NO. COA12-1320
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 08 CRS 250566
08 CRS 80584

RODNEY EUGENE JONES,
Defendant.

Appeal by defendant from judgment entered 13 March 2012 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 April 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

S. Hannah Demeritt for defendant-appellant.

GEER, Judge.

Defendant Rodney Eugene Jones appeals from his conviction of first degree burglary, larceny after a breaking and entering, and being a habitual felon. He primarily contends on appeal that his out-of-court identification by the victim was the result of a "showup," was improperly suggestive of his guilt, and should have been excluded. As we find that the out-of-court

identification of defendant did not create a substantial likelihood of irreparable misidentification, we hold that the trial court did not err in admitting the identification.

Facts

The State's evidence tended to show the following facts. On the evening of 20 October 2008, Tracy Thompson was alone and asleep in her townhome on North Church Street in Charlotte, North Carolina. Before going to bed at around 9:30 p.m., Ms. Thompson had dead-bolted the front door and left the light on in the hallway outside her bedroom. After she had fallen asleep at about 10:00 p.m., Ms. Thompson was awakened by a pounding sound, but she fell back to sleep.

At around 10:30 p.m., Brandon Phillips was a passenger in an automobile parked on North Church Street. Mr. Phillips was talking to a coworker when he noticed two individuals, one wearing a black hoodie and the other wearing a gray hoodie, on the street. Thinking the pair looked suspicious, Mr. Phillips and his coworker sat back in the car and watched them. They saw the two individuals walk up to a townhouse, and the one wearing a gray hoodie, who was taller, kicked the door two or three times until the door came open. Both of the individuals ran into the townhouse.

Sometime after that, Ms. Thompson was awakened by a loud crash, a flash of light, and her bedroom door being flung open. She saw a thin black male in his forties wearing a light-colored hoodie and dark pants. Ms. Thompson could see the intruder's face because the hallway light illuminated his face and he was only three to five feet away from her. Ms. Thompson screamed, told the man she had a gun, and threatened to kill him. The intruder turned and walked back toward the hallway. Ms. Thompson then opened the window, kicked out the screen, screamed out the window for help, and called 911.

Still sitting outside, Mr. Phillips saw Ms. Thompson, heard her scream for help, and watched the two individuals run from her townhouse. The two ran down North Church Street toward Discovery Place with Mr. Phillips and his companion in their car following slowly behind them. Mr. Phillips called 911 while keeping the two intruders in sight. As the two individuals continued down Church Street, the man wearing the gray hoodie took off the hoodie. The two individuals then made a right turn onto 6th Street and crossed that street.

At that point, Officer Marvin Bell, an off-duty officer with the Charlotte-Mecklenburg Police Department, who had heard the call regarding the break-in and gone to the area, saw what he believed to be two men crossing 6th Street. Officer Bell was

looking at their backs and could not see either person's face, although he believed them to be the two suspects based upon the descriptions of their clothing that had come over the radio. Officer Bell lost sight of the two as they turned a corner.

Officer Benjamin Roldan and another officer, who were responding to the breaking and entering call, saw two individuals matching the description of the suspects walk across 6th Street and detained them. At that point, Mr. Phillips identified the two people as the individuals who had broken into and fled from Ms. Thompson's townhouse. Mr. Phillips noted that the gray hoodie had disappeared sometime between the time the two intruders had turned the corner and the police had arrived. It turned out that the person wearing a black hoodie was female while the other individual was male. Officer Roldan searched the two suspects and recovered a cell phone, charger, and digital camera.

Meanwhile, Ms. Thompson informed Officer Patrick Mulhall, who arrived at her home, that her cell phone was missing. Officer Mulhall called the cell phone's number, and Officer Roldan answered -- the cell phone he had retrieved from the suspects was Ms. Thompson's phone.

Ms. Thompson was then taken to 6th and Poplar Streets where she saw two individuals standing in a parking lot. The area was

well lit, and she was taken within 15 feet of the two suspects. She identified defendant as the person who had entered her bedroom. After identifying defendant, Ms. Thompson traveled with police down an alley through which the two suspects had traveled. Ms. Thompson noticed a light colored hoodie sweatshirt in a bush that looked like the one defendant was wearing when he kicked in her bedroom door.

