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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-160

No. COA 20-259

Filed 20 April 2021

Union County, Nos. 17 CRS 51105-06

STATE OF NORTH CAROLINA

v.

LEE JERNARD BURNS

Appeal by Defendant from Judgments entered 15 November 2019, by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 10 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Stacey A. Phipps, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1

Lee Jernard Burns (Defendant) appeals from the trial court's Order denying his Motion to Suppress and from Judgments entered 15 November 2019, after a jury returned verdicts finding Defendant guilty of First-Degree Burglary, Felonious Larceny, Robbery with a Firearm, and First-Degree Rape. The Record, including

testimony elicited at trial, tends to reflect the following:

¶ 2

On the evening of 10 August 2015, Michael Thompson and his girlfriend Samantha Irish were at Thompson's house in Indian Trail, North Carolina. Thompson and Irish were in the master bedroom: Thompson was playing video games as Irish was sitting on the bed. Irish was not wearing a shirt because she had recently applied aloe to a sunburn and was waiting for it to dry. Around 9:00 p.m. Thompson heard a knock at the front door and went to answer it while Irish stayed in the bedroom. When Thompson opened the door, his dog tried to escape. Thompson reached down to grab the dog and immediately felt a pistol touch him in the back of the head. Thompson slowly stood up and was confronted by "three [B]lack gentlemen standing in front of [him,] and [who] all had guns pointed right at [him]."

¶ 3

Thompson described the three men:

There was a shorter male about [Irish]'s height, maybe a little taller. There was a bigger male, maybe about 230, 250 [pounds]. He was a much bigger guy, a little bit shorter than me, about my height, but he was really stocky. And then there was the one taller male that was taller than me, very slim build, dark complex[ion], had long dreads and he had a gray hoodie on that was kind of around his face.

. . . .

The big guy had a bandanna on his head, like it had been rolled up almost like a jogging bandanna right around the top of his forehead.

Thompson testified that neither the "big guy" nor the "shorter guy," later identified

as Defendant, were wearing face coverings.

¶ 4

The three men pushed through Thompson and proceeded to the master bedroom. Irish immediately grabbed a pillow to cover herself, and the men began interrogating the couple regarding the whereabouts of drugs and weapons in the house. Thompson testified: “The shortest, smallest guy, he asked me where the weed was and I told him there was none and the bigger guy told me to stop lying and then he would just punch me right in the face and stuff.” The men raided the house— “They pulled [the] bed mattress off, went through [the] closets and tore a bunch of [the] clothes out and [the] dresser, pulled everything out of it and threw it on the floor.” The men found the gun safe in the closet, and “[t]he smallest guy” led Irish to the safe forcing her to open it at gunpoint before telling her “he wanted her to show him where everything was pretty much in the house.” Thompson estimated the interrogation in the bedroom lasted around fifteen to twenty minutes.

¶ 5

The “tallest guy” stayed in the master bedroom with Thompson while Defendant took Irish around the house. Thompson recalled:

I could hear all the noise and stuff in the house from them tearing stuff up and picking it up. And the tall guy just stood behind me the whole time and the -- when I tried to look over at him he came around and hit me with the butt of the pistol right in the mouth. And it knocked one of my teeth just straight out. And it knocked back one of my other teeth that was right beside it when I tried to look at him.

¶ 6

Meanwhile, after directing Irish to open the gun safe, Defendant led Irish into

the dining room to search for the couple's car keys. In the dining room, Defendant pushed Irish against the wall, where "[h]e pulled the pillow away and started touching [her] chest and making moaning sounds, putting his hand in [her] shorts." Then, Defendant led Irish into the kitchen where he pushed her against the dishwasher, pulled her shorts down, and rubbed his penis against her. Defendant pushed Irish to the floor and began stroking his penis with one hand and holding a gun in the other. Irish testified Defendant held the gun in his hand the entire time. Irish recalled that the lights were on in the dining room, which shone through a window and illuminated the kitchen. Irish stated once Defendant forced her onto the kitchen floor, she pulled the pillow over her face as Defendant raped her because she did not want him to see her, and he only stopped when "[o]ne of the other guys told him that they had to go[.]"

