IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-797

Filed: 17 July 2018

Mecklenburg County, Nos. 16 CRS 21555-56, 21558-62, 21564-66

STATE OF NORTH CAROLINA

v.

ANTHONY TERRELL CHISHOLM, Defendant.

Appeal by Defendant from judgments entered 27 March 2017 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.

Richard Croutharmel for Defendant-Appellant.

INMAN, Judge.

Defendant Anthony Terrell Chisholm ("Defendant") appeals six judgments following jury verdicts finding him guilty of three counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, and four counts of conspiracy to commit robbery with a dangerous weapon. Defendant argues that the trial court erred in denying his motion to suppress victims' identifications of him

at a show-up hours after the robberies. He further argues that the trial court erred in denying his motion to dismiss the armed robbery and conspiracy charges for insufficiency of the evidence. After careful review, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

A. The Padilla and Ortiz Robbery

On the evening of 16 January 2015, Katherine Padilla ("Ms. Padilla") and her husband, Roberto Ortiz ("Mr. Ortiz"), were seated in a well-lit area outside their apartment complex's laundromat in Charlotte, North Carolina. While the two were looking at Facebook on Mr. Ortiz's cell phone, a man ran up to the couple and snatched the phone from Mr. Ortiz's hand. In his haste, the thief dropped the cell phone before picking it up off the ground and fleeing. Mr. Ortiz stood up to pursue the phone pilferer, but he stopped when a second man approached the couple and pointed a gun at them. The second man demanded money from Ms. Padilla and Mr. Ortiz and began searching their pockets. The man with the phone waited a few feet away while the couple was searched and, once the robbery was accomplished, the two perpetrators ran off together.

A neighbor called the police to report the robbery of Ms. Padilla and Mr. Ortiz. Police interviewed both victims that evening and, in statements to investigators, Ms.

Padilla and Mr. Ortiz described the cell phone thief as a skinny black male, about 5'10" tall, with long dreadlocks.

B. The Garcia and Guzman Robbery

Later that same evening, at approximately 9:00 p.m., Kiara Garcia ("Ms. Garcia") and her boyfriend, Oscar Guzman ("Mr. Guzman") were returning to their apartment in Charlotte after going out to visit Goodwill and pick up a pizza for dinner. As they were walking down an exterior hallway to the door of their apartment, the two heard footsteps behind them. When the couple turned around, two men with guns approached them and demanded money. The robbers took Mr. Guzman' cell phone, while Ms. Garcia gave the men both her wallet and phone. The robbers then searched the Goodwill bag and ran away; moments later, Ms. Garcia heard the squealing of tires as the perpetrators fled by car.

After the robbery, Ms. Garcia and Mr. Guzman knocked on a neighbor's door and called the police, who took statements from the couple once they arrived. In her statement, Ms. Garcia described the thieves as skinny black males, each approximately 6' tall. Mr. Guzman described them only as two black males in ski masks.

C. The Show-Up and Evidentiary Rulings

Later that same night, at approximately 10:00 p.m., Defendant was detained by a South Carolina sheriff's deputy at a gas station in York County, South Carolina

in connection with a different crime. The Charlotte-Mecklenburg Police Department was contacted concerning the detention, and the detective responsible for investigating the Padilla, Ortiz, Garcia, and Guzman robberies arranged for each victim to be transported to the South Carolina gas station to identify possible perpetrators. Video from a camera in a Charlotte-Mecklenburg patrol car shows that, at the time the victims were taken to the show-up to identify any possible robbers, roughly 15 police vehicles with flashing emergency lights encircled the gas station. Uniformed officers from both North and South Carolina were present. As patrol cars carrying the victims pulled into the gas station, suspects, including Defendant, were brought in front of the victims to be identified individually. The suspects, all in handcuffs, were escorted from police vehicles and placed in front of a spotlight; the victims, each in a different patrol car, were driven and parked in front of the suspects one at a time. Each victim was shown one suspect individually, and police officers recorded, via video, audio, or both, the victims' identifications.

