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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
The Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2021-000521

THE STATE,

Respondent,

v.

COREY RASHAD BROWN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

STANDARD OF REVIEW6

ARGUMENT7

 I. The trial judge did not abuse its discretion in allowing Victim to identify a
 person in a surveillance video as the person who robbed him because it
 does not amount to an in-court identification7

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

<u>Fields v. Reg'l Med. Ctr. Orangeburg</u> , 363 S.C. 19, 609 S.E.2d 506 (2005).....	6
<u>Neil v. Biggers</u> , 409 U.S. 188 (1972)	4
<u>Perry v. New Hampshire</u> , 565 U.S. 228.....	8
<u>State v. Brown</u> , 356 S.C. 496, 589 S.E.2d 781 (Ct. App 2003).....	6, 7
<u>State v. Byers</u> , 392 S.C. 438, 710 S.E.2d 55 (2011).....	9
<u>State v. Fripp</u> , 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012).....	8
<u>State v. Singleton</u> , 395 S.C. 6, 716 S.E.2d 332 (Ct. App 2011)	6, 9
<u>State v. Tisdale</u> , 338 S.C. 607, 527 S.E.2d 389 (2000).....	8
<u>State v. Traylor</u> , 360 S.C. 74, 600 S.E.2d 523 (2004)	6, 7
<u>State v. Wyatt</u> , 421 S.C. 306, 806 S.E.2d 708 (2017).....	7

STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse its discretion in allowing Victim to identify a person in a surveillance video as the person who robbed him because it did not amount to an in court identification.

STATEMENT OF THE CASE

Appellant was indicted in March of 2020 for armed robbery, first degree burglary, assault and battery first degree, and possession of a weapon during the commission of a violent crime. Appellant proceeded to a jury trial April 28-30, 2021, in Sumter County before the Honorable Kristi F. Curtis. Michael Routzong represented the Appellant. The jury found Appellant guilty of armed robbery, first degree burglary, and assault and battery first degree, but Appellant was acquitted on the weapons charge. He was sentenced to twenty years for first degree burglary, ten years for armed robbery and ten years for the assault and battery first degree to be served concurrently. This appeal follows.

STATEMENT OF FACTS

On July 22, 2019, Anselmo Lopez Martinez (Victim) had just arrived home from work when he heard someone on the steps of his door. (Tr. 220). He went to close the door, but a man forcefully pushed the door open from the outside. (Tr. 220). This man approached Victim with a knife and said "Give me your money". (Tr. 220). Victim gave the man the money that he had and the man demanded more. (Tr. 220). When Victim told the man he didn't have anymore, the man struck him in the face. (Tr. 222). Victim then gave the man the rest of the money he had and the man left through the same door he came. (Tr. 220). Victim followed him out and observed the man run through the apartment area. (Tr. 221).

Willie McFadden, an Officer with the Sumter Police Department, went to the scene and spoke with the Victim through an interpreter. (Tr. 139). Victim told police that he could see the man who had robbed him running through the apartment area. (Tr. 226). McFadden learned that there was video surveillance in the Harmony Court Apartments across the street from the scene. (Tr. 140). Sumter Police obtained the video surveillance from the security company that owned the cameras. (Tr. 140). There were four cameras in the apartments that allow a 360° view of the apartment complex. (Tr. 104). McFadden testified a vehicle can be seen driving back and forth numerous times past the Victim's house. (Tr. 143, State's Exhibit 3). On another camera, an individual can be seen walking through the apartment area towards the Victim's residence. (Tr. 149). The same individual is seen running back through the same apartment area towards the vehicle. (Tr. 153). Victim can also be seen on camera coming out of his residence to watch the man running. (Tr. 153). At trial, Victim, after watching the surveillance video, testified that the man running in the video was the one who had just robbed him. (Tr. 232).

Kaitlyn Nugawela, an expert in video enhancement, created a timeline video from the multiple cameras following the individual as he moved through the camera views. (Tr. 185). She

was able to enhance the video and created individual pictures of the individual in the video. (Tr. 185). Clips of the video along with the still photos were posted on the Sumter Police Department Facebook page looking for Crime Stopper tips. (Tr. 143). Information about Corey Brown (Appellant) was received through a tip. (Tr. 157). At some point Appellant was taken into custody Mirandized and interviewed by McFadden. (Tr. 158). During the interview, Appellant was shown the stills from the video and identified himself in the photos. (Tr. 164-165). Appellant also provided a written statement in which he identified himself in the photo and stated that he was in the area, but did not see or hear anything. (Tr. 168, State's Exhibit 13).

During pretrial motions trial counsel brought to the court's attention that there may be an identity issue. (Tr. 48). On July 27, 2019, Victim had been shown a photo lineup that included Appellant, but Victim did not pick anyone out of the lineup. (Tr. 175). On August 29, 2019, Victim attended Appellant's preliminary hearing. (Tr. 52-53). At some point¹ Victim was shown the surveillance video and told the solicitor that the man running in the video was the person who robbed him. (Tr. 57). Defense counsel asserted that the identification of Appellant in the video amounted to an out-of-court identification that triggered a Neil v. Biggers² hearing arguing that during Appellant's preliminary hearing the Victim had a long time to look at Appellant.

The court noted that if Victim could not identify Appellant in the photo lineup and could only identify him after he had observed him at the preliminary hearing, it would be problematic. (Tr. 55-56). The State argued that Appellant can be seen exiting Victim's residence and within a few seconds Victim can be seen coming out of the residence while Victim has said "the person running away from my house is the person who just robbed me." (Tr. 55). The State further

¹ It is unclear from the record whether Victim was shown the video before the preliminary hearing was held.