¶ 7

Once the three men left, Thompson went to his neighbor's house to call 911. Emergency Services arrived and transported Irish and Thompson to Carolina's Medical Center-Union (CMC Union) for treatment. At CMC Union, Thompson spoke with detectives regarding the robbery and his assault. Thompson described the three men and estimated the "short guy" was about five feet, nine inches and approximately 160 pounds. Also at CMC Union, Irish submitted to a sexual assault forensic medical exam, which included the collection of evidence—the clothes Irish was wearing at the time of the alleged assault, swabs from Irish's mouth and vagina for DNA evidence,

and photographs from the process. The evidence from the exam was transmitted from CMC Union to Sergeant Matthew Price of the Union County Sheriff's Office for further processing.

¶ 8 As a part of the investigation, on 26 August 2015, Irish participated in five different photo line-ups. On the fifth line-up, Irish identified an individual with “eighty percent” certainty. However, Detective Price noted: “The last line-up resulted in [Irish] picking one subject but she was emotionally spent and the picture she chose was not the target.” Irish later testified the individual she identified was not the short guy, but the tall guy.

¶ 9 In the weeks following, the North Carolina State Crime Lab conducted a forensic examination of the samples taken from Irish's sexual assault examination kit. The vaginal swabs “revealed the presence of spermatozoa.” Further DNA extractions returned a “predominant DNA profile from an unknown male contributor[,]” which the Crime Lab “routinely queried against the [DNA Database].” At some point in October 2016, the Crime Lab reported a positive hit on the DNA to Detective Price. Detective Price was provided Defendant's name and began further investigations, which culminated in Detective Price traveling to the Anson County Courthouse on 17 January 2017, to obtain a DNA sample from Defendant. At that time, Defendant willingly provided Detective Price his cheek swab.

¶ 10 The Crime Lab processed Defendant's DNA sample and on 24 February 2017,

reported the “major contributor profile is consistent with the DNA profile obtained from [Defendant] Burns.” Detective Price then prepared a warrant for Defendant’s arrest. Prior to arresting Defendant on 2 March 2017, Detective Price notified Irish and Thompson of the reported DNA hit and of Defendant’s forthcoming arrest. Defendant was arrested on the warrant, and Thompson was notified of Defendant’s bond hearing pursuant to North Carolina’s Crime Victim’s Rights Act. Thompson explained during his voir dire testimony: “I was told that they had a suspect in custody. I was given no information. I was only told when the bond hearing was and they really wanted [Irish] to be here but she couldn’t so I came for her because she was not available at that time.”

¶ 11 Accordingly, on 20 March 2017, Thompson attended Defendant’s bond hearing with Daniella Martinez, a victim’s witness assistant with the District Attorney’s office. There, Thompson stated he recognized Defendant, present and sitting in the front of the courtroom with several other defendants, right away as “the short guy.” After Defendant’s bond hearing Thompson approached Detective Price in the courtroom hallway and, before Detective Price could speak, told him “the gentleman that [he] saw in the courtroom was the same gentleman that was in the house that night.”

¶ 12 Prior to Defendant’s case being called for trial, on 30 October 2019, Defendant filed a Motion to Suppress Thompson’s out-of-court identification of Defendant as “the

short guy” as well as Irish’s anticipated in-court identification. Defendant argued the identification procedures were “unnecessarily suggestive as to create a substantial likelihood of irreparable misidentification and were further obtained in deliberate disregard of the identification procedures required by the Eyewitness Identification Reform Act.”

¶ 13 When Defendant’s case came on for trial on 4 November 2019, the trial court considered several pretrial motions, including Defendant’s Motion to Suppress. The trial court called both Thompson and Irish for voir dire. Thompson recalled being notified by the District Attorney’s office of Defendant’s bond hearing. He described the courtroom on that day, “Holy moly. [I]t was packed. [There were] tons of people in [t]here. . . . All the pews were full that day.” The State continued:

Q. When you walked in and you first saw the person that you recognized as one of the -- you recognized as the short guy; is that right?

