

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-410
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 10 CRS 234736

KENNETH D. GRIER

Appeal by defendant from judgment entered 26 August 2011 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for the State.

Ryan McKaig, for defendant-appellant.

Calabria, Judge.

Kenneth D. Grier ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of robbery with a dangerous weapon. We find no error.

I. Background

On 19 July 2010, Omar Chavez ("Chavez") was walking through a parking lot near his apartment in Charlotte, North Carolina between 4:00 and 5:00 in the afternoon. Defendant approached

Chavez, pointed a pistol at him and asked him for money. Chavez gave defendant \$12.00 which was all the money he had. Chavez observed defendant's face during the robbery and recognized defendant as someone he had previously seen at the apartment complex. After being robbed, Chavez returned to his apartment and called law enforcement.

Chavez described defendant as a black man wearing jeans and an orange shirt. While giving the officers the description, Chavez noticed that defendant was standing on the balcony of a nearby apartment. Chavez informed the officers that the man on the balcony was the man who robbed him. Officers then went to the apartment where Chavez saw defendant standing on the balcony and knocked on the door. Defendant answered the door. The officers detained defendant until Chavez was brought to the door of the apartment to identify defendant as the man who robbed him. Chavez stated that he was 100 percent sure that defendant was the man who robbed him. Chavez also identified defendant in open court at trial.

Defendant was taken to the Charlotte-Mecklenburg Police Department, where he was interviewed. Defendant confessed to the robbery, confirming that he pointed a gun at Chavez and that Chavez had given him money. Defendant was arrested and charged

with robbery with a dangerous weapon ("RWDW"). The jury returned a verdict finding defendant guilty of RWDW. Defendant was sentenced to a minimum of 51 and a maximum of 71 months in the North Carolina Department of Correction. Defendant appeals.

II. Show-Up

Defendant argues the trial court committed plain error in failing to suppress the victim's identification of him at a show-up. Defendant claims the show-up was impermissibly suggestive. Defendant further argues the trial court committed plain error in failing to suppress the victim's in-court identification of him, because the in-court identification was tainted by the impermissible show-up. We disagree.

"Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Powell*, 321 N.C. 364, 368, 364 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830, 102 L. Ed. 2d 60 (1988). In determining whether pretrial identification should have been suppressed, this Court first must determine "whether the pretrial identification procedure is impermissibly suggestive." *Id.* at 368-69, 364 S.E.2d at 335. "Our Supreme Court has stated that the test for whether an

identification procedure was impermissibly suggestive 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.'" *State v. Stowes*, __ N.C. App. __, __, 727 S.E.2d 351, 357 (2012) (citation omitted).

If it is determined that the pretrial identification procedure is impermissibly suggestive the court must then determine whether the suggestive procedure gives rise to a substantial likelihood of irreparable misidentification. Factors to be considered in making this determination are (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 of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation.

Powell, 321 N.C. at 369, 364 S.E.2d at 335. Because defendant did not object at trial to the admission of the testimony regarding the show-up identification, we review this issue for plain error. *State v. Lawrence*, __ N.C. __, __, 723 S.E.2d 326, 333 (2012). For an error to be considered 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 affects the fairness, integrity or public reputation of judicial proceedings.

Id. at ___, 723 S.E.2d at 334 (citations and quotation marks omitted).

In the instant case, Chavez had already identified defendant as the man who had robbed him before the show-up procedure. Defendant cites two cases, *State v. Richardson*, 328 N.C. 505, 511, 402 S.E.2d 401, 405 (1991), and *State v. Oliver*, 302 N.C. 28, 44, 274 S.E.2d 183, 194 (1981), where officers told the witnesses they would be viewing a suspect or someone that met their description. In contrast to *Richardson* and *Oliver*, here Chavez was the one who pointed out defendant while giving the officers defendant's description. Chavez noticed a man standing on the balcony of a nearby apartment and informed the officers that the man on the balcony was the man who robbed him. That man was defendant. Therefore, since the identification preceded the show-up, we find that the show-up procedure was not impermissibly suggestive.

Assuming, *arguendo*, that the show-up was suggestive, the Court determines whether the "procedure gives rise to a substantial likelihood of irreparable misidentification" by determining if it satisfies the reliability factors the Supreme Court set out in *Powell*. 321 N.C. at 369, 364 S.E.2d at 335. Defendant gave Chavez ample opportunity to view him at the time of the robbery. Although defendant approached Chavez from behind, he faced Chavez when he pointed the gun at him. Chavez paid attention to his surroundings and the location of his attacker at the time he was robbed. In addition, when Chavez identified defendant, he stated that he was 100 percent certain defendant was the one that robbed him because Chavez was familiar with defendant. He had seen defendant on multiple occasions at the apartment complex. For the timing element, the time between the robbery and the identification process was approximately an hour.

Defendant contends that the third factor set out in *Powell*, accurate identification of the criminal, is missing. Chavez told the officers that the suspect was wearing an orange shirt. When defendant was located he was not wearing an orange shirt. In addition, the officers did not locate an orange shirt in the apartment where defendant was staying. However, "[i]n

determining the existence of irreparable misidentification, the court must examine the totality of the circumstances[.]” *State v. Smith*, 134 N.C. App. 123, 127, 516 S.E.2d 902, 906 (1999). In examining the totality of the circumstances in the instant case, Chavez’s pretrial identification of defendant established a substantial likelihood for the court to determine that Chavez’s identification of defendant was sufficiently reliable, and that defendant was properly identified since most of the factors set out in *Powell* applied. Accordingly, we hold it was not error, let alone plain error, for the trial court to allow into evidence Chavez’s identification of defendant at the show-up.

Defendant further argues that the trial court committed plain error in failing to suppress the victim’s in-court identification of him, because the in-court identification was tainted by the impermissible show-up. “Where the pretrial identification procedures have created a likelihood of irreparable misidentification, neither the pretrial nor the in-court identification is permissible.” *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). Since both the pretrial and in-court identifications were permissible, we have determined that there was no likelihood of misidentification.

Therefore, both the show-up and the in-court identification of defendant were free from error.

III. Ineffective Assistance of Counsel

Defendant also contends that he received ineffective assistance of counsel because his trial attorney failed to object to the show-up and the resulting evidence including the in-court identification. Since we have held that the show-up was not impermissibly suggestive and there was no substantial likelihood of misidentification, the trial counsel's failure to object to the show-up and request the suppression of the evidence cannot constitute deficient performance. *See State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 ("To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense."), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). The clear reliability of the show-up, as well as the lack of suggestiveness, ensures that the evidence would have been admitted over objection. We overrule this argument.

IV. Rule 2

Finally, defendant asks this Court to invoke Rule 2 of our Rules of Appellate Procedure to avoid the manifest injustice

that would result from a conviction based on evidence that should have been suppressed. "Aside from the possibility of plain error review in criminal appeals, Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to 'prevent manifest injustice to a party' or to 'expedite decision in the public interest.'" *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (quoting N.C.R. App. P. 2). However, in the instant case we have determined from the totality of the circumstances that the evidence from the show-up identification should not have been suppressed. Therefore, this is not a proper application of Rule 2 and we decline defendant's request to invoke Rule 2. Defendant received a fair trial free from error.

No error.

Judges HUNTER, Robert C. and McCULLOUGH concur.

Report per Rule 30(e).