Defendant was indicted for first degree burglary and larceny after breaking and entering. At trial, Ms. Thompson testified that she was 100 percent sure that defendant was the man who had broken into her townhouse and that she had not forgotten his face. The jury convicted defendant of both offenses, and defendant pled guilty to being a habitual felon. The trial court consolidated the offenses into a single judgment and sentenced defendant to a presumptive-range term of 151 to 191 months imprisonment. Defendant timely appealed to this Court.

I

Defendant first contends that the trial court's admission of Ms. Thompson's out-of-court identification of defendant violated his due process rights under the federal and state constitutions because the circumstances of that identification were impermissibly suggestive. Although defendant objected at

trial, he did not assert a constitutional basis for that objection. We, therefore, review his constitutional argument for plain error. *State v. Lemons*, 352 N.C. 87, 95, 530 S.E.2d 542, 547 (2000) ("Additionally, defendant did not object to the admission of the statements on constitutional grounds at trial. As we will discuss in detail below, defendant's failure to object at trial and properly preserve the constitutional issue for appeal requires us to review this potential constitutional error under the plain error standard of review, not the constitutional error standard required by the United States Supreme Court . . . .").

For this Court to find plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

Our Supreme Court has noted: "The value of the showup as an investigatory technique has been recognized in many

jurisdictions. Showups are an efficient technique for identifying a perpetrator when the trail is still fresh." *In re Stallings*, 318 N.C. 565, 569, 350 S.E.2d 327, 329 (1986) (internal citations omitted). As a result, the Supreme Court "has, on numerous occasions, sanctioned the use of showups." *Id.*

In *State v. Oliver*, 302 N.C. 28, 46, 274 S.E.2d 183, 194 (1981), the Supreme Court addressed the standards for determining the admissibility of an identification that resulted from use of a show-up procedure similar to the one used in this case. There, the grandson of the victim who had seen his grandfather killed was brought to the police station after one of the policemen had told him that he would be "taken to the police station where he 'could see that man again.'" *Id.* at 45, 274 S.E.2d at 194. The Court determined that the show-up identification process was unnecessarily suggestive. *Id.*

That conclusion did not, however, end the inquiry. The Court observed that "'the primary evil to be avoided is a very substantial likelihood of irreparable misidentification.'" *Id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 198, 34 L. Ed. 2d 401, 410, 93 S. Ct. 375, 381 (1972)). Consequently, "[i]f an out-of-[court] identification procedure is so suggestive that it leads to a substantial likelihood of misidentification, the out-of-

court identification is inadmissible." *Id.*, 274 S.E.2d at 194-95. On the other hand, "[s]uggestive pre-trial identification procedures, even if unnecessary, do not create a substantial likelihood of misidentification so as to preclude an in-court identification nor are the pre-trial procedures themselves inadmissible where under the totality of circumstances surrounding the crime itself 'the identification possesses sufficient aspects of reliability.'" *Id.*, 274 S.E.2d at 195 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 106, 53 L. Ed. 2d 140, 149, 97 S. Ct. 2243, 2249 (1977)).

The Court then noted that the factors a court must consider in deciding the reliability of identification testimony include "'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.'" *Id.* at 46, 274 S.E.2d at 195 (quoting *Manson*, 432 U.S. at 114, 53 L. Ed. 2d at 154, 97 S. Ct. at 2253). Against these factors the court must "'weigh[] the corrupting effect of the suggestive identification itself.'" *Id.* (quoting *Manson*, 432 U.S. at 114, 53 L. Ed. 2d at 154, 97 S. Ct. at 2253).

Here, there is no question that the showup procedure was very suggestive. On the other hand, with respect to Ms. Thompson's opportunity to view defendant during the crime, Ms. Thompson testified that defendant was only three to five feet away from her, he was illuminated by the hallway light, and she could clearly see his face. From her testimony, it appears Ms. Thompson's attention was squarely on the intruder who had just thrown open her bedroom door. As for her description of the intruder, Ms. Thompson was able to give a relatively detailed description of him as a tall, thin, black male, in his forties, who was wearing a light-colored hoodie and dark pants. This description was similar to Mr. Phillips' description of one of the people leaving Ms. Thompson's townhouse. With respect to Ms. Thompson's degree of certainty, Ms. Thompson immediately identified defendant at the showup as the person who entered her bedroom. This identification occurred in a matter of minutes after Ms. Thompson saw the intruder in her bedroom.