A. Yes.

. . . .

Q. All right. So you see somebody sitting -- you see who you recognize as the short guy sitting on the bench.

A. Yes, ma’am.

Q. And you said he was amongst other African-American males?

A. Yes.

. . . .

Q. Was there any doubt in your mind when you looked at the bench as who was sitting on the bench?

A. No. I recognized him right away.

Q. And how was it that you recognized him?

A. From the day that the home break in occurred.

Q. Was there any doubt in your mind as to who that was?

A. No, ma'am.

¶ 14 Irish also identified Defendant in court as the “short guy.” During voir dire, Irish recalled the initial interaction beginning in the bedroom, and her testimony corroborated Thompson’s. Irish recounted Defendant asking her to open the safe and then leading her out of the bedroom and into the dining room to look for car keys. In the dining room, Defendant backed Irish against the dining room wall where she estimated her face was about six inches from Defendant’s. Then, Irish recalled Defendant forcing her into the kitchen where he pushed her onto the floor and she again found herself face-to-face with him. Irish testified that the lights were on in the bedroom and dining room and confirmed she “had gotten good looks at [Defendant’s] face” by the time they were in the kitchen. Although the lights were off in the kitchen, Irish was still able to see Defendant’s face because “[t]here was a -- like a window between the dining room and the living so the light comes into the

kitchen through the window.”

¶ 15 The trial court, considering Thompson and Irish’s testimony, arguments from counsel, and the evidence presented, denied Defendant’s Motion to Suppress. In denying Defendant’s Motion, the trial court rendered oral findings of fact and conclusions of law:

The Court makes the following findings of fact as relates to the motion to suppress the in-court identification of Michael Thompson. On or about August 10th, 2015[,] Mr. Thompson was at his home in Monroe when he heard a knock on the door. He approached the door. The porch light was on. He saw three subjects standing on the porch that he described as a tall person, a big person and a shorter person. The light was on the porch at the time giving the -- Mr. Thompson the opportunity to observe the subjects standing on the porch. The faces of the subjects were not obstructed, although there were bandannas that were being worn around the head area, not to obstruct the face of the individuals. Following those individuals coming into the house, there was interaction between Mr. Thompson and those three individuals for approximately 15 to 20 minutes while in the bedroom, also a lighted area, whereby he had the opportunity to observe the three subjects.

The Court concludes that the -- that Mr. Thompson had sufficient opportunity to observe and view the Defendant in this case and the -- well, all three subjects at the time in order to make an identification based on his viewing and opportunity to view at the scene on August 10th, 2015. The witness’s, being Mr. Thompson’s description, was not a detailed description, noting no obviously noticeable facial features or markings at the time. Given the time period which the Defendant had the opportunity - - not the Defendant, the witness had the opportunity to observe the subjects and the interaction between the subjects, the witness had a sufficient degree of attention in order to be able to form or to form an opinion in regards to the identity.

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Opinion of the Court

Notably -- as a finding, notably the identification that has been questioned in this case is not an identification as was contemplated in State versus Flowers and Waugh, W-A-U-G-H, 318 N.C. 208. In that case, in the cases that we've addressed during this motions hearing it was the common operation that the law enforcement agencies were seeking an identification. In this case there was no solicitation of Mr. Thompson to make an identification of the Defendant in this case in court. The witness, Mr. Thompson, was summoned or notified that there would be a bond hearing, that the person arrested for the alleged crime would be present in the courtroom. There were multiple individuals in the courtroom at the time that were dressed in jail attire. It was not just the Defendant in this case that was in the courtroom at the time. After the bond motion was addressed by the Court, Mr. Thompson then approached Detective Price. Detective Price asked the first question, that question being do you have an updated phone number, to which Mr. Thompson did not reply. Instead he indicated to -- or told Detective Price that he knew immediately that the person -- the person charged that was in the courtroom during the bond hearing was the person that was in his house that night.