Ms. Padilla identified Defendant as the man who stole her husband's phone; she was completely confident of her identification. Mr. Ortiz also identified Defendant as the phone thief with absolute certainty. Mr. Guzman identified Defendant as a participant in the robbery of himself and Ms. Garcia with unqualified certainty. Ms. Garcia, however, could only identify Defendant as a perpetrator with 50 percent confidence. Defendant was subsequently charged with six counts of

robbery with a dangerous weapon and six counts of conspiracy to commit robbery with a dangerous weapon.[1]

Before trial, Defendant filed a motion to suppress the show-up identifications. At a pre-trial motions hearing, the State dismissed one count of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon. The State also amended one indictment for robbery with a dangerous weapon to the lesser-included offense of attempted robbery with a dangerous weapon. The trial court deferred ruling on Defendant's suppression motion. When the State sought to admit Ms. Garcia's show-up identification, the trial court allowed voir dire examinations of Ms. Garcia and Detective Joseph Dollar ("Detective Dollar"), who administered the show-ups, outside the presence of jurors. The trial court suppressed Ms. Garcia's identification, ruling it was inadmissible due to insufficient indicia of reliability. The State later sought to introduce audio recordings of the show-up identifications by Ms. Padilla and Messrs. Ortiz and Guzman, with Detective Dollar testifying that the three victims all identified Defendant on the audio recording. The trial court opened a second voir dire examination of Detective Dollar and, following arguments by counsel, recognized that "show[-]up identifications whereby a single suspect is shown to a witness shortly after a crime is something that is inherently

[1] Defendant was tried for a separate robbery of a fifth victim and was found not guilty on those charges. Defendant asserts no error as to any testimony by or concerning that victim. As a result, we do not address that robbery on appeal.

suggestive[.]" The trial court then engaged in an analysis of five factors enumerated by the United States Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98, 53 L. Ed. 2d 140 (1976) and recognized by our Supreme Court in *State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983) (the "*Manson* factors"), to determine whether the show-up was "so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness, and justice." After making findings of fact and conclusions of law concerning each of these factors as applied to the show-up identifications by Ms. Padilla and Messrs. Ortiz and Guzman, the trial court concluded that those identifications were admissible and denied Defendants' motion to suppress testimony concerning the same.

At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court denied the motion. Defendant presented no evidence. Following instruction by the trial court and closing arguments by counsel, the jury returned verdicts finding Defendant guilty on all charges pertaining to Ms. Padilla and Messrs. Ortiz and Guzman. Defendant made notice of appeal in open court.

II. DISCUSSION

Defendant asserts two prejudicial errors by the trial court: (1) denying his motion to suppress concerning Detective Dollar's testimony on the show-up identifications by Ms. Padilla and Messrs. Ortiz and Guzman; and (2) denying his motion to dismiss the charges of armed robbery and conspiracy to commit armed

robbery pertaining to Ms. Padilla and Mr. Ortiz. We hold that the trial court did not err in denying either motion.

A. Standards of Review

We review a trial court's ruling on a motion to suppress by determining "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). Unchallenged factual findings are binding on appeal. *Id.* at 168, 712 S.E.2d at 878. We review the conclusions of law *de novo*, substituting our judgment for that of the trial court. *Id.* at 168, 712 S.E.2d at 878. Likewise, "[t]his 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) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)).