Considering the totality of the circumstances of the case, the showup in this case was no more suggestive than typical showup procedures and given the immediacy of the showup after Ms. Thompson first saw the intruder, combined with the level of detail of her initial description, and the certainty of her identification, we hold that Ms. Thompson's pretrial

identification of defendant was admissible. The identification was sufficiently reliable that there was not a substantial likelihood of misidentification. *See State v. Richardson*, 328 N.C. 505, 511-12, 402 S.E.2d 401, 405 (1991) (upholding admission of showup identifications when showups occurred between 45 minutes and 2½ hours after witnesses first saw defendant, their descriptions were essentially consistent and included descriptions of clothing, height, and weight, and witnesses had good opportunities to see defendant earlier); *State v. Pigott*, 320 N.C. 96, 100, 357 S.E.2d 631, 634 (1987) (holding that identification made during overly suggestive photographic lineup was admissible when lineup occurred within hours of crime); *Oliver*, 302 N.C. at 46, 274 S.E.2d at 195 (holding in part that identification was admissible because "identification was consistent, unequivocal and made without the slightest hesitancy or uncertainty").

By way of contrast, in each of the cases on which defendant relies, the evidence regarding the factors set out in *Oliver* suggested a substantial likelihood of misidentification. *See State v. Headen*, 295 N.C. 437, 442-43, 245 S.E.2d 706, 710 (1978) (holding that pretrial identification was inadmissible when witness expressed doubt about his identification, his opportunity to identify defendant prior to showup was limited

because it was dark, his attention was not on suspect's face during his interaction with him, witness could only give general description of defendant, and identification occurred more than 20 months after crime); *State v. Pinchback*, 140 N.C. App. 512, 519-20, 537 S.E.2d 222, 226-27 (2000) (finding pretrial identification inadmissible because witness could not make positive identification of passenger in car even though identification took place within hour of robbery; witness did not have opportunity to view passenger at time of robbery; and witness' description of passenger was not reliable).

Although defendant also cites *State v. Al-Bayyinah*, 356 N.C. 150, 156, 567 S.E.2d 120, 123 (2002), the Supreme Court in *Al-Bayyinah* was not addressing whether a showup identification was admissible, but rather held that evidence of other robberies, which were factually dissimilar from the crime being prosecuted, was inadmissible under Rule 404(b) in part because the evidence that the defendant perpetrated the other robberies "rested upon a pretrial identification procedure of questionable validity." Because the Court was addressing Rule 404(b), the Court had no reason to conduct the *Oliver* analysis and, therefore, *Al-Bayyinah* is not controlling.[1]

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[1]Defendant also cites *State v. McCraw*, 300 N.C. 610, 616, 268 S.E.2d 173, 177 (1980), as supporting his contention, but *McCraw* in fact held that the evidence regarding the factors set

In light of the evidence on each of the factors set out in *Oliver*, we hold that the trial court properly admitted Ms. Thompson's pretrial identification. Although defendant also argues that the trial court erred in admitting Ms. Thompson's in-court identification, his argument regarding the in-court identification hinges entirely on his contention that the pretrial identification should have been excluded. We, therefore, hold that the trial court also properly allowed Ms. Thompson's in-court identification.

II

Defendant next contends that photographs of the light-colored hoodie recovered in the alley near where defendant was apprehended were improperly admitted. At trial, Ms. Thompson was asked about three photographs:

> Q. And what are State's Exhibits Numbers 14 through 16?
>
> A. Pictures of a sweatshirt and some shrubbery.
>
> Q. And do you recognize these pictures?
>
> A. Yes.
>
> Q. . . . Do these pictures fairly and accurately depict the sweatshirt as you saw it on October 20th, 2008?

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out in *Oliver* was sufficient "to withstand any attempt by defendant to show that any alleged impermissible pre-trial procedure raised the strong likelihood of misidentification."