Notably, there was approximately one year and seven months between the date of the alleged offense and August of 2015 and the next opportunity that Mr. Thompson had to view the Defendant, Lee Burns, in court on March 20th, 2017. The degree of certainty indicated by Mr. Thompson on the witness stand based upon his observations at the time of the incident at his home on August 10th, 2015 was high. He had a high degree of certainty.

Based upon those findings, the Court concludes that the in-court identification first off was not an illegal or unconstitutionally suggestive identification, as there was no State actor, there was no identification solicited. Secondly, if -- even if it were, the identification of the Defendant in this case was based upon the opportunity to view and observe the Defendant at the time of the offense at the home of the Defendant, Mr.

Thompson. So the identification is admissible.

¶ 16 As it related to Irish's identification of Defendant, the trial court concluded:

It sounds like that there was no pretrial identification that could have been unfairly prejudicial in the in-court identification based on the evidence received. I don't think that the -- that the concern that was voiced in the motion to suppress is applicable to this witness based on the evidence received. So in light of the testimony from Ms. Irish, the motion to suppress as to her in-court identification is denied.

Accordingly, both Thompson and Irish identified Defendant as the "short guy" before the jury during Defendant's trial.

¶ 17 On 15 November 2019, the jury ultimately returned verdicts finding Defendant guilty of First-Degree Burglary, Felonious Larceny, Robbery with a Firearm, and First-Degree Rape. For Defendant's First-Degree Rape conviction, the trial court sentenced Defendant to 240 to 348 months active sentence. The trial court consolidated Defendant's convictions of First-Degree Burglary, Felony Larceny, and Robbery with a Dangerous Weapon, and sentenced Defendant in the presumptive range of sixty-four to eighty-nine months active sentence, to run consecutively. Defendant gave Notice of Appeal in open court.

Issues

¶ 18 On appeal, Defendant challenges the trial court's denial of his Motion to Suppress the victims' out-of-court and in-court identifications. The issues are whether: (I) Thompson's pretrial identification of Defendant was (A) impermissibly

suggestive and, if so, (B) it created a substantial likelihood of irreparable misidentification or the at-trial identification was of independent origin; similarly, (II) Irish’s in-court identification had sufficient independent origin; and, (III) even if admission of these identifications was error, any such error was prejudicial.

Standard of Review

¶ 19 Upon review of the denial of a motion to suppress, “the reviewing court must determine whether competent evidence supports the trial court’s findings of fact and whether the findings of fact support the conclusions of law.” *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citations and quotation marks omitted). “The trial court’s findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *Id.* (citations and quotation marks omitted). Indeed, “[a] trial court has the benefit of being able to assess the credibility of witnesses, weigh and resolve any conflicts in the evidence, and find the facts, all of which are owed great deference by this Court.” *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) (citation omitted). The trial court’s conclusions of law are then reviewed de novo. *Williams*, 366 N.C. at 114, 726 S.E.2d at 165 (citation omitted).

Analysis

I. Thompson’s Identifications

¶ 20 Defendant first challenges the admission of Thompson’s pretrial identification

of Defendant based on the trial court's conclusion Thompson's bond-hearing identification "was not an illegal or unconstitutionally suggestive identification, as there was no State actor, no identification solicited[.]" and that Thompson's in-court identification had an independent origin "based upon the opportunity to view and observe [Defendant] at the time of the offense at the home of [Thompson]." [T p. 421].

¶ 21 There is a two-step procedure for determining whether a pretrial identification is admissible: "[T]he first step require[s] the Court to determine whether the identification procedures were impermissibly suggestive[.]" *Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (citation and quotation marks omitted). "[T]he second step . . . becomes relevant in the event that 'the procedures were impermissibly suggestive,' [and] requir[es] the Court to determine 'whether the procedures create a substantial likelihood of irreparable misidentification.'" *Id.* (citation omitted). "Even if the witness was subjected to impermissibly suggestive identification procedures, that witness's in-court identification testimony may still be admissible" if "the trial court finds '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." *Id.* (citation omitted).

