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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-993

Filed 17 October 2023

Surry County, Nos. 20CRS52655, 52711–13, 21CRS3

STATE OF NORTH CAROLINA

v.

MARK ANTHONY NIEVES, Defendant.

Appeal by defendant from judgments entered 31 March 2022 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 19 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for the State.

Chris J. Heaney, for defendant-appellant.

FLOOD, Judge.

Mark Anthony Nieves ("Defendant") appeals from judgments finding him guilty of common law robbery, first-degree forcible sex, attempted robbery with a dangerous weapon, and indecent liberties with a child. Defendant argues two issues on appeal: (A) the trial court erred in allowing out-of-court and in-court identifications of Defendant where the identifications were too unreliable for the jurors to consider;

and (B) if Defendant's counsel did not preserve its objections to certain witness testimony, Defendant received ineffective assistance of counsel where his counsel failed to introduce evidence at the suppression hearing that would have resulted in the exclusion of key evidence linking Defendant to the offenses. As explained in further detail below, the trial court did not err.

I. Factual and Procedural Background

Elise[1] is a Spanish-speaking native of Honduras, who lives in Mount Airy, North Carolina. Elise managed a *tanda*—a group savings pool—and often had cash on her person.

In early October 2020, a Spanish-speaking man came to Elise's house and asked a *tanda* participant—one of Elise's friends—if he could borrow money. The friend denied the man's request, and the man left. Later that same day, a Spanish-speaking man came to Elise's house, approached Elise and offered to sell her a watch and CDs. Elise believed this was the same man who had asked to borrow money from her friend, and she observed that this man had a Puerto Rican accent.

A. The First Incident

On 7 October 2020, at around 8:00 p.m., Elise was returning home with her five-year-old son. When Elise pulled into her dark, poorly lit driveway, a man sporting a ski mask that covered "his whole face except for his eyes" opened her car

[1] Pseudonyms are used to protect the identities of the adult complaining witness ("Elise") and her minor daughter ("Amelia"). *See* N.C.R. App. P. 42(b).

door, grabbed her hair, and pulled her out of the car. The man told Elise "[t]o hand over the money," and when she told him to let her go, he told her to "shut up, to just shut up." According to Elise, the man was speaking "English and Spanish, but more in Spanish." After the man pulled Elise out of the car, another man grabbed Elise's purse—which contained $1,800.00 from the *tanda* and $400.00 of Elise's own money—and ran away. The man who pulled Elise from the car remained at the scene, dragged Elise to a nearby wooded area, and then squeezed Elise's breasts and penetrated her vagina with his fingers. The man was wearing gloves worn by carport installers, according to Elise, and he scratched and harmed the inside of Elise's vagina. To make the man stop the assault, Elise urinated on herself. Around this time, a car approached, and the man ran away in the same direction as the man who had stolen Elise's purse.

Elise called the police and reported the incident. Elise described the assailant to a Spanish-speaking police officer, and reported that the man was tall, skinny, spoke with a Puerto Rican accent, had dark skin, and emanated a "very strong odor" that Elise described as "really smelly." Elise also observed that one of her car's tires had been punctured and flattened, and that one of the car's mirrors had been "turned around[.]"

Sometime between 8 and 14 October, Elise used Facebook to search for photographs of the man who assaulted her. She found a picture of Defendant, believed him to be the culprit, and reported his identity to law enforcement. On 13

October, an officer saw Defendant in his apartment complex, made casual conversation with him, and asked him about reports of thefts in the area. Defendant "did not appear to understand" the officer's inquiry, and the officer ended the conversation.

B. The Second Incident

On 15 October 2020, a man wearing a mask that showed only his eyes approached Elise as she was leaving her home. The man spoke with a Puerto Rican accent and was armed with a gun; he touched the gun to Elise's head and told Elise he would kill her if she called the police. The man took no money from Elise, and he left after approximately ten to fifteen minutes. Elise's eleven-year-old daughter, Amelia, watched the incident through a window from inside Elise's home. After the man left, Elise or Amelia called the police to report the assault. Elise again described the man as tall, skinny, having dark skin, a Puerto Rican accent, and emanating a "very strong odor[.]" Elise claimed that this was the same man as in the first incident, and she disclosed that Amelia had witnessed almost the entire incident.