² Neil v. Biggers, 409 U.S. 188 (1972).

argued that whether or not Victim could sit in the courtroom and say that Appellant was the person who robbed him was not dispositive of its case. (Tr. 57-58). The court declared that if the State was not going to have Victim identify Appellant in court as the man who robbed him then it was not a Biggers issue. (Tr. 59).

The State ultimately decided that it was best to go ahead and have a Biggers hearing because Victim would be testifying through an interpreter and the solicitor was unsure how the answer would come out when questioning him about the individual in the video. (Tr. 109). During the hearing, Victim testified that Appellant was in his house for “just seconds.” (Tr. 115). Victim went back and forth in his testimony about whether he picked Appellant from a photo lineup, but McFadden testified that he did not identify anyone in a photo lineup that was given shortly after the incident. (Tr. 110-123). Victim did testify that he recognized Appellant as the man who robbed him while he was at Appellant’s preliminary hearing, but no one else could testify that he identified him there. (Tr. 110-123). The trial judge ruled that the in court identification was inadmissible based on the fact that he did not identify anyone in the photo lineup and that the only person being presented at the preliminary hearing was Appellant as the perpetrator that it would be unduly suggestive to have him testify that Appellant was the person who robbed him. (Tr. 127). The trial judge further ruled that Victim “looking at the video and saying that the person who ran out of the house in the video is the person who robbed me. I think that’s an entirely different matter. But I would not permit testimony from Mr. Lopez that he identifies Mr. Brown in court as the person who committed the robbery.” (Tr. 127).

STANDARD OF REVIEW

An in court identification of an accused is inadmissible if a suggestive out of court identification procedure created a very substantial likelihood of irreparable misidentification. State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) “Generally, the decision to admit an eyewitness identification is in a trial judge’s discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error.” State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App 2003). “To warrant reversal based on the admission or exclusion of evidence, the Appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or lack thereof.” State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App 2011) (citing Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

ARGUMENT

The trial judge did not abuse its discretion in allowing Victim to identify a person in a surveillance video as the person who robbed him because it does not amount to an in court identification.

Appellant argues the trial judge erred in allowing Victim to identify Appellant as the person in the surveillance video as the intruder because Victim had failed to pick Appellant out of a lineup. Appellant's argument lacks merit because Victim did not identify the person in the video as Appellant. He identified the person in the video as the person who robbed him.

"Generally, the decision to admit an eyewitness identification is in a trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error." State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App 2003). Appellant relies on State v. Traylor³ stating that Victim's identification of Appellant was not reliable and should not have been admitted at trial because Victim only identified Appellant in the surveillance video after attending Appellant's "unduly suggestive preliminary hearing."

The purpose of a Biggers hearings is to determine whether an identification was unduly suggestive. "A criminal [Appellant] may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id. Under Biggers, the trial court must first determine whether the police used an "unnecessarily suggestive" identification procedure. State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017). In this case, the preliminary

³"An in court identification of an accused is inadmissible if a suggestive out of court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004).

hearing was not an identification procedure and more importantly not set up by the police so Biggers is not applicable. Nothing in the record suggests that Victim's presence at Appellant's preliminary hearing was arranged by law enforcement for the purpose of him making an identification. See Perry v. New Hampshire, 565 U.S. 228, 232, n. 1 (2012) (“[W]hat triggers due process concerns is *police use* of an unnecessarily suggestive identification procedure[.]” (emphasis added)); see also State v. Tisdale, 338 S.C. 607, 612-613, 527 S.E.2d 389, 392 (2000) (explaining the typical reliability analysis to be conducted when determining the admissibility of identification evidence is not applicable to identifications made without any law enforcement involvement).⁴

More importantly, Victim identifying the man in the surveillance video as the man who robbed him was not an identification of Appellant. Victim was a fact witness giving a lay witness opinion as to whether the man running in the video was the man who had just robbed him not that the man in the video was Appellant or even that Appellant had robbed him. Victim made no connection whatsoever that Appellant was the one who robbed him or that Appellant was in the video. In State v. Fripp, this court held that in a burglary case, lay witnesses were allowed to testify that in their opinion Fripp was the suspect seen on the surveillance tape because the identifications were not based solely on video tape but on the witnesses' familiarity with the defendant as a frequent customer. State v. Fripp, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012). In the current case, Victim doesn't even go as far as making an identification. Victim states his opinion that the man in the video is the person who robbed him. (Tr. 225). He makes this opinion based on the fact that he followed the man out of his residence and observed him running from

⁴ An in court identification should have been allowed because the preliminary hearing was not an “unduly suggestive identification procedure.”

his house across the grass into the apartment area. (Tr. 226). Similar to Fripp, Victim's testimony was rationally based on his perception of the event.

Harmless Error

Even if the trial judge did amount to an in court identification, it was harmless error because there were other identifications that Appellant was the man in the video. "To warrant the reversal based on the admission or exclusion of evidence, the Appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App 2011) Appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011).

The admission of Victim's testimony that the man in the video is the man who robbed him is not reversible error because there were other actual identifications presented to the jury. McFadden testified that in the interview with Appellant, he showed Appellant stills from the surveillance video to which Appellant responded that it was him and that he was just walking through the area. (Tr. 164-165). Through McFadden, the State also admitted the written statement made by Appellant that he was the man in the stills taken from the surveillance video. (State's Exhibit 13). Even if Victim's testimony were to amount to an in court identification it was harmless because Appellant identified himself as the man in the video. Therefore the trial court's decision should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Sarah E. Shipe, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 14th day of July, 2022.



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Good afternoon, Ms. Shipe.

Attached to this email you will find the State's Initial Brief Of Respondent and Designation Of Matter in the above criminal appeal. Shortly we will be filing this brief and designation with the Court electronically through the AIS One Drive system.

If you would, please confirm your receipt of this brief and designation by return email.

Sincerely,

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