A. Impermissible Suggestiveness

¶ 22 We review the challenged findings of fact to determine if they are supported by competent evidence and review de novo the trial court's conclusion the pretrial

identification procedure was not impermissibly suggestive. *Id.* at 148, 833 S.E.2d at 788 (noting the “findings of fact . . . did not support the conclusion of law that the procedures used were not impermissibly suggestive”). To determine if the procedures were impermissibly suggestive, we consider “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. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001) (citation and quotation marks omitted).

¶ 23 In support of its admission of Thompson’s out-of-court identification, the trial court found:

[T]here was no solicitation of Mr. Thompson to make an identification of the Defendant in this case in court. The witness, Mr. Thompson, was summoned or notified that there would be a bond hearing, that the person arrested for the alleged crime would be present in the courtroom. There were multiple individuals in the courtroom at the time that were dressed in jail attire. It was not just the Defendant in this case that was in the courtroom at the time. After the bond motion was addressed by the Court, Mr. Thompson then approached Detective Price. Detective Price asked the first question . . . to which Mr. Thompson did not reply. Instead he indicated to -- or told Detective Price that he knew immediately that the person -- the person charged that was in the courtroom during the bond hearing was the person that was in his house that night.

¶ 24 Defendant first challenges the trial court’s finding “there was no solicitation of Mr. Thompson to make an identification of the Defendant” as not supported by

competent evidence. Defendant argues because the victim's witness assistant—an employee of the district attorney's office—requested Thompson to attend Defendant's bond hearing,¹ sat with him during the hearing, and because, according to Detective Price, Thompson was informed of Defendant's name prior to the hearing,² Thompson's identification was de facto solicited by the State.

¶ 25 The State's argument in opposition, and seemingly the trial court's conclusion, rely on the fact that there was no *express* solicitation of Thompson to identify Defendant by anyone on behalf of the State.

¶ 26 Our Supreme Court has established:

The viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification *unless* other circumstances are shown which are so unnecessarily suggestive and conducive to irreparable mistaken identification as would deprive defendant of his due process rights.

Fowler, 353 N.C. at 617-18, 548 S.E.2d at 698 (emphasis added) (citation and quotation marks omitted).

¹ Specifically, Thompson stated: "I was only told when the bond hearing was and they really wanted [Irish] to be here but she couldn't so I came for her because she was not available at that time."

² Notably the trial court did not make a finding as to *who* summoned Thompson. From our review of the Record and trial transcript, it is unclear but it appears Detective Price notified Thompson about the bond hearing and the victim's witness assistant from the District Attorney's office attended with Thompson.

¶ 27

Thus, although Thompson was not *expressly* solicited to identify Defendant, that fact is not dispositive. Indeed, as the trial court found: Thompson “was summoned or notified that there would be a bond hearing [and] that the person arrested for the alleged crime would be present in the courtroom.” [T p. 420]. Further, Thompson was accompanied during the bond hearing by a victim’s witness assistant from the District Attorney’s office, and the State did not seek Thompson’s testimony in opposition to Defendant’s requested bond reduction. [T p. 372]. Moreover, at the time of the bond hearing, Thompson had been informed by Detective Price there was a positive DNA match from the robbery-rape and, according to Detective Price’s testimony, also of Defendant’s name.³ Despite the presence of “four or five” potential defendants in the courtroom, the trial court’s own findings of fact reflect Thompson identified Defendant *after* the bond hearing, *i.e.*, after Defendant’s name had been called before the court.