C. The Third Incident

On 27 October 2020, Elise was outside in the front yard of her home with Amelia and Elise's infant daughter, who was being held by Amelia. A man who was not wearing a mask and was armed with a gun approached Elise and her children. The man placed the gun to Elise's right temple, forced her to kneel on the ground, and told her to give him the money. The man then asked Amelia for the money,

touched her breast, and put his hand in her pants. Amelia started to cry and dropped her infant sister. Soon after this, the man left, and Amelia called the police. When the police arrived, Elise told them she believed the assailant was the same man from the prior two incidents, and she attributed to the man the same characteristics as the assailant in the first and second incidents—tall, slim, dark-skinned, having a Puerto Rican accent, and emanating the same odor as the assailant in the first and second incidents. Elise also described the assailant as "wearing a black hoodie, jeans, and tennis shoes[,]" and she insisted the hoodie's logo "was just a mountain with words, maybe an A." The officer to whom Elise was speaking "figured out [the logo] was . . . possibly Adidas[.]"

D. The Show-Up

After receiving the call from Amelia, the police put out an alert for Defendant. Roughly a quarter of a mile from Elise's house, the police apprehended Defendant, who at the time was sporting a black Adidas sweater, a "hoodie/tobagan [sic] like thing on his head[,]" jeans, and tennis shoes. The police transported Elise and Amelia to a parking lot, where officers had brought Defendant and no other suspect for a show-up (the "show-up"). Upon Elise and Amelia's arrival, which was approximately fifteen to twenty minutes following the third incident, Defendant was wearing handcuffs behind his back, was either standing next to or inside the back of a patrol car, and was surrounded by law enforcement officers. At approximately

twenty feet away from Defendant, Elise identified Defendant as the man who had assaulted her, and Amelia made the same identification.

On 23 November 2020, Surry County District Court found Defendant guilty of assault by pointing a gun and resisting a public officer. Defendant appealed from this judgment, and Surry County Superior Court took jurisdiction over the matter. On 4 January 2021, a grand jury indicted Defendant for common law robbery and first-degree forcible sex, two counts of attempted robbery with a dangerous weapon, and indecent liberties with a child. Defendant pled not guilty to all charges.

On 23 March 2022, prior to trial, Defendant moved to suppress Elise's and Amelia's out-of-court identifications of Defendant, as well as their in-court identifications. The trial court denied this motion. On 28 March 2022, these matters came on for trial before Surry County Superior Court. At trial, the State presented testimony from Elise and Amelia (the "Witnesses"). Elise was asked if she recognized Defendant as the person who attacked her at her home, and she responded: "Yes. I will recognize him all my life." Elise testified that, during each assault, she recognized Defendant's eyes, his voice, his odor, and his Puerto Rican accent. Defendant, notably, is originally from Puerto Rico.

On 31 March 2022, the jury found Defendant guilty of all charges from the first and third incidents, and not guilty of one of the counts of attempted robbery, which was the sole charge from the second incident. The trial court sentenced Defendant to 220 to 324 months' imprisonment, a consecutive sentence of 54 to 77 months'

imprisonment, and a consecutive, consolidated sentence of 13 to 25 months' imprisonment. The court made no written findings, as Defendant's sentence was in the presumptive range. Defendant gave oral notice of appeal.

II. Jurisdiction

Defendant preserved his appeal by moving to suppress the Witnesses' in-court and out-of-court identifications, and by making timely and specific objections before and during trial. *See State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.") (citing N.C.R. App. P. 10(b)(1)). His appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021) and Rule 4 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 4(a)(1).

