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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID CROCKETT ROBINSON,

APPELLANT

APPELLATE CASE NO. 2021-001039

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in admitting an out-of-court show-up identification, where the suggestibility dwarfed the reliability, where officers advised the victim “we got him” immediately before the identification, and where the victim could only state the individual who she identified looked similar to the assailant?

II. Whether the trial judge erred in refusing to allow Appellant the opportunity to recross-examine the victim during the pre-trial Biggers hearing, where new information was elicited during redirect examination, but where the trial judge was concerned about the jury waiting?

STATEMENT OF THE CASE

In September 2017, a Charleston County Grand Jury indicted Appellant for armed robbery and possession of a weapon during the commission of a violent crime. R. 364 - 368. He proceeded to trial before the Honorable R. Ferrell Cothran, Jr. and a jury on September 7, 2021. Rodney Davis and Alex Reid represented Appellant; Benjamin Simpson and Philip Abshire appeared on behalf of the state.

After a three-day trial, the jury found Appellant guilty as indicted. R. 347, ll. 1 – 7. Judge Cothran sentenced Appellant to twenty-seven years' incarceration on the armed robbery offense and five years concurrent on the weapons charge. R. 362, ll. 14 – 19.

This appeal follows.

ARGUMENT

I. The trial court erred in admitting an out-of-court show-up identification, where the suggestibility dwarfed the reliability, where officers advised the victim “we got him” immediately before the identification, and where the victim could only state the individual who she identified looked similar to the assailant.

Relevant facts

After a tourist was robbed at gunpoint in downtown Charleston, law enforcement tracked the stolen cell phone and employed an unduly suggestive show-up identification procedure wherein they outright told the tourist “we got him” before asking her to identify him. In doing so, the officers tainted the show-up identification. The trial judge erred in allowing the identification to be admitted at trial.

Jacquelyn Cox, a New York City resident, traveled to Charleston for work in May 2017. R. 5, ll. 4 – 24. On May 7, 2017, Cox was robbed while on Queen Street. R. 6, l. 4 – R. 8, l. 23. The man placed a gun against her ribcage and took her laptop, cell phone, and other personal items. R. 9, l. 22 – R. 12, l. 9. The man then ran away and Cox sought help. R. 12, ll. 10 – 25. Officers arrived quickly. R. 13, ll. 1 – 8.

Cox provided a description of the perpetrator to the officers. She indicated he had “no distinguishing hair style.” R. 14, ll. 1 – 13. She stated his race was African American. R. 14, ll. 14 – 19. He was approximately 5’ 10” according to Cox. R. 14, l. 20 – R. 15, l. 10. The assailant was wearing a white shirt with black pants and carrying a black duffel bag. R. 15, ll. 11 – 24. Cox also described a blemish on the man’s face—a “scar, dimple, pick mark on the cheek.” R. 16, ll. 3 – 15. She was unable to view the lower half of her assailant’s face, as it was obscured by a mask or bandana. R. 9, ll. 12 – 16.

Based on a past incident where she had lost her phone in Brooklyn, Cox realized she could track her phone using the “Find my iPhone” feature.¹ She suggested this course of action to the officers, who used allowed Cox to input her information into one of their phones. R. 17, l. 24 – R. 18, l. 12. The officers then tracked the location of Cox’s stolen iPhone. Id.

As officers located the car in which Cox’s phone appeared to be, one of the officers, Henderson, told Cox “we got him.” R. 34, ll. 14 – 20; State’s Exhibit 37 (09:57 – 10:20 & 25:25 – 25:42). Officers followed the location of Cox’s phone and detained Appellant, a passenger in the vehicle.² R. 55, ll. 5 – 8.

They arranged for a show-up identification. Counsel for Appellant questioned Cox regarding any conversations that occurred as she rode in the cop car to go make the identification. R. 43, ll. 3 – 9.

During the pre-trial Biggers hearing, the state played state’s Exhibit 36. As part of the show-up procedure, an officer told Cox:

We’re here at this location. There’s an individual detained. I want you to bear in mind that their overall appearance may have changed from what you saw or what initially you saw there on scene. Hairstyle and a couple of other things may have differed.

State’s Exhibit 36B (00:20 – 00:33).

During the identification process, Cox stated “Yeah, it’s very similar. I wish I could see his face closer to see if there’s a pock mark or something on that cheek but it looks very similar.” State’s Exhibit 36B (01:28 – 01:37). She described his stature as similar and said his hair looked

¹ This technology allows a user to determine the location of a device. “Find My [Device]” <https://www.apple.com/icloud/find-my/> (last accessed July 27, 2022).

² Officers never found a bandana or a weapon.

“*about* the same” (emphasis in original). Id. This conversation was also memorialized during cross-examination pre-trial. R. 46, l. 7 – R. 47, l. 13.