³ The parties dispute this central fact, which, notably, the trial court did not make findings of fact about. Thompson testified he did not remember if he was informed of Defendant’s name and, even if he was informed, he did not recall it; however, when questioned, “[a]t what point did you give [Defendant’s] name to the victims, sir?” Detective Price specifically stated: “When there was an arrest made. Because I didn’t want that to come out in the news.” Detective Price continued to explain it would be customary to notify Thompson and Irish of Defendant’s arrest and that Defendant was held at Union County jail. This is consistent with N.C. Gen. Stat. § 15A-831(b) (2019) (“[T]he investigating law enforcement agency shall notify the victim of the arrest within an additional 72 hours.”). Therefore, Defendant argues, citing Detective Price’s testimony, Thompson knew Defendant’s name on 2 March 2017, and thus Thompson also knew it on the date of the bond hearing.

¶ 28 Therefore, acknowledging on the Record before us there was no express “solicitation” of Thompson to identify Defendant at the bond hearing and no clear evidence of any specific procedure or influence placed on Thompson to make his pretrial identification, the facts in this case—including both the challenged and unchallenged findings of the trial court—present a totality of circumstances that *could* indicate an impermissibly suggestive pretrial identification procedure. For the purpose of analysis and presuming, without deciding, these circumstances establish impermissibly suggestive identification procedures, we proceed to the second inquiry, which becomes dispositive.

B. Independent Origin

¶ 29 “[I]f the witness was subjected to impermissibly suggestive identification procedures, that witness’s in-court identification testimony may still be admissible in the event that the trial court finds ‘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 (citations omitted). Whether “a witness’s in-court identification has an independent origin is a question of law or legal inference rather than a question of fact[.]” *id.* at 145-46, 833 S.E.2d at 787 (citation omitted), which we review de novo.

¶ 30 Here, despite concluding the pretrial procedure in question was not

impermissibly suggestive, the trial court also found “the identification of the Defendant in this case was based upon opportunity to view and observe Defendant at the time of the offense at the home of [Thompson]. So the identification is admissible.”

¶ 31 To determine whether Thompson’s identification was independent from the asserted impermissibly suggestive pretrial procedure, we consider the five factors set out in *State v. Pigott*. *Id.* at 149, 833 S.E.2d at 789 (citing *State v. Pigott*, 320 N.C. 96, 99-100, 357 S.E.2d 631, 634 (1987)). “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; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation.” *Pigott*, 320 N.C. at 99-100, 357 S.E.2d at 634 (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)). “[W]eighing 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.

¶ 32 Defendant first challenges the trial court’s findings Defendant had the “opportunity to observe” Defendant both on the front porch and in the bedroom. Defendant argues because the three men pulled their guns on Thompson when he opened the door, Thompson would have focused on the men’s weapons instead of their

faces. Defendant next contends the trial court's finding Thompson observed the men during the "15 to 20 minutes while in the bedroom, also a lighted area, whereby [Thompson] had the opportunity to observe the three subjects" is unsupported by competent evidence because the "tall guy" repeatedly hit Thompson in the face while in the bedroom.

¶ 33 Here, the trial court's finding Thompson had the "opportunity to observe" the three, armed men while on the front porch is supported by competent evidence in the Record. Despite Defendant's contention Thompson would have been distracted by his dog and focused solely on the guns pointed at him, Thompson, in fact, testified: "I was looking almost right at them for a couple moments before they pushed me back up into the house." This testimony supports the trial court's finding.

¶ 34 The trial court further found Thompson had an opportunity to observe the men once they entered the bedroom. Although the "short guy" eventually left with Irish, Thompson testified that they remained in the bedroom together for "maybe at least 15 or 20 minutes," and both Thompson and Irish testified that the lights were on during the entirety of the encounter. Thompson testified that during that time, the "big guy" and the "short guy" remained in his line of vision. The two men interrogated Thompson regarding the presence of guns and drugs in the house with "the short guy [] asking the questions" and the "big guy" hitting Thompson in the face and jaw when he answered in the negative. Thompson testified he was hit "at least 15 or 20 times."