III. Analysis

Defendant argues on appeal: (A) the Witnesses' out-of-court and in-court identifications of Defendant as the perpetrator of the crimes were too unreliable for the jurors to consider and in violation of his due process rights; and, (B) in the alternative and assuming *arguendo* this Court finds Defendant's trial counsel did not preserve Defendant's objections to Amelia's testimony about her out-of-court and in-court identifications, Defendant's counsel was ineffective for failing to introduce evidence at the suppression hearing that would have resulted in the exclusion of key

evidence linking Defendant to the offenses. Because Defendant's objections to Amelia's testimony are preserved for our review, we need not address his alternative ineffective assistance of counsel argument. We therefore address only Defendant's allegation of error on part of the trial court.

Defendant argues the manner in which he was presented during the show-up—handcuffed, surrounded by officers, and in or next to a patrol car—was impermissibly suggestive, and the show-up accordingly caused a substantial likelihood of irreparable misidentification by the Witnesses and was not harmless beyond a reasonable doubt. According to Defendant, he is therefore entitled to a new trial. After careful review, we disagree.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citation omitted). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Saldierna*, 371 N.C. 407, 421, 817 S.E.2d 174, 183 (citation and internal quotation marks omitted). This Court reviews conclusions of law *de novo*. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. Furthermore, "the extent to which a witness's in-court identification has an independent origin is a question of law or legal inference rather than a question of fact." *State v. Malone*, 373 N.C. 134, 145–46, 833 S.E.2d 779, 787 (2019) (citation omitted).

The governing law applicable to the issue before us is well-established. "As a general proposition, 'the jury, not the judge, traditionally determines the reliability of evidence.'" *Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (quoting *Perry v. New Hampshire*, 565 U.S. 228, 245, 132 S. Ct. 716, 728, 181 L. Ed. 2d 694, 711 (2012)). Due process considerations, however, "do place limitations upon the admission of eyewitness identification evidence obtained as a result of impermissible official conduct." *Id.* at 146, 833 S.E.2d at 787 (citation omitted).

"The initial inquiry in which a reviewing court is required to engage in conducting such a due process inquiry is whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *Id.* at 146, 833 S.E.2d at 787 (citation and internal quotation marks omitted). To make the relevant determination, this Court, in consideration of the totality of the circumstances, employs a two-step process,

> with the first step requiring [this] Court to determine whether the identification procedures were impermissibly suggestive, and with the second step, which becomes relevant in the event that the procedures were impermissibly suggestive, requiring [this] Court to determine whether the procedures create a substantial likelihood of irreparable misidentification.

Id. at 146, 833 S.E.2d at 787 (citations and internal quotation marks omitted); *see State v. Yancey*, 291 N.C. 656, 660, 231 S.E.2d 637, 640 (1977) ("[T]he recognized test as to the admissibility of evidence concerning pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily

suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." (citations omitted)). Even if this Court determines a witness made an identification under impermissibly suggestive circumstances, however, "that witness's in-court identification testimony may still be admissible in the event that . . . the in-court identification has an *origin independent* of the invalid pretrial procedure because, in that case, the procedures have not created a substantial likelihood of irreparable misidentification." *Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (emphasis added) (citations and internal quotation marks omitted). Per the articulated two-step process, we first address whether the procedures used during the show-up were impermissibly suggestive.

A. Impermissibly Suggestive

"Our courts have widely condemned the practice of showing suspects singly to persons for the purpose of identification[,]" *Yancey*, 291 N.C. at 661, 231 S.E.2d at 640, and the United States Supreme Court has held single-suspect identification procedures can "clearly convey[] the suggestion to the witness that the one presented is believed guilty by the police." *United States v. Wade*, 388 U.S. 218, 234, 87 S. Ct. 1926, 1936, 18 L. Ed. 2d 1149 (1967); *see also State v. Matthews*, 295 N.C. 265, 285–86, 245 S.E.2d 727, 739–40 (1978) (providing that show-ups may be "inherently suggestive [because] the witnesses would likely assume that the police had brought them to view persons whom they suspected might be the guilty parties").