Through *post hoc rationalization*, the state elicited testimony from Cox that it was her intent to “convey to [the officer] that that is the same [person].” R. 22, ll. 10 – 12. Notably, as the state continued to question Cox about her identification, the solicitor interrupted her as she began to describe what she *did not see*. R. 23, ll. 11 – 14.

At the conclusion of the Biggers hearing, the state argued for admissibility. R. 68, l. 12 – R. 73, l. 17. The defense sought suppression. R. 73, l. 19 – R.78, l. 9. Although he found that the show-up was suggestive, the trial judge denied the suppression motion. R. 79, l. 22 – R. 81, l. 11.

Standard of Review

“[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact.” State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was “patently suggestive”). “Generally, the decision to admit an eyewitness identification is at the trial judge’s discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error.” Moore at 288, 540 S.E.2d at 448. “In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” Id. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

Discussion

An eyewitness identification which is unreliable because of suggestive line-up procedure is constitutionally inadmissible as a matter of law. Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976) (citing Foster v. California, 394 U.S. 440, 442-43, n. 2, 89 S.Ct. 1127, 22 L.E.2d 402 (1969)).

Officers repeatedly suggested to Cox that the person they had captured was the person who robbed her. Through their actions and their words, law enforcement tainted her already flimsy identification. Her response to defense counsel's final question during pre-trial cross-examination reflected her understanding that the person she was supposed to identify was definitely the person who robbed her:

Q: Given the shortness in time between the robbery and when you're up in the industrial area and given the conversations with Henderson, who calls out the pings, okay, that officer while you're sitting there. And given the summary of what's happened that Sergeant Adams [gave] you, did you feel confident the police had the suspect caught?

A: Based on them taking me to go I.D. somebody? **I would feel confident that that would be a suspect.**

R. 49, ll. 10 – 21 (emphasis added).

Cox's above testimony illustrates the inherent—and seemingly infallible—suggestiveness of the show-up procedures employed in this case. Notably, another witness—perhaps one not force fed suggestive information—was unable to make a positive identification of Appellant. R. 62, l. 16 – R. 63, l. 14.

“A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification.” State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (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.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

South Carolina courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); see also Rule 104(c), SCRE (providing that “[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the

jury”). “The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification.” Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

The Supreme Court of the United States has repeatedly emphasized “that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.” Perry v. New Hampshire, 565 U.S. 228, 238-39, 132 S.Ct. 716, 724, 181 L.Ed. 2d 694, 707 (2012) (citing Manson v. Brathwaite, 432 U.S. 98, 107, 109, 97 S.Ct. 2243, 2249, 2250, 53 L.Ed. 2d 140, 149, 151 (1977), and Biggers, 409 U.S. at 198, 93 S.Ct. at 382, 34 L.Ed. 2d at 411); see also Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (describing the trial court's task under the first prong as determining “whether the identification resulted from unnecessary and unduly suggestive police procedures”). “[W]hat triggers due process concerns is police use of an unnecessarily suggestive identification procedure....” Perry, 565 U.S. at 232 n.1, 132 S.Ct. at 721 n.1, 181 L.Ed. 2d at 703 n.1.

In general, “one-on-one show-ups have been sharply criticized, and are inherently suggestive.” State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (quoting Jefferson v. State, 206 Ga.App. 544, 425 S.E.2d 915, 918 (1992)); see also Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (overruled on other grounds). In State v. Johnson, this Court noted how single person show-ups are particularly disfavored in the law. 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993).

Our Supreme Court has held the inquiry turns upon “whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.” Moore at 287, 540 S.E.2d at 448 (internal citation omitted). “Suggestiveness alone does not mandate the exclusion of evidence.” State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263. “Reliability is

the linchpin in determining the admissibility of identification testimony.” Id. This standard is ripe for abuse, particularly in the matter *sub judice*, where the suggestiveness gives way to an identification. Confirmation bias should not be relied upon in order to convict defendants in South Carolina.

Officer Harvill testified that the “best practice” would have been to do a photograph lineup as opposed to the show-up identification. R. 64, ll. 2 – 9. Instead, an officer drove Cox to the industrial area where officers had detained Appellant. Coupled with the remark “we got him,” this was beyond unduly suggestive. Taking a witness to a location where a suspect, but no other individuals, are being detained is suggestive. In the Interest of Jamal Rashee A., 308 S.C. 392, 418 S.E.2d 326 (Ct App. 1992).

Reviewing the reliability factors, the fourth factor—level of certainty demonstrated at confrontation—prevents a finding of reliability on its own. Cox was unsure at the confrontation; she could only state that the individual at the show-up appeared similar to the perpetrator. The length of time between crime and confrontation likely weighs neutral; forty-five minutes to an hour transpired in between, and Cox had to travel in the cop’s car to the industrial area. Cox’s prior description matched when it came to clothing and race. As mentioned above, neither a bandana nor a weapon were located. Cox’s degree attention and ability to see the assailant were limited, especially considering she was approached from behind. Additionally, the incident did not last long, and the robber’s face was partially obscured. The pock mark cannot be used in good conscience to argue reliability, where Cox was unable to see Appellant’s face clearly or closely at the show-up; she instead wistfully noted how it would have been ideal to see him closer.

