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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-773

Filed 7 May 2025

Johnston County, No. 14CRS055560-500

STATE OF NORTH CAROLINA

v.

ROBERT DWAYNE LEWIS

Appeal by defendant from judgment entered 25 September 2023 by Judge Craig Croom in Johnston County Superior Court. Heard in the Court of Appeals 9 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Milind Kumar Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

ARROWOOD, Judge.

Robert Dwayne Lewis (“defendant”) appeals from judgment entered 25 September 2023 upon his conviction of robbery with a dangerous weapon and second-degree kidnapping. On appeal, defendant argues: (1) an officer’s in-court identification of defendant should have been excluded because it was unreliable

under the five-factor due process test, and (2) the trial court's ruling on the discovery violation was an abuse of discretion because the ruling was based on irrelevant law and resulted in a "toothless sanction." For the following reasons, we find no error.

I. Background

The facts at trial tended to show the following:

On 19 October 2014, Hannah Cox ("Ms. Cox") was working as an assistant manager at Smithfield Business Center ("the Center"). Ms. Cox was in the parking lot outside the Center helping a patron restart their car when she noticed someone wearing a mask, an older style of glasses, and holding a gun approach her and the patron. The man told Ms. Cox to give him money and go back inside the Center. The man then asked Ms. Cox to transport a safe from the Center to his car. She noted that he was driving a newer looking brown colored car.

Shortly after this, a customer, believing a robbery was taking place, flagged down Officer Jared Bridges ("Officer Bridges") who was on patrol on a nearby road. Officer Bridges arrived at the Center and Ms. Cox told him that the man who was previously attempting to rob the Center ran out the back of the store. Ms. Cox described the man's appearance and the car he was driving.

Officer Bridges scoped out the Center and was returning to his patrol car when he noticed a vehicle fleeing the parking lot at a high speed. Officer Bridges followed the car and alerted other officers the car was leaving the parking lot at the Center and was heading towards Highway 301. Officer Rickey Parker ("Officer Parker")

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overheard the description of the suspect and the vehicle he was driving and since he was nearby, decided to pursue the vehicle. Officer Parker took a U-turn to follow the vehicle and saw that the individual inside the vehicle was defendant. On 21 September 2014, prior to the night of these events, Officer Parker had encountered defendant outside another business similar to the Center when he responded to a trespass call. Officer Parker observed defendant driving a Kia. Based on this prior interaction, Officer Parker testified that he was “100 percent certain” the suspect he observed on 19 October 2014 was defendant.

The suspect vehicle proceeded to speed up and drive at about ninety miles per hour. Although Officer Parker tried to pursue the suspect, he eventually lost sight of the vehicle.

Shortly thereafter, Detective Christopher Blinson (“Detective Blinson”), the lead investigator on the case, arrived at the Center around 4:15 a.m. and spoke with Officer Parker about the identity of the suspect.

On 5 October 2015, defendant was indicted for robbery and two separate counts of kidnapping in Johnston County from events that took place on 19 October 2014. Following discovery and prior to the trial, defendant’s counsel moved to suppress evidence found in defendant’s vehicle and in his home. The trial court denied this motion.

On 6 April 2017, defendant entered a plea agreement and pleaded guilty to the charges, however he reserved the right to appeal the final judgment and seek

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review of the trial court's denial of his motions to suppress evidence. Defendant appealed the trial court's denial of his motions to suppress. Defendant succeeded on appeal,¹ and this Court ordered defendant's conviction to be vacated and allow defendant's motion to suppress evidence found in defendant's residence. *See State v. Lewis*, 259 N.C. App. 424 (2018) (remanding with instruction to allow motion to suppress evidence seized from residence).

Prior to retrial, on 27 January 2023, defendant filed a motion to suppress any evidence surrounding the identification of defendant as the driver of the Kia observed near the Center where the robbery took place. Defendant argued this identification violated his due process rights. On 25 August 2023, defendant also filed a motion to dismiss for a discovery violation, arguing that the Smithfield Police Department committed gross negligence when they discovered a longer dash camera video from the night of the incident, nine years after the incident took place.

Retrial for defendant's case commenced on 28 August 2023. During pretrial motions, the trial court considered both the motion to suppress and the motion to dismiss for discovery violation. During the hearing for the discovery violation, defendant's counsel stated that the first video of the dash-camera footage was six

¹ The Supreme Court affirmed this Court with respect to the motion to suppress evidence taken from defendant's residence, and reversed and remanded with respect to the motion to suppress evidence taken from defendant's vehicle. *See State v. Lewis*, 372 N.C. 576 (2019); *see also State v. Lewis*, 268 N.C. App. 325 (2019) (remanding with instruction to grant motion to suppress evidence seized from the Kia vehicle).