This Court has held that a show-up is "unduly suggestive" when the defendant was "brought before [the witness] from the back of a police car for identification." *State v. Patterson*, 249 N.C. App. 659, 667, 791 S.E.2d 517, 522 (2016). Additionally, presenting a suspect in handcuffs may be suggestive, but that factor "alone is insufficient to make the show-up impermissibly suggestive." *State v. Lee*, 154 N.C. App. 410, 416, 572 S.E.2d 170, 174 (2002). In the recent case of *State v. Rouse*, this Court, while noting that the suspect being in handcuffs, alone, was insufficient to conclude a show-up is impermissibly suggestive, found the defendant's show-up identification *was* impermissibly suggestive because the defendant was in handcuffs *and* brought for the show-up in the back of a police car. 284 N.C. App. 473, 481, 876 S.E.2d 107, 115 (2022).

Here, the Record unequivocally shows that Defendant was presented to the Witnesses while handcuffed and surrounded by law enforcement officers. The Record is not clear as to when or whether, during the show-up, Defendant was in the back of or standing next to the patrol car. Defendant being in handcuffs and surrounded by law enforcement officers, however, coupled with Defendant either sitting in the back of or standing next to a patrol car, demonstrates "a suggestion to the [W]itness[es] that the one being presented is believed guilty by the police." *Wade*, 388 U.S. at 234, 87 S. Ct. at 1936, 18 L. Ed. 2d 1149; *see also Yancey*, 291 N.C. at 661, 231 S.E.2d at 640; *Rouse*, 284 N.C. App. at 481, 876 S.E.2d at 115. We therefore conclude the show-up was impermissibly suggestive, and accordingly, now consider whether the show-

up procedures created a substantial likelihood of irreparable misidentification. *See Malone*, 373 N.C. at 146, 833 S.E.2d at 787.

B. Substantial Likelihood of Irreparable Misidentification

In assessing the question of whether there was a substantial likelihood of irreparable misidentification, this Court determines whether the witness' in-court identification had the "necessary independent origin[.]" *Malone*, 373 N.C. at 147, 833 S.E.2d at 787. In making this determination, we rely on five factors:

> (1) [T]he opportunity of the witness to view the accused at the time of the crime, (2) the witness' degree of attention at the time, (3) the accuracy of his prior description of the accused, (4) the witness' level of certainty in identifying the accused at the time of the confrontation, and (5) the time between the crime and the confrontation.

Rouse, 284 N.C. App. at 481–82, 876 S.E.2d at 115 (cleaned up) (quoting *Malone*, 373 N.C. at 147, 833 S.E.2d at 787). "Ultimately, weighing factors such as these is not an exercise employed with mathematical precision. Certain factors may be more important than others depending upon the nature of the impermissibly suggestive procedure as well as the particular facts of the case." *Malone*, 373 N.C. at 152, 833 S.E.2d at 790. This Court does "not need to find all five factors weigh against a substantial likelihood of irreparable misidentification to admit the evidence over due process concerns. Instead, against these factors must be weighed the corrupting effect of the suggestive procedure itself." *Rouse*, 284 N.C. App. at 482, 876 S.E.2d at

115 (cleaned up) (citations and internal quotation marks omitted). We address each factor in turn.

1. Opportunity of the Witnesses to View the Accused at the Time of Each Crime

As to the first factor, in *State v. Morris* we found this factor counted against a due process violation where, during the assault, "it was light out, there was nothing obstructing the [assailant's] . . . face, and [the witness] had an unobstructed view of [the assailant's] face for approximately [one] minute from a distance of [three to five] feet[.]" 288 N.C. App. 65, 78, 884 S.E.2d 750, 760 (2023) (internal quotation marks omitted). Likewise, in *Malone*, our Supreme Court counted this factor in favor of a finding of independent origin where a witness saw a shooter for seventy-five to ninety seconds from four feet away. *See Malone*, 373 N.C. at 149–50, 833 S.E.2d at 789.