B. Motion to Suppress

Our jurisprudence recognizes that show-ups "may be 'inherently suggestive' because the [identifying] witness 'would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties.' " *State v. Oliver*, 302 N.C. 28, 45, 274 S.E.2d 183, 194 (1981) (quoting *State v. Matthews*, 295 N.C. 265, 285-86, 245 S.E.2d 727, 739 (1978)). The inherent suggestiveness of show-up identifications, however, does not automatically render them inadmissible on due process grounds: "Pretrial show-up identifications . . . , even though suggestive and

unnecessary, are not *per se* violative of a defendant's due process rights." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). Instead, we turn to the five *Manson* factors to determine 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." *State v. Henderson*, 285 N.C. 1, 9, 203 S.E.2d 10, 16 (1974), *death penalty vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976). We consider:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

State v. Harris, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983). These factors are then " 'weighed [against] the corrupting effect of the suggestive identification itself.' " *Turner*, 305 N.C. at 365, 289 S.E.2d at 374 (quoting *Manson*, 432 U.S. at 114, 53 L. Ed. 2d at 154).[2]

In this case, the trial court concluded that the show-up identifications by Ms. Padilla and Messrs. Ortiz and Guzman were inherently suggestive and proceeded to apply the *Manson* factors. In doing so, the trial court found as facts that: (1) the time

[2] We note that North Carolina's Eyewitness Identification Act, N.C. Gen. Stat. § 15A-284.50, *et seq*., now imposes certain requirements in conducting show-ups. However, the version of the statute in effect at the time of the show-up in this case did not require specific procedures, and Defendant does not contend on appeal that the amended version of the statute applies to this case.

between the crimes in question and the show-up identifications "was extremely short[;]" (2) each witness "had some reasonable opportunity to view the . . . perpetrators at the time of the commission of the crime[;]" (3) each witness "had an opportunity to focus, or give a significant degree of attention to the perpetrators at the time the crime was committed[;]" (4) each witness gave a "generally accurate description of the suspects from recollection at the time of the commission of the crime[;]" and (5) Ms. Padilla and Messrs. Ortiz and Guzman demonstrated a high degree of certainty in identifying Defendant.

Defendant concedes that the trial court's first, second, and third findings were supported by the evidence; as a result, they are binding on this Court. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. Further, we hold that each of these factual findings on three of the *Manson* factors supports the conclusion of law that the show-up identifications in question did not create a substantial likelihood of irreparable misidentification. We therefore consider Defendant's challenge to the remaining findings and determine whether the binding factual findings support the trial court's conclusion.

Defendant contends that the trial court's accuracy finding is erroneous because the witnesses' descriptions were not completely consistent with one another. He also argues that the factor is nonsensical, as one cannot determine the accuracy of a

description without actual, conclusive knowledge as to the identity of the perpetrator in the first instance. We disagree with Defendant's reasoning.

The degree of accuracy of a witness identification is determined by the similarities and dissimilarities between the description of the perpetrator and the person identified in the out-of-court procedure. *See, e.g.*, *State v. Jackson*, 229 N.C. App. 644, 655, 748 S.E.2d 50, 58 (2013) ("Although defendant was not dressed exactly as described by the victim, defendant largely matched the description of the assailant the victim provided to the police."). Here, the written statement from Mr. Guzman describes the robbers as black males; Ms. Padilla and Mr. Ortiz both described the cell phone robber as a skinny black male, roughly 5'10" tall, with long dreads. Given Defendant is a black male, we cannot say that Mr. Guzman's description was inaccurate, although its lack of detail diminishes its impact in the totality of the circumstances analysis of his identification. As for Ms. Padilla's and Mr. Ortiz's descriptions, we have previously found similar descriptions sufficiently accurate to support admissibility. *See, e.g.*, *id.* at 655, 748 S.E.2d at 58 (holding accuracy supported admitting a show-up identification because the victim described the perpetrator as a 5'9" tall black male with dreadlocks and defendant matched that description); *see also State v. Watkins*, 218 N.C. App. 94, 106, 720 S.E.2d 844, 852 (2012) (holding accuracy *Manson* factor supported admissibility where defendant matched the description of "a black male, 5'10" tall, with medium build").