minutes and ended when Officer Parker lost sight of the suspect's car. The new video discovered prior to retrial was twelve minutes long and was in existence during defendant's original trial in 2017. In the alternative, defendant's counsel requested that the trial court exclude the second half of the longer video, which showed Officers Parker and Bridges discussing how they recognized the car and related it back to defendant. The trial court ruled that it believed dismissing all charges would be a harsh remedy and instead, would exclude the second half of the video from evidence. However, the trial court specifically noted that any witness may still testify "as to their personal knowledge" as to what the video showed and allowed the extended video to be used during the hearing on defendant's motion to suppress.²

The trial court then conducted a hearing on defendant's motion to suppress Officer Parker's identification of the suspect. Defendant's counsel sought to suppress both Officer Parker's eyewitness testimony of seeing defendant in the vehicle fleeing the scene and his identification of defendant after Detective Blinson showed Officer Parker a photo of defendant. Officer Parker testified during this hearing that he had previously talked to defendant about three weeks before the night of the incident, when he responded to a trespass call. Officer Parker stated that he tried to commit defendant to memory at their first meeting, and also "took a mental picture" of the

² The trial court clarified that this allowance was for the purpose of making a preliminary determination on the motions and that the State was prohibited from introducing the longer video in front of the jury.

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car defendant was driving. On the night of the incident at the Center, Officer Parker stated that when he was pursuing the suspect's vehicle, the lighting was hitting the vehicle in a way that he could clearly see defendant driving the vehicle.

After the suspect's vehicle drove away, Officer Parker returned to the Center and told Officer Bridges that he recognized the suspect as defendant from his interactions with defendant the prior month. He also spoke with Detective Blinson around 5:00 a.m., who showed him a photo of defendant and confirmed that defendant was who Officer Parker saw driving away from the Center. The day after the incident, Detective Blinson showed Officer Parker a picture of defendant and Officer Parker confirmed that he believed defendant was driving the vehicle away from the Center the previous night. Defendant's counsel argued that Officer Parker's identification based on his eyewitness testimony and this single photo violated the Eyewitness Identification Act.

Citing *State v. Crumitie*, 266 N.C. App. 373 (2019), the trial court denied defendant's motion to suppress Officer Parker's identification of defendant, stating the identification did not violate the Eyewitness Identification Reform Act. The trial court also conducted a five-factor due process test to ensure Detective Blinson showing Officer Parker a photograph of defendant was not impermissibly suggestive.

At the close of the State's evidence, defendant moved to dismiss one of the charges for kidnapping. The trial court granted this motion. The jury found defendant guilty of robbery with a dangerous weapon and guilty of second-degree

kidnapping. The trial court sentenced defendant to 128 to 166 months imprisonment. Defendant entered oral notice of appeal in open court on 1 September 2023.

II. Discussion

On appeal, defendant argues: (1) an officer's in-court identification of defendant should have been excluded because it was unreliable under the five-factor due process test, and (2) the trial court's ruling on the discovery violation was an abuse of discretion because the ruling was based on irrelevant law and resulted in a "toothless sanction." We address each argument in turn.

A. Motion to Suppress

First, defendant argues the trial court erred in denying defendant's motion to suppress, which allowed the jury to consider Officer Parker's identification of defendant as the suspect. Specifically, defendant argues that Officer Parker's identification violated the five-factor due process test because the identification was impermissibly suggestive and was not sufficiently reliable to be admitted into evidence. In response, the State argues defendant's motion to suppress is rather "a pretrial motion to have Officer Parker's claimed identification of [defendant] deemed irrelevant and excluded from trial." We hold the trial court properly denied defendant's motion to suppress Officer Parker's identification.

Defendant's motion to suppress alleged that Officer Parker's identification of defendant as the suspect of the robbery violated his due process rights guaranteed by both the United States and North Carolina Constitutions. Defendant did not argue

that the identification violated any specific provisions of Chapter 15. Specifically, defendant argued that Officer Parker’s identification of defendant from when defendant allegedly drove past him was not independent of Detective Blinson showing him a single-suspect photograph of defendant about two hours later.

To determine if an eyewitness identification is admissible, the court must first consider “whether the procedures were impermissibly suggestive” and if so, whether the in-court identification was of independent origin from the impermissibly suggestive procedure so as to not cause a substantial likelihood of irreparable misidentification. *State v. Malone*, 373 N.C. 134, 148–49 (2019). If so, the trial court must conduct a five-factor due process test, set out in *State v. Pigott*, 320 N.C. 96 (1987) to determine if admission of the identification violated the due process clause. *Malone*, 373 N.C. at 149.

However, if there is no pretrial identification procedure, “there can be no requirement of a judicial determination of the independence and reliability of the in-court identification, for there has been no pretrial procedure upon which the in-court identification could depend.” *State v. Green*, 296 N.C. 183, 187 (1978). Thus, “the sole determination for the trial judge is whether or not the witness had a reasonable possibility of observation sufficient to permit subsequent identification. In such event the credibility of the witness and the weight of his or her identification testimony is for the jury.” *Id.* at 189.