A self-fulfilling prophecy is insufficient, particularly where the individual making the identification is repeatedly told that the person she is about to identify matches her assailant. The police have, in essence, done her job for her. All they need is a perfunctory “yes” in order to make the arrest. The suggestibility vastly outweighed the reliability. The identification should have been suppressed.

II. The trial judge erred in refusing to allow Appellant the opportunity to recross-examine the victim during the pre-trial Biggers hearing, where new information was elicited during redirect examination, but where the trial judge was concerned about the jury waiting.

Relevant facts

At the conclusion of the state’s redirect examination of Cox at the pre-trial Biggers hearing, defense counsel sought to utilize recross-examination. R. 52, l. 24 – R. 53, l. 9. The judge would not allow counsel to ask additional questions of the witness:

No, he goes first, you go second then that’s it. Under the rules that I’ve always practiced you don’t get a second crack. Besides, I got a jury sitting out there.

R. 53, ll. 4 – 8.

Under the trial judge’s stated procedure, it would seem the state should not have been afforded the opportunity to redirect the witness. Nonetheless, the state then called Joseph Harvill, an officer with the City of Charleston Police Department. R. 53 – 54. As outlined in Issue I, *supra*, the trial judge denied the defense’s motion to exclude the statement.

Standard of Review

“The scope of cross-examination is within the discretion of the trial judge, whose decision will not be reversed on appeal absent a showing of prejudice.” State v. Pradubsri, 403 S.C. 270, 276, 743 S.E.2d 98, 101 (Ct. App. 2013). An error of law is an abuse of discretion.

State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). A ruling lacking evidentiary support is an abuse of discretion. Id. A trial judge may not limit a defendant's right to engage in cross-examination unless the record clearly shows the cross-examination is improper. State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002) (reversing refusal to allow cross-examination for bias).

Discussion

“The confrontation clause of the Sixth Amendment of the Constitution of the United States is applicable to the States, and the primary interest secured by the confrontation clause is the right of cross-examination.” State v. Cooper, 386 S.C. 210, 219, 687 S.E.2d 62, 67 (Ct. App. 2009).

“[A] trial judge may impose reasonable limits on cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant.” State v. Johnson, 338 S.C. 114, 124, 525 S.E.2d 519, 524 (2000). “Absent the introduction of any new matter on re-direct examination,” the rule is that recross-examination is not required. Without something new, a party has the last word with his own witness.” United States v. Fleschner, 98 F.3d 155, 157 (4th Cir. 1996).

In U.S. v. Caudle, the government objected when defense counsel sought to, on recross examination, ask questions of a witness regarding a study the government had done. 606 F.2d 451, 456 (4th Cir. 1979). The objection was “on the basis that he has already been asked that question and answered that question on redirect examination.” The trial court sustained the objection as well as additional others on the same grounds. Id. On appeal, the defendant argued he was deprived of the right of cross-examination; the Fourth Circuit agreed.

“Repeating the same testimonial matter of the direct examination, by questioning the witness anew on cross-examination, is a process which often becomes desirable ... in order to test the witness’ capacity to recollect what he has just stated and to ascertain whether he falls easily into inconsistencies and thus betrays falsification. Id. at 456 (internal citation omitted). The goals of cross-examination cannot be achieved “except by the direct and personal putting of questions.” Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). “The questions involved having been asked for the first time on redirect examination, the fact that they had been asked and answered is a reason to permit cross-examination, not a reason to deny it.” Caudle at 457.

The Fourth Circuit discussed the right of cross examination at length. Turning to recross examination, the Court held “the reasons we have given in support of the right of cross-examination apply with equal strength to recross examination where new matter is brought out on redirect examination.” Id. at 457-58. “To deny recross examination on matter first drawn out on redirect is to deny the defendant the right of any cross-examination as to that new matter. The prejudice of the denial cannot be doubted.” Id. at 458.

On cross-examination, defense counsel elicited testimony and played bodycam footage regarding one of the officers saying “we got him.” On redirect, the state sought to sidestep that evidence by asking Cox whether “the chatter on the radio or any other detail” influenced her “confident I.D.”? R. 51, ll. 8 – 12. A similar question was asked as to whether “anything stated later by the police” would “unduly impact” her identification. R. 51, ll. 19 – 25. This was newly elicited information, properly subject to recross examination. This was new information and deserved follow-up. The trial judge mistakenly concluded the jury’s time was more valuable than Appellant’s constitutional rights. This was error, and Appellant is entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court to reverse and remand for a new trial.



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ATTORNEY FOR APPELLANT

This 3rd day of January, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 3, 2023



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