Here, the Record shows that, during the third incident, the Witnesses were approached by a man who was not wearing a mask and was armed with a gun. Over the course of the incident, the man placed the gun to Elise's temple and touched Amelia's breast and put his hand inside her pants. From this we can reasonably infer he was, at different times during the incident, no more than two feet from each Witness. As in *Morris* and *Malone*, where witnesses were three to five feet away from a suspect and had an unobstructed view of the suspect's face, this factor weighs against a due process violation, here, where the assailant was unmasked and, at given times during the incident, no more than two feet from each of the Witnesses. *See Morris*, 288 N.C. App. at 78, 884 S.E.2d at 760; *see Malone*, 373 N.C. at 149–50,

833 S.E.2d at 789. We therefore conclude this factor weighs in favor of a finding of independent origin as to the third incident.

During the first incident, however, Elise was assaulted, under poorly-lit conditions, by a man sporting a ski mask that "covered his whole face except for his eyes[.]" These conditions afforded Elise little opportunity to view the accused and, as such, we conclude this factor weighs against a finding of independent origin as to the first incident. *See Rouse*, 284 N.C. App. at 481, 876 S.E.2d at 115.

2. The Witnesses' Degree of Attention at the Time of the Incidents

As to the second factor, in *Malone* our Supreme Court found this factor supported a finding of independent origin where the witness gave a general description of the suspect and his actions, while admitting that, during the incident, she was "in shock[.]" 373 N.C. at 150, 833 S.E.2d at 789. Here, across the first, second, and third incidents, Elise provided incisive descriptions of the assailant as tall, skinny, having a Puerto Rican accent, dark skin, and emanating a "very strong odor." Elise also provided she was "scared" and "angry" during the third incident, but, per *Malone* where the witness was "in shock[,]" Elise's disturbed states of emotion during the third incident do not necessitate a finding of her lack of attention at the time of the incident. *See id.* at 150, 833 S.E.2d at 789. Although the Record does show Amelia was emotionally distressed during the third incident and, as she is a minor, this may have clouded her powers of perception, we conclude Elise's description of the assailant's features evinces her paying attention during both the

first and third incidents, and this factor weighs in favor of a finding of independent origin.

3. Accuracy of the Witnesses' Prior Descriptions of the Accused

Turning to the third factor, we have concluded that a "general description" of a suspect's "race, height, age range, and approximate[] . . . weight . . . . slightly favors a finding" against independent origin. *Morris*, 288 N.C. App. at 79–80, 884 S.E.2d at 760–61. Our Supreme Court, in *Malone*, likewise found that where the witness accurately described only the "defendant's shoulder-length" hair, this "fact somewhat undermines a finding of independent origin[.]" 373 N.C. at 150–51, 833 S.E.2d at 790. Here, the trial court made no findings as to Defendant's appearance, but the Record demonstrates Defendant is a native of Puerto Rico and, at the time of the stand-up, was dark-skinned and was wearing a black Adidas sweater, a hoodie, jeans, and tennis shoes. As articulated above, Elise described the assailant in both the first and third incidents as tall, skinny, having a Puerto Rican accent, dark skin, and emanating a "very strong odor." After the third incident, Elise also described the assailant as wearing jeans, tennis shoes, and a black hoodie with a logo that was "like a mountain" and containing the letter "A," which the interviewing officer concluded to be Adidas.