A. Yes.

Q. And would these pictures help to illustrate your testimony?

A. Yes.

Although defendant objected that the photographs were duplicitous, the trial court admitted the photographs for illustrative purposes.

Ms. Thompson then testified regarding what the photographs showed:

Q. Ms. Thompson, I'm showing you what's been marked as State's Exhibit 14. What is this a picture of?

A. It's a picture of a light-colored hoodie sweatshirt in the shrubbery.

Q. And where is that shrubbery?

A. Just off the alley.

Q. And when you're saying the "alley," is that the same alley that you're referring to in State's Exhibit 13?

A. Correct, the alley behind Discovery Zone parking between 6th and 7th.

Q. I'm also showing you what's been marked as State's Exhibit 15. Can you tell me what that is?

A. The picture of the sweatshirt that was found in the alley.

Q. And that's the same picture -- that's the same sweatshirt that was found in State's Exhibit 14?

A. Yes.

Q. And also, I'm showing you what's been marked as State's Exhibit 16. Can you tell the jury what that is a picture of?

MR. BUTLER: Objection.

THE COURT: Overruled.

THE WITNESS: It is a picture of the sweatshirt that was found in the alley on the evening of 10/20/08.

On appeal, defendant challenges the admission of the photographs as well as the admission of Ms. Thompson's testimony that the hoodie in the photographs was "the sweatshirt" that the intruder was wearing. Because, at trial, defendant objected to the admission of the photographs only on the grounds that they were duplicitous (an argument not made on appeal) and lodged only a general objection regarding Ms. Thompson's testimony, the arguments made on appeal were not properly preserved. We, therefore, review for plain error.

With respect to the photographs, defendant argues that they should have been excluded because Ms. Thompson did not personally take the pictures. Our Supreme Court has, however, held that "[i]t is not necessary that the photograph be taken by the witness, if the witness testifies that it correctly represents what the witness observed." *State v. Atkinson*, 275 N.C. 288, 311, 167 S.E.2d 241, 255 (1969), *sentence vacated*, 403

U.S. 948, 29 L. Ed. 2d 859, 91 S. Ct. 2283 (1971). In addition, contrary to defendant's arguments on appeal, it does not matter that the State did not also offer into evidence the subject of the photographs: the sweatshirt itself. *See State v. Alston*, 91 N.C. App. 707, 712-13, 373 S.E.2d 306, 311 (1988) (holding trial court properly admitted for illustrative purposes photographs of money even though money was not itself admitted).

Ms. Thompson testified that the photographs were an accurate representation of what she saw when she and the officer found the grey hoodie in a shrub in the alley. That testimony was sufficient to permit the admission of the photographs for illustrative purposes. With respect to Ms. Thompson's testimony that the sweatshirt depicted in the photographs -- the sweatshirt found in the alley -- was the sweatshirt that the intruder was wearing in her house, defendant argues that the testimony was so unreliable that it should have been excluded as irrelevant under Rule 401 of the Rules of Evidence. Alternatively, defendant argues that the evidence should have been excluded as more unfairly prejudicial than probative under Rule 403 of the Rules of Evidence.

Defendant's arguments regarding the reliability of Ms. Thompson's testimony raise questions for the jury. Only the jury may determine whether Ms. Thompson was credible when she

testified that she could recognize the hoodie in the shrub as being that of the intruder. Moreover, as for defendant's Rule 403 argument, this Court may not apply plain error analysis to decisions under Rule 403. *See State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) ("The balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error to issues which fall within the realm of the trial court's discretion." (internal quotation marks omitted)).

III

Defendant finally contends that the trial court erred in denying his motion to dismiss in that there was insufficient evidence that defendant was the perpetrator of the offenses. "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d

164, 169 (1980). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Here, the State presented testimony from witnesses outside Ms. Thompson's townhouse who watched two people break into that house and then leave. They trailed the two individuals until they were stopped by police officers -- defendant was one of the two individuals. The individuals had Ms. Thompson's cell phone -- stolen only minutes before -- in their possession. Finally, Ms. Thompson identified defendant as the intruder in her bedroom. The State presented ample evidence that defendant was the perpetrator, and the trial court, therefore, properly denied the motion to dismiss.

No error.

Judges McGEE and DAVIS concur.

Report per Rule 30(e).