An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-143

Filed: 6 November 2018

Harnett County, No. 15CRS051385

STATE OF NORTH CAROLINA

v.

MICHAEL EMMANUEL HUDSON, Defendant.

Appeal by Defendant from judgment entered 13 June 2017 by Judge Charles W. Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Steven Armstrong, for the State.

North Carolina Prisoner Legal Services, Inc., by Reid Cater, for the Defendant.

DILLON, Judge.

Defendant Michael Emmanuel Hudson appeals from the trial court's judgment entering a jury verdict finding him guilty of robbery with a dangerous weapon, conspiracy, and kidnapping. Defendant challenges the trial court's admission of the victim's in-court identification of Defendant as the perpetrator of the crimes. We find no error.

I. Background

This case arises from an alleged robbery at gunpoint. The State's evidence at trial tended to show as follows:

In March 2015, Dalan Mosley picked up Porschia Sparks for their first date. During the course of the date, Mr. Mosley and Ms. Sparks were robbed at gunpoint by Defendant. Later that night, Mr. Mosley became suspicious over the events of the robbery[1] and went on Ms. Sparks's Facebook page to investigate. On Ms. Sparks's Facebook page, Mr. Mosley found many pictures of Defendant, whom Mr. Mosley believed to be the individual who committed the robbery. Mr. Mosley reported the incident to the police and stated that he suspected Defendant.

Police searched Defendant's apartment and found multiple items of clothing matching Mr. Mosley's description of the robber, as well as a handgun. Police arrested Defendant and charged him with multiple offenses related to the robbery. At trial, and over Defendant's objection, Mr. Mosley was allowed to identify

[1] Mr. Mosley and Ms. Sparks first met in high school, but did not speak for three years before their date. Mr. Mosley picked Ms. Sparks up from work and then drove to her parents' house to pick up a key. Ms. Sparks asked Mr. Mosley to walk with her to the door of her parents' house. On the way back to the car, Ms. Sparks received a text message and immediately bent down to tie her shoe, though both shoes were already tied.

As Ms. Sparks began "tying her shoe," a man holding a gun emerged from behind nearby bushes and forced Mr. Mosley and Ms. Sparks into the vehicle. The man forced Mr. Mosley to withdraw money from an ATM, deleted all text messages between Mr. Mosley and Ms. Sparks from Mr. Mosley's phone, and then stole Ms. Sparks' purse and ran away. Ms. Sparks appeared calm throughout the incident, and did not ask Mr. Mosley to walk her to her door when he dropped her off at home.

Defendant as the perpetrator of the robbery. The jury convicted Defendant of all charges.

Defendant appeals.

II. Analysis

Defendant argues that the trial court erred in admitting Mr. Mosley's in-court identification of Defendant as the perpetrator of the robbery. Specifically, Defendant contends that the in-court identification was the product of an impermissibly suggestive pre-trial identification and, therefore, its admission into evidence violated his constitutional right to due process. We disagree.

A witness's in-court identification of a defendant as the perpetrator of a crime is admissible where the evidence shows that prior, out-of-court identifications did not occur under impermissibly suggestive circumstances and the witness otherwise has sufficient personal knowledge on which to base the identification. See *State v. Hamilton*, 298 N.C. 238, 242, 258 S.E.2d 350, 352 (1979). "Identification evidence must be excluded as violating a defendant's rights 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. White*, 307 N.C. 42, 45-46, 296 S.E.2d 267, 269 (1982). However, "suggestive pretrial identification procedures that do not result from state action do not violate [a] defendant's due process rights." *State v. Fisher*, 321 N.C. 19, 24, 361 S.E.2d 551, 554 (1987).

Indeed, Defendant cites many cases evidencing the test for whether an identification is impermissibly suggestive, and therefore prejudicial, but each involves a pre-trial identification process conducted by State actors. *See State v. Powell*, 321 N.C. 364, 369, 364 S.E.2d 332, 335 (1988) (a state bureau of investigation agent conducted a one man show-up of the defendant with the witness and then showed her a photographic line-up featuring the defendant); *State v. Hammond*, 307 N.C. 662, 667, 300 S.E.2d 361, 364 (1983) (a police sergeant showed the victim photographs of the defendant and asked if the man in the photograph was her assailant); *State v. Oliver*, 302 N.C. 28, 43-44, 274 S.E.2d 183, 193-94 (1981) (a police investigator told a young witness that the witness would be taken to the station and given an opportunity to "see that man again," referring to the defendant).

The circumstances surrounding Mr. Mosley's initial identification of Defendant as the individual who committed the robbery may indeed be somewhat "suggestive." Mr. Mosley made the identification shortly after a stressful event while purposefully scouring Ms. Sparks's Facebook page with the intent to find the robber. However, Mr. Mosley acted purely on his own, without any direction or assistance from the police or other State actors. *See State v. Tyson*, 278 N.C. 491, 495, 180 S.E.2d 1, 4 (1971) (holding that an in-court identification was untainted because "[t]here [was] nothing whatever in the record to suggest, even remotely, that there was any line-up,

or any display of photographs of . . . [the] defendant to [the] witness by any officer or employee of any law enforcement agency").

The trial court did not err in allowing Mr. Mosley to make an in-court identification of Defendant. Though the incident occurred at night, Mr. Mosley had opportunities to view Defendant's face by way of the light inside the car, street lights, and the light at the ATM. On the night of the incident, the robber wore a hood over his head and a bandana over the lower half of his face, but Mr. Mosley could tell that the robber had dreadlocks, similar to Defendant. Mr. Mosley could see the robber's nose and eyes, and later recognized Defendant "from the nose up" and remembered him from high school. Mr. Mosley's personal experiences presented a sufficient foundation for the admissibility of his in-court identification. "Any lack of certainty in his identification goes to the weight and not the admissibility of the testimony." *State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981). We, therefore, find no error.

NO ERROR.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).