Further, the pre-identification descriptions provided by Ms. Padilla and Messrs. Ortiz and Guzman are not inconsistent with one another. *See State v. Richardson*, 328 N.C. 505, 511, 402 S.E.2d 401, 405 (1991) (no substantial likelihood of misidentification existed where the victim's "description matched that of other witnesses"). Only Ms. Garcia's statement materially differs from the others, and it was excluded by the trial court due to her lack of certainty. Given the apparent certainty of the other witnesses, we cannot say that the trial court's finding of fact concerning accuracy of their identifications is without sufficient evidence. As a result, we hold that the trial court's factual findings as to accuracy were supported by the evidence, and in turn support the trial court's conclusion of law that the show-up did not create a substantial likelihood of irreparable misidentification by Ms. Padilla and Messrs. Guzman and Ortiz.

Defendant's other challenge to the trial court's findings asserts that Mr. Guzman was not sufficiently certain in his identification to avoid a substantial likelihood of irreparable misidentification.[3] We disagree. In a written statement

[3] Defendant concedes that Ms. Padilla was certain in her identification and presents no argument refuting the trial court's finding consistent therewith. As to Mr. Ortiz, Defendant again concedes that he was certain in his identification, but points out that Detective Dollar's testimony as to which person Mr. Ortiz identified on an audio recording of the show-up differed from that testified to in court by Mr. Ortiz. Defendant argues it was error to permit Detective Dollar's testimony on this point, asserting that it constituted an inadmissible prior out-of-court statement directly contradicting the witness's in-court testimony. *See, e.g.*, *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000) ("[T]he State may not introduce as corroboration prior statements that actually, directly contradict trial testimony."). Defendant, however, did not argue before the trial court that Detective Dollar's testimony was inadmissible for this reason, and instead challenged Detective Dollar's testimony about,

taken immediately after the show-up, Mr. Guzman stated that "[t]he first guy they showed me I know was one of the suspects, . . . I can say without any doubt that he was one of the suspects." Mr. Guzman testified that this statement was accurate, and Detective Dollar confirmed that Mr. Guzman had identified Defendant at the show-up. Because this evidence supports the trial court's finding that Mr. Guzman was very certain about his identification of Defendant, we leave it undisturbed, and hold that it supports the trial court's conclusion that the show-up did not create a substantial likelihood of misidentification.

All of the trial court's factual findings concerning the five *Manson* factors are binding on this court as either unchallenged or supported by sufficient evidence, and all of these findings support the trial court's conclusion of law that the show-up identifications were not inadmissible. Even giving the accuracy of Mr. Guzman's description lesser weight, the certainty of his identification, its temporal proximity to the crime, his attentiveness during the robbery, and his opportunity to view the perpetrator all support a conclusion that his show-up identification is admissible. We hold that the trial court did not err in concluding that the show-ups were free from a substantial likelihood of irreparable misidentification.

C. Motion to Dismiss

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and the introduction of, the audio recording on foundation, hearsay, and substantial likelihood of misidentification grounds. Because Defendant failed to object on the basis argued in his appellant brief at trial, and he does not assert plain error review of the issue on appeal, he has failed to preserve this argument. N.C. R. App. P. 10 (a)(1) & (4).

We also hold that the trial court did not err in denying Defendant's motion to dismiss the armed robbery and conspiracy to commit armed robbery charges related to Ms. Padilla and Mr. Ortiz. A motion to dismiss should be denied if, taking the evidence and all reasonable inferences therefrom in the light most favorable to the State, there is substantial evidence of each essential element of the crime charged and that the crime was committed by the defendant. *State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010). Defendant argues that the State failed to introduce evidence showing two necessary elements of armed robbery by Defendant: (1) possession, use, or threatened use of a firearm or other dangerous weapon; and (2) endangerment of Mr. Ortiz's life. *See* N.C. Gen. Stat. § 14-87 (2017) (establishing the elements of the offense of armed robbery). We are unpersuaded.

