to eighteen months for her convictions for possession of cocaine and selling and delivering cocaine, followed by a suspended sentence of fifteen to eighteen months

imprisonment for conspiracy to sell cocaine. In imposing the suspended sentence, the trial court placed defendant on supervised probation for thirty-six months. Defendant filed written notice of appeal dated 29 July 2009.

Defendant now argues the trial court erred in denying her pretrial motion to suppress the identification of her as the perpetrator of the charged offenses. Defendant contends the pretrial identification was obtained through the use of a single photograph and was impermissibly suggestive, unconstitutional, and a substantial violation of the provisions of the current North Carolina Criminal Procedure Act. We disagree.

It is well established that "[i]dentification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). "Whether there is a substantial likelihood of misidentification depends upon the totality of the circumstances." *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987). In determining whether there is a substantial likelihood of misidentification, the court weighs the "corrupting effect of the suggestive procedure" against five factors:

- 1) The opportunity of the witness to view the criminal at the time of the crime;
- 2) the witness' degree of attention;
- 3) the accuracy of the witness' prior description;

4) the level of certainty demonstrated at the confrontation; and

5) the time between the crime and the confrontation.

*Id.* at 99-100, 357 S.E.2d at 634. Furthermore, our review of a trial court's ruling on a motion to suppress is "strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993). Unchallenged findings of fact are binding on appeal. *See State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006).

Here, in ruling on defendant's motion to suppress, the trial court made the following relevant findings of fact:

5. On April 4<sup>th</sup>, 2006, Detective Ward was directed to a location at a residence to buy crack cocaine. Detective Ward arrived at the residence between 9:30 and 10:30 p.m. and was informed he would be meeting a female using the name "Boss Lady." An older model Cadillac, or similar vehicle, drove up and Detective Ward approached the driver's side and spoke to a black female who identified herself as "Boss Lady."

6. Detective Ward testified that he got a good look at the black female but that it was dark and that he could not identify her for certain on that occasion.

7. Since Detective Ward could not positively identify the black female on April 4<sup>th</sup>, 2006, he and the Stokes County officers decided to arrange another deal to buy drugs from "Boss Lady." Detective Ward testified he wanted a second opportunity to observe the Defendant.

8. On June 14<sup>th</sup>, 2006, Detective Ward arranged to meet the black female known to him as "Boss Lady" in the parking lot of the Wendy's Restaurant in King, North Carolina, to buy cocaine again.

9. At about 8:45 p.m. on June 14<sup>th</sup>, 2006, a car pulled into the Wendy's parking lot for the arranged meeting and Detective Ward approached the driver's side and spoke to the black female driver. The parking lot at Wendy's was well lit. Detective Ward was only eighteen (18) inches from the driver during the drug buy, and he was one hundred percent (100%) certain that the driver he bought from on the June 14<sup>th</sup>, 2006 deal was the same person he bought cocaine from on April 4<sup>th</sup>, 2006. Detective Ward also testified about seeing a gap between the black female's teeth as one distinguishing feature. Detective Ward testified that he paid close attention to the Defendant because he knew that it was a possibility that he would have to identify her in court at a later date.

10. That a "day or two" later Detective Ward was shown a single photograph of a black female and that he identified her as the same black female he bought cocaine from on April 4<sup>th</sup>, 2006, and June 14<sup>th</sup>, 2006, and known to him as "Boss Lady." Detective Ward also identified the Defendant in the courtroom from the witness stand as the person who called herself "Boss Lady" and that he bought cocaine from on the dates referenced above.

11. Detective Gregg Kirkman was a surveillance officer during both buys from the Defendant. Detective Kirkman was able to get a license number from the Defendant's car in the Wendy's parking lot and received the Defendant's name and photograph from the Division of Motor Vehicles (DMV). The vehicle driven by the Defendant in the Wendy's parking lot was registered to the Defendant.

12. Detective Ward testified that the person in the photograph he identified was definitely the same person he bought drugs from on both occasions.

13. Detective Ward called Defendant again on October 13<sup>th</sup>, 2006, to arrange another drug deal. Detective Ward recognized the voice of the Defendant as the same person he talked to on the other two occasions when he bought drugs from her. Defendant advised Detective Ward that "her man" would be taking care of business this time.

Defendant does not challenge any of these findings of fact, and they are thus binding on this Court on appeal.