¶ 35 In challenging this portion of the trial court’s finding, Defendant does not point to contradictory or conflicting evidence to rebut Thompson’s opportunity to observe Defendant in the bedroom. Instead, Defendant contends the trial court made no finding that Thompson’s view was “unobstructed.” Although Defendant is correct—the trial court did not find Thompson had an “unobstructed” view of Defendant in the bedroom—the trial court’s finding that Thompson had an opportunity to observe Defendant is supported by competent evidence. Thompson faced Defendant, whose face was not covered or obstructed, for around fifteen to twenty minutes in the well-lit bedroom while Defendant interrogated him.

¶ 36 In support of its ultimate conclusion regarding the admissibility of Thompson’s identifications, the trial court made findings in line with the five *Pigott* factors: Thompson had the “opportunity to observe” Defendant both on the porch and in the bedroom; Thompson’s “description was not a detailed description, noting no obviously noticeable facial features or markings at the time”; “[Thompson] had a sufficient degree of attention in order to be able to form or to form an opinion in regards to the identity”; the “degree of certainty indicated by [Thompson] on the witness stand based upon his observations at the time of the incident . . . was high. He had a high degree of certainty”; and “there was approximately one year and seven months between the date of the alleged offense and . . . the next opportunity that [Thompson] had to view [Defendant] in court”

¶ 37 Although we review the trial court’s conclusion de novo, the trial court “has the benefit of being able to assess the credibility of witnesses, weigh and resolve any conflicts in the evidence, and find the facts,” and we owe such credibility determinations great deference. *Malone*, 373 N.C. at 145, 833 S.E.2d at 786 (citation omitted). Thus, we give the trial court appropriate deference for its determinations of Thompson’s credibility and his “high degree of certainty” Defendant was the “short guy.” Considering the totality of the circumstances, we conclude the trial court did not err in determining Thompson’s identification did not subject Defendant to a substantial likelihood of irreparable misidentification as it had an independent origin. *Id.* at 152, 833 S.E.2d at 790.

¶ 38 The State cites our prior opinion in *State v. Garner* in support of its arguments. 136 N.C. App. 1, 523 S.E.2d 689 (1999). In *Garner* the witness in question, who was also a victim in the case, identified the defendant after she “voluntarily attended the bond hearing where she saw five or six individuals in orange jumpsuits[,]” one of which she recognized as the defendant. *Id.* at 11, 523 S.E.2d at 696. The witness subsequently related her identification to the district attorney. *Id.* When the State sought to admit the witness’s pretrial identification, the witness testified during voir dire:

(1) the defendant’s face was not covered; (2) she was face-to-face with defendant when he pulled her to the front of the office to get her purse; (3) she was looking directly at the defendant when he

shot her in the head; (4) her vision was good before the shooting; (5) there was adequate lighting in the office; (6) she was observing the defendant for the majority of the twenty minutes he was there; (7) she was calm throughout the robbery; and (8) she was “positive” that the defendant was the gunman.

Id. at 10, 523 S.E.2d at 696. In *Garner*, this Court held: “Under a totality of the circumstances, there was no substantial likelihood of irreparable misidentification by [the witness]. The out-of-court and in-court identifications of [the witness] were not impermissibly suggestive and the trial court did not err in their admission.” *Id.* at 12, 523 S.E.2d at 697.

¶ 39 *Garner* is indeed instructive. Similar to the witness’s testimony in *Garner*, the trial court here found: Defendant’s face was not covered at the time of the robbery; Defendant and Thompson interacted for fifteen to twenty minutes in the bedroom—a lighted area; Thompson “had a sufficient degree of attention in order to be able to form . . . an opinion in regards to the identity”; and Thompson had a “high degree of certainty” regarding Defendant’s identity. Consequently, our prior decision in *Garner* further supports the conclusion that, even presuming the pretrial identification was impermissibly suggestive, the trial court did not err in concluding under the totality of the circumstances Thompson’s identification was of independent origin.

