NO. COA10-393

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 09 CRS 572-74, 11127

TONY RAY SMITH

Appeal by defendant from judgment entered 19 November 2009 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 October 2010.

Roy Cooper, Attorney General, by David L. Elliot, Director, Victims and Citizens Services, for the State.

Leslie C. Rawls for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered pursuant to jury verdicts finding him guilty of misdemeanor larceny, misdemeanor financial card fraud, felony financial card theft, and attaining the status of an habitual felon. The trial court consolidated the convictions for sentencing and sentenced defendant to a term of 135 to 171 months' imprisonment.

At trial, the State's evidence tended to show that on 29 August 2008, Ms. Alicia Baucom was working in the garden center at the Kings Drive farmer's market in Mecklenburg County. Ms. Baucom observed defendant enter the garden center with a friend and look

at flowers. Defendant asked Ms. Baucom about a bougainvillea and she talked with him about the plant. Ms. Baucom noticed defendant had a beer bottle in his back pocket and that he was trying to conceal it from view during their conversation. Defendant continued looking at flowers after the conversation regarding the bougainvillea and Ms. Baucom moved on to assist other customers, but she "kept an eye" on defendant because she thought he "seemed like he was not there for flowers."

While assisting another customer, Ms. Baucom's attention was called back to defendant. She saw him walking away from the checkout area, where she had left her pocketbook. She went over to the checkout area and noticed her wallet was gone. She then followed defendant out to the parking lot and demanded that he return her wallet. Defendant started running, and Ms. Baucom followed him to a blue Dodge Durango. Defendant got into the driver's seat and began to drive away. Ms. Baucom reached into the Durango in an attempt to switch off the ignition, but defendant drove off. As defendant drove away, Ms. Baucom noted the license plate number of the Durango and phoned the police. A short while later, Ms. Baucom phoned her credit card company and reported her card stolen, and she subsequently learned that a transaction for $53.49 at a Shell Oil station had already been charged on her card.

Later that day, Officer J.S. Cerdan spotted a blue Dodge Durango with two occupants parked in a parking lot. The Durango pulled out of the lot and Officer Cerdan maneuvered behind the Durango. Officer Cerdan confirmed the license tag of the Durango,

called for backup and stopped the vehicle. Defendant was the driver of the Durango and the passenger was female. Officer Cerdan took defendant into custody.

Shortly thereafter, police officers interviewed defendant. Defendant waived his rights and gave a statement to the officers. Defendant's statement was written down by Officer Cerdan and signed by defendant. Defendant's statement as to the offenses at issue states:

> We were driving down Kings Dr and went to the farmers [sic] market to buy a banana. I saw the change purse on a chair[.] I took it and got back into the Dodge Durango and I left by myself. I got the card from the change purse. I went to the gas station on Providence Rd and put the credit card in the pump and pumped the gas. I went into the gas station and asked for a carton of cigarette[s]. The man denied me[.] I left in the Dodge Durango. I don't know nothing else about nothing.

Defendant did not testify or otherwise present evidence at trial on his own behalf.

Defendant's sole argument on appeal is that the trial court committed plain error in not striking Ms. Baucom's in-court identification of defendant after she testified that she had not seen him before the incident and, after his arrest, was directed to a website where she viewed his photograph. Defendant contends Ms. Baucom's viewing of defendant's photograph on the website impermissibly tainted her in-court identification of defendant. 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). This determination involves a two-step process:

> First, the Court must determine whether the pretrial identification procedures were unnecessarily suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so impermissibly suggestive that they resulted in a substantial likelihood of irreparable misidentification.

State v. Fisher, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987). "Whether a substantial likelihood exists depends on the totality of the circumstances." *Id.* 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;
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> 2) the witness' degree of attention;
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> 3) the accuracy of the witness' prior description;
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> 4) the level of certainty demonstrated at the confrontation; and
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> 5) the time between the crime and the confrontation.

State v. Pigott, 320 N.C. 96, 99-100, 357 S.E.2d 631, 634 (1987) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)).

Because defendant did not object at trial to the admission of Ms. Baucom's testimony identifying defendant as the perpetrator of the crimes, we review this issue for plain error only. *See In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009) ("Under the plain error doctrine, errors or defects affecting a fundamental right may be addressed [on appeal] even though they were not previously brought to the attention of the [trial] court." (citing N.C. R. App. P. 10(c)(4); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983))). "[P]lain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Plain error exists where,

> after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the . . . mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted, emphasis and alteration in original). To show the trial court committed plain error, a defendant must establish that "the error was so fundamental that, absent the error, the jury probably would have reached a different

result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Here, Ms. Baucom had an extended opportunity to view defendant at the time of the crime. Just before her belongings were taken, she engaged in a conversation with defendant regarding a bougainvillea plant, and kept an eye on him afterwards because she did not believe he was at the farmer's market to buy flowers as he had stated. While she did not actually see defendant take her belongings, Ms. Baucom ran after defendant, demanding he return her purse. Defendant fled from the market and Ms. Baucom followed him into the parking lot and even reached into the cab of his Durango in an attempt to turn off the vehicle's ignition. Further, Ms. Baucom was never directed to go to the website in question to view the photograph and make an identification of defendant. In fact, Ms. Baucom was never asked to make a pretrial identification of defendant. Officer Cerdan gave Ms. Baucom the website so that she could check the status of the case, and Ms. Baucom only viewed the photograph of defendant on the website twice.

In light of the totality of the circumstances, we hold that even if Ms. Baucom's viewing of defendant's photograph on the website constituted an unnecessarily suggestive pretrial identification procedure, the two viewings were not impermissibly suggestive and they did not result in a substantial likelihood of irreparable misidentification. Accordingly, the trial court's failure to strike, *ex mero motu*, Ms. Baucom's in-court identification of defendant was not error, let alone plain error.

No error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).