Applying the factors in *Pigott* to its findings of fact, the trial court made the following conclusions of law:

2. In considering the above referenced factors Detective Ward's [sic] did not describe the Defendant Nicole Peterson Ross after the first drug deal on April 4<sup>th</sup>, 2006, because he met her in the dark and was not certain of her description. That was the reason for the arranged second meeting so that Detective Ward could make a second observation of the Defendant. After the second meeting with the Defendant Detective Ward's level of certainty of the Defendant's identity was one hundred percent (100%). Detective Ward recalled a distinguishing feature of a gap between the Defendant's teeth. Detective Ward also paid close attention to the Defendant because he knew that there was a possibility that he would be called upon in court to identify the person he bought drugs from on April 4<sup>th</sup> and June 14<sup>th</sup>, 2006. Detective Ward is an experienced officer with fourteen (14) years of experience identifying suspects. As to the other "Pigott Factors" the court concludes the facts in this case strongly support a conclusion that Detective Ward's identification is not such that there is a strong likelihood of irreparable misidentification.

3. While the procedures followed in this case for identification of the Defendant using a single photograph is frowned upon, based upon the totality of the circumstances in this case the use of a single photograph was not so suggestive that there was a substantial

likelihood of irreparable misidentification of the Defendant.

We conclude that the trial court's findings of fact address the necessary *Pigott* factors and support the trial court's conclusions of law that the identification testimony was sufficiently reliable and was not the result of irreparable misidentification. Due to the darkness at the initial encounter on 4 April 2006, Detective Ward was initially unsure of the identity of "Boss Lady." This precipitated the second purchase of crack cocaine from "Boss Lady" on 14 June 2006, whereupon Detective Ward confirmed the woman from whom he bought cocaine that night was the same woman who sold him crack cocaine on 4 April 2006. Detective Ward was able to get a better look at "Boss Lady" during the second transaction, sufficient to identify her at a later date. Detective Ward testified he was one hundred percent certain defendant was the woman from whom he bought crack cocaine on 4 April and 14 June 2006 and was known to him as "Boss Lady." Given the totality of the circumstances, we agree with the trial court that Detective Ward's pretrial identification of defendant through the use of a single photograph did not present a substantial likelihood of misidentification. Accordingly, we hold the trial court did not err in denying defendant's motion to suppress.

Defendant next argues the trial court erred by allowing impermissibly suggestive identification procedures to be utilized by the State in violation of her constitutional rights and those of her co-conspirator, Artemus Roberts. Defendant states that she wishes to present "a similar argument as to Roberts'

identification" as she presented in her arguments regarding the denial of her motion to suppress concerning her identification. However, even assuming she has standing to challenge Roberts' identification on constitutional grounds, defendant has waived any review of this issue.

"Chapter 15A, Article 53, of the General Statutes sets forth the exclusive method for challenging evidence on the ground that its exclusion is constitutionally required." *State v. Maccia*, 311 N.C. 222, 227, 316 S.E.2d 241, 244 (1984); *see also State v. Conard*, 54 N.C. App. 243, 244, 282 S.E.2d 501, 503 (1981) ("The exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. § 15A-974 is a motion to suppress evidence which complies with the procedural requirements of G.S. § 15A-971 et seq.").

As a general rule, motions to suppress *must be made before trial*. A defendant may move to suppress evidence at trial only if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (twenty working days) of its intention to use certain types of evidence; or that additional facts have been discovered after a pretrial determination and denial of the motion which could not have been discovered with reasonable diligence before determination of the motion.

*State v. Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980) (citations omitted). "The defendant has the burden of showing that he has complied with the procedural requirements of Article 53 [of Chapter 15A of the North Carolina General Statutes]." *Maccia*, 311 N.C. at 227, 316 S.E.2d at 244. "When no exception to making the

motion to suppress before trial applies, failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds." *State v. Detter*, 298 N.C. 604, 616, 260 S.E.2d 567, 577 (1979) (citations omitted). Here, defendant did not raise any constitutional challenge regarding the identification of Roberts in her pretrial motion to suppress, and makes no showing that any exception excuses her failure to raise the issue in her pretrial motion. Accordingly, defendant has waived any right she may have had to contest the admissibility of the evidence of Roberts' identification at trial by not presenting this issue in her pretrial motion to suppress.

No error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).