II. Irish’s Identification

¶ 40 In addition to his challenge of the admission of Thompson’s identifications, Defendant contends the trial court erred in allowing Irish’s in-court identification on

the basis it did not have an independent origin. “[T]he extent to which a witness’s in-court identification has an independent origin is a question of law” *Malone*, 373 N.C. at 145, 833 S.E.2d at 787 (citation omitted).

¶ 41 In relation to Irish’s in-court identification of Defendant, the trial court concluded:

It sounds like that there was no pretrial identification that could have been unfairly prejudicial in the in-court identification based on the evidence received. I don’t think that the -- that the concern that was voiced in the motion to suppress is applicable to this witness based on the evidence received. So in light of the testimony from Ms. Irish, the motion to suppress as to her in-court identification is denied.

Indeed, Defendant’s argument is not that Irish made a pretrial identification that was subject to impermissibly suggestive procedures but, instead, because Irish knew Defendant’s name,⁴ Thompson had already identified Defendant, and Irish was informed of the positive DNA match, “it was a foregone conclusion she’d identify [Defendant].”

¶ 42 Defendant’s argument, however, ignores the distinct fact that in addition to Irish’s time in the bedroom with Defendant, Thompson, and the other two men, Irish was face-to-face with *only* Defendant in both the dining room and the kitchen where

⁴ Again, just like with Thompson, there is disputed testimony as to whether Irish knew Defendant’s name prior to trial. Irish testified Detective Price did not inform of her Defendant’s name when he notified her of the DNA match; Detective Price’s testimony would seem to support that he did. The trial court did not make findings to this fact.

Defendant assaulted and then raped her. Irish described being with Defendant in the dining room for around two minutes with Defendant's face "[m]aybe 6 inches in front of [her]. Probably not even that." Then, after Defendant forced Irish into the kitchen, Defendant pushed Irish onto the floor, where she again found herself face-to-face with him. Despite the lights being off, Irish could still see Defendant's face due to a "window between the dining room and the living room so the light comes into the kitchen through the window" Irish also estimated being on the kitchen floor with Defendant for "a couple of minutes."

¶ 43 Thus, as Irish's testimony exhibited, Irish's in-court identification of Defendant was based on her observations during the initial portion of the robbery in the bedroom and further from her direct, face-to-face contact with Defendant in both the dining room and the kitchen. Both rooms were sufficiently illuminated, and, moreover, Defendant's face was not covered. Although the length of time between the robbery-rape and Irish's in-court identification is substantial, with the latter occurring four years afterward, "weighing factors such as these is not an exercise employed with mathematical precision." *Malone*, 373 N.C. at 152, 833 S.E.2d at 790. Accordingly, the trial court correctly concluded Irish's in-court identification of Defendant was of independent origin and admissible.

III. Prejudice

¶ 44 Moreover, even if it were error to admit the identifications by the victims in

this case, any such error did not rise to the level of prejudicial error. Defendant argues he was prejudiced by the admission of both Thompson and Irish's identifications because they "unfairly increas[ed] the weight and credibility of each other's identifications" and speculates "it's reasonably likely" the identifications "quelled" the jury's "DNA-related doubts." However, Defendant does not argue on appeal any error relating to the admission of the DNA results obtained from Irish's sexual assault examination kit and Defendant's cheek swab. Given the DNA evidence linking Defendant to Irish through the sexual assault examination kit taken on the night of the rape, as well as testimony from Thompson and Irish describing the suspects and course of events on the night of 10 August 2015, it is beyond any reasonable doubt suppressing the identifications would not change the outcome of Defendant's trial. *See Malone*, 373 N.C. at 152, 833 S.E.2d at 791 ("With one witness confidently identifying defendant as the shooter, we believe beyond any reasonable doubt that suppressing a second identification would not change the outcome here."). Consequently, even presuming admitting *both* witnesses' identifications were error, such error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

Conclusion

¶ 45 Accordingly, for the foregoing reasons, the trial court did not err in admitting Thompson and Irish's identifications of Defendant.

NO ERROR.

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Opinion of the Court

Judges TYSON and INMAN concur.

Report per Rule 30(e).