To be guilty of an armed robbery, it is not a requirement that the perpetrator use or threaten to use a gun prior to taking property, as "the exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction amounting to armed robbery with the elements of violence and of taking so joined in time and circumstances as to be inseparable." *State v. Hope*, 317 N.C. 302, 305-06, 345 S.E.2d 361, 363-64 (1986) (internal quotation marks and citation omitted). In *Hope*, the defendant walked into a store, put on a coat, and began to leave without paying. 317 N.C. at 306, 345 S.E.2d at 364. When he was told to stop by a store employee, the defendant threatened to

kill him, and another store employee noticed a gun in the defendant's waistband. *Id.* at 306, 345 S.E.2d at 364. The defendant was permitted to leave the store. *Id.* at 306, 345 S.E.2d at 364. Our Supreme Court held this evidence sufficient to support a conviction of armed robbery. *Id.* at 306, 345 S.E.2d at 364.

Nor must a defendant be in possession of, use, or threaten to use a firearm if he acts in concert with an armed robber. *See, e.g.*, *State v. Davis*, 301 N.C. 394, 397, 271 S.E.2d 263, 264 (1980) ("A person who actually commits the offense [of armed robbery], or who is present when another commits the offense and does some act in furtherance of the crime, is a principal in the first degree."). Acting in concert, or "act[ing] together, in harmony or in conjunction one with another pursuant to a common plan or purpose[,]" *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979), can "be inferred from [a defendant's] actions . . . ." *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975).

Here, the State introduced evidence showing that Defendant snatched Mr. Ortiz's phone, dropped it while fleeing, and turned around to pick it up. Mr. Ortiz began pursuing Defendant but was stopped by a man with a gun. Defendant stayed at the scene, waited for the man with the gun to search Ms. Padilla and Mr. Ortiz for money, and then fled together with the armed man. These facts are sufficiently analogous to those in *Hope* to satisfy the elements of armed robbery; Defendant attempted to steal property but was pursued, and that pursuit was halted by the

threat of a firearm. Because the threatened use of a firearm was part of the same criminal transaction and allowed Defendant's theft of the cell phone to be accomplished, and because Defendant's actions support a reasonable inference that he acted in concert with the gunman, we hold that the State introduced sufficient evidence to submit the armed robbery charge to the jury.

We also hold that the State introduced sufficient evidence of the conspiracy to commit armed robbery charge despite Defendant's argument that there was no direct evidence of any connection between Defendant and the gunman. As with evidence of two criminals acting in concert, direct evidence of a conspiracy is not required, and "may be . . . established by a number of indefinite acts . . . [that], taken collectively . . . point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). Indeed, the elements of conspiracy to commit armed robbery require only "a mutual, implied understanding to commit robbery with a dangerous weapon." *State v. Johnson*, 164 N.C. App. 1, 17, 595 S.E.2d 176, 186 (2004). As recounted *supra*, the State introduced sufficient evidence to show just such an implied understanding, as Defendant accomplished the theft of Mr. Ortiz's cell phone with the assistance of a gunman, waited for the gunman to accomplish his own shakedown of Mr. Ortiz and Ms. Padilla, and then fled with said

gunman. We therefore hold that the trial court did not err in denying Defendant's motion to dismiss as to these charges.[4]

III. CONCLUSION

The trial court did not err in permitting Detective Dollar to testify concerning the show-up identifications, as its binding findings of fact on each of the *Manson* factors support the conclusion of law that the show-ups were free from a substantial likelihood of irreparable misidentification. Further, the trial court did not err in denying Defendant's motion to dismiss the charges of armed robbery and conspiracy to commit armed robbery of Ms. Padilla and Mr. Ortiz, as the State introduced evidence sufficient to satisfy the elements of each crime.

NO ERROR.

Judges STROUD and DILLON concur.

Report per Rule 30(e).

[4] Defendant attempts to tie a perceived issue with the trial court's jury instruction on armed robbery to the denial of his motions to dismiss. We note that the Defendant did not object to the jury instruction, nor does he assert plain error; as a result, this argument has not been preserved for appellate review. N.C. R. App. P. 10 (a)(1) & (4).