Per *Morris*, Elise's descriptions—in both the first and third incidents—of the assailant's Puerto Rican accent and dark skin tone are "general description[s]" that, although accurate as to Defendant's features, on their own slightly favor a finding

against independent origin. *See Morris*, 288 N.C. App. at 79–80, 884 S.E.2d at 760–61. Elise's description of the assailant's clothing in the third incident, however, matched Defendant's clothing at the time of the show-up and was timely and specific enough to not constitute a "general description." Coupled with Elise's general, but accurate, descriptions of Defendant's accent and skin tone, we find her description of the assailant's clothing was such that this factor favors a finding of independent origin for the third incident. As Elise provided only the general descriptions in the first incident, however, we find this factor "slightly favors a finding against" independent origin for the first incident. *Morris*, 288 N.C. App. at 79–80, 884 S.E.2d at 760–61; *see also Malone*, 373 N.C. at 150–51, 833 S.E.2d at 790.

4. Level of Certainty in Identifying the Accused at the Time of the Incidents

Regarding the fourth factor, we found in *Morris* that where the witness' "testimony about her identification at the time of the confrontation did not demonstrate hesitancy, this factor slightly counts" in favor of independent origin. 288 N.C. App. at 80, 884 S.E.2d at 761. Here, the Record demonstrates no hesitancy in the Witnesses' identifications of Defendant at the show-up and, when Elise was asked at trial if she recognized Defendant as the person who attacked her at her home, she testified: "Yes. I will recognize him all my life." This factor therefore favors a finding of independent origin. *See id.* at 80, 884 S.E.2d at 761.

5. Time Between the Incidents and the Show-Up

With respect to the fifth factor, our Supreme Court found in *Malone* that where "only a week or two passed between the crime" and the witness' identification of the defendant, this factor favors a finding of independent origin. 373 N.C. at 151, 833 S.E.2d at 790. Here, both Witnesses identified Defendant at the stand-up, which was approximately two weeks following the first incident, and approximately fifteen to twenty minutes following the third incident. Accordingly, this factor favors a finding of independent origin. *See id.* at 151, 833 S.E.2d at 790.

6. Weighing the Factors

Weighing these factors, under the totality of the circumstances and against the "corrupting effect of the suggestive procedure itself[,]" we find the Witnesses' in-court identifications were of independent origin. *Rouse*, 284 N.C. App. at 482, 876 S.E.2d at 115; *see also Malone*, 373 N.C. at 147, 833 S.E.2d at 787. The Witnesses had ample opportunity to view the accused at the time of the third incident. Elise's descriptions of her assailant demonstrate she was paying attention during both the first and third incidents. Elise's description of the assailant in the third incident was specific and accurate and, while this fact "does not fit cleanly within any of the five factors," Elise repeatedly described the assailant as emanating a "very strong odor"—a unique quality for one to possess—which mitigates the impact of her more general descriptions in the first incident. *See Morris*, 288 N.C. App. at 81, 884 S.E.2d at 761 (finding that "[w]hile this fact does not fit cleanly within any of the five factors, the length of time in between the confrontation and identification" is mitigated by the

witness having reviewed video recordings of the suspect "shortly before making the identification"). Additionally, after the first incident and prior to the third incident, Elise independently found a picture of Defendant on Facebook and reported Defendant's identity to the police, and Defendant was later detained based on Elise's specific descriptions in the third incident. This, too, mitigates the impact of Elise's more general descriptions in the first incident. *See id.* at 81, 884 S.E.2d at 761. Neither of the Witnesses demonstrated hesitancy in identifying Defendant at the show-up, and Elise confidently testified that she recognized Defendant. Finally, a short period of time elapsed between the incidents and the stand-up. As the Witnesses' in-court identifications were of independent origin, there was not a substantial likelihood of irreparable misidentification. *See Malone*, 373 N.C. at 147, 833 S.E.2d at 787. Defendant's due process rights were not violated, and the trial court did not err.

IV. <u>Conclusion</u>

As the Witnesses' in-court identifications of Defendant were of independent origin, Defendant has failed to demonstrate the Witnesses' out-of-court and in-court identifications of Defendant were too unreliable for the jurors' consideration. We hold the trial court did not err in denying Defendant's motion to suppress.

NO ERROR.

Chief Judge STROUD and Judge MURPHY concur.

Report per Rule 30(e).