In *Green*, the victim gave police “a general description of her assailant” and

that she was “almost certain” the assailant was someone who worked at the sheriff’s department, despite not telling officers the name of her assailant. *Id.* at 186. Our Supreme Court held that because the victim “had ample opportunity to view her assailant, that her identification testimony was a matter of fact for the jury to assess, and that none of the defendant’s constitutional rights were violated by admission of her identification testimony.” *Id.* Furthermore, in *Green*, the Supreme Court held there was no pretrial identification procedure and thus, “formal findings of fact and conclusions of law regarding the independence and reliability of the identification are not required[.]” *Id.* at 187.

Here, the facts surrounding Officer Parker’s identification of defendant as the perpetrator of the robbery are substantially similar to the facts of *Green*. Officer Parker testified that he had a prior dealing with defendant about a month before the robbery when Officer Parker responded to a trespass call and that based on his training, he got “a visual picture in [his] mind of who this person is so if [he] ever [sees] him again, [he’ll] recognize him.” Officer Parker later testified that on the night of the robbery, when the suspect’s vehicle was driving past him, that Officer Parker was able to get a good look at the vehicle and the driver of the vehicle. Furthermore, Officer Parker testified that “the way the light hit the car” allowed him to see in it and identify the suspect as defendant. He testified that based on this interaction, he was able to recognize defendant but his “mind wasn’t registering where from right away.” However, he was able to recognize the vehicle “from the incident where [he

was] a couple of weeks ago.” Once Officer Parker calmed down after losing the car, he “realized who exactly it was.”

Officer Parker told Detective Blinson about his identification an hour and a half after the initial incident call. Detective Blinson testified that Officer Parker was the person who initially supplied defendant’s name, after which Detective Blinson showed him defendant’s photo in CJLEADS. Like the victim’s identification in *Green*, there was no point in which a lineup was required because after observing the suspect personally, Officer Parker was certain that the suspect was defendant based on his past recollection. Because no pretrial identification procedure took place, the sole question before the trial court is “whether or not the witness had a reasonable possibility of observation sufficient to permit subsequent identification.” *Green* at 189. The trial court found that because Officer Parker is a trained police officer, had dealings with defendant prior to the night of the incident, and was certain about the identification, there was sufficient evidence to support Officer Parker’s identification of defendant. Accordingly, the trial court denied defendant’s motion to suppress the identification.

The State presented competent evidence to support the trial court’s denial of defendant’s motion to suppress. Officer Parker and Detective Blinson’s testimony, taken together, established that Officer Parker had ample opportunity to view the driver of the vehicle and be certain of his identification. Thus, the trial court did not err in denying defendant’s motion to suppress Officer Parker’s identification and

defendant's due process rights were not violated.

B. Motion to Dismiss for Discovery Violation

Defendant further argues the trial court abused its discretion in ruling on defendant's motion to dismiss for discovery violations by basing its ruling on irrelevant law and imposing a "toothless sanction." Specifically, defendant argues the trial court abused its discretion by allowing the State to use the excluded dash camera video at the suppression hearing. The State correctly noted in its brief that defendant's counsel did not object to the trial court's ruling on allowing the video to be used during the suppression hearing. Accordingly, we review the trial court's decision for plain error.

"An appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564 (2018) (citation omitted). "[T]o demonstrate that a trial court committed plain error, the defendant must show that a fundamental error occurred at trial." *Id.* (internal citations and quotations omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518 (2012) (internal citations and quotations omitted).

Here, defendant argues the trial court erred in allowing the video to be used to rule in defendant's motion to suppress Officer Parker's identification testimony.

Defendant further argues that because the jury heavily relied on Officer Parker's identification testimony, the trial court's error likely prejudiced defendant. However, even without the video, enough evidence was presented by both Officer Parker and Detective Blinson to establish that Officer Parker's identification was supported by competent evidence. First, Officer Parker testified that he had established a good memory of defendant from his prior encounter in the trespass case. Second, Officer Parker testified that the lighting on the night of the robbery was just right so that Officer Parker could clearly see inside the car. Furthermore, the State conceded that the quality of the dash camera video "does not tell the whole story" and as such, they are not substituting the videos for trained law enforcement officers who are "100 percent sure" of the identification. Thus, the State presented sufficient evidence, apart from the extended dash-camera video, to show Officer Parker's identification was credible.

Accordingly, the trial court did not commit plain error in allowing the dash camera video to be used during the suppression hearing.

III. Conclusion

For the foregoing reasons, we hold the trial court committed no error.

NO ERROR.

Judges WOOD and FREEMAN concur.

Report per Rule 30(e).