ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEROD SWINTON,

APPELLANT

Appellate Case No. 2012-212564

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 8, 2011, a Charleston County grand jury indicted Appellant for attempted murder. R.* (Indictment). The prosecution, represented by Rutledge Durant, called the case for trial on May 16, 2012 before the Honorable Kristi Harrington and a jury. Tr. 1. Martha Kent Runey represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 228, line 24 – Tr. 229, line 5. During the sentencing proceeding, the prosecutor asked the judge "to take note that he has taken no responsibility, shown no remorse for this crime, and that mitigation is not available to him." Tr. 231, lines 6 – 9. Judge Harrington sentenced Appellant to twenty years' imprisonment. Tr. 234, lines 16 – 19; R.* (sentence sheet).

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

Violating Appellant's state and federal constitutional right to due process of law, the trial judge erred in failing to conduct an *in camera* hearing concerning the alleged victim's identification of Appellant as the perpetrator where police officers showed the alleged victim, who had known Appellant for several years, a single photograph of Appellant for identification purposes.

Relevant facts.

During the trial, Appellant requested a hearing outside the presence of the jury regarding the alleged victim's identification of Appellant as the perpetrator and law enforcement's use of the photograph to confirm that identification. Tr. 61, line 23 – Tr. 62, line 1. The prosecutor informed the court that law enforcement showed the alleged victim a photograph at the hospital. Tr. 62, lines 4 – 6. Appellant's trial counsel explained her position as follows:

> Well, Your Honor, I just want – – I feel like that the State has to establish how it was presented to the victim at the hospital, and from my understanding from the case that [the prosecutor] submitted to the Court. – – I just read it briefly when he showed it to me – – is that his plan was to put the victim up to testify to that identification, although it is different from Biggers.[1] I would request a hearing on that outside the presence of the jury.

Tr. 62, lines 16 – 24. To Appellant's request, the trial court responded as follows:

> Well, my understanding [] is that they have known each other for an extended period of time, that [he] based [his] identification – – the identification was based upon [his] personal knowledge, not upon the picture, but [the] picture was merely a confirmation that the person [he] told the detective was, was [Appellant] is actually the person that Detective Kramitz knew as [Appellant], I don't know that we need at this point to – – the question is entirely different, and you're correct, in the court's mind, we don't need to establish – – it was merely a confirmation,

[1] Neil v. Biggers, 409 U.S. 188 (1992).

not an ID. It was not the basis of [his] understanding of who [Appellant] is.

Tr. 63, lines 3 – 14. The prosecutor agreed with the trial court's position. Tr. 63, line 16. The parties then discussed the issue relating to discovery as it concerned the photograph. Tr. 63, lines 20 – 22. Thus, the court failed to hold an in camera hearing to determine the admissibility of the alleged victim's identification of Appellant.

Simon Simmons, the alleged victim, testified that on August 5, 2010, he and Appellant ran into each other about midday. The two returned to Simmons's home where the two reminisced, ate food, and drank beer. According to Simmons, he and Appellant attended school together and had known each other for approximately fifteen years; however, the two had not seen each other in a while. Tr. 69, line 17 – Tr. 71, line 25. The two visited for about an hour. Tr. 72, lines 16-22. Simmons claimed Appellant returned sometime after noon because Simmons owed him $100 for cocaine. Simmons informed Appellant that he was waiting for someone to pay him money before he could pay Appellant. This encounter lasted between twenty and thirty minutes. Tr. 73, lines 1 – 24. Simmons alleged that Appellant returned a third time at midnight. Once again Simmons informed Appellant that he did not have the money he owed Appellant. The two decided to walk to the store for cigarettes. While walking to the store, Appellant allegedly pointed a gun at Simmons. Tr. 75, line 7 – Tr. 76, line 1. Simmons claimed that he threw his phone at Appellant and tried to run. He heard a gunshot and then fell on his back. He recalled Appellant walking over to him, shooting him twice, and running away. Tr. 79, lines 5 – 18. Simmons retrieved his phone and made his way back to his apartment. Tr. 80, line 23 – Tr. 81, line 5. His wife met him on the steps and called for police and an ambulance. Tr. 81, lines 5-10.

Simmons claimed he told his wife as soon as he arrived that Appellant was the person responsible for shooting him, and he repeated this story to the police officer who arrived. Importantly, Simmons claimed he identified Appellant by his nickname, "Rod Black." Tr. 82, lines 11-23. Simmons' wife, Veronica Black Simmons, testified similarly regarding the events of the day. She testified that Simmons identified his shooter as "Rob Black." Tr. 104, lines 6-9. Additionally, she testified that she knew the person only as "Rob Black." Tr. 110, lines 23-25. The questioning during direct examination was clear that Simmons referred to the nickname "Rod," whereas Simmons' wife referred to the nickname "Rob."

Eric Jourdan, an officer with the City of North Charleston Police Department, testified that he was the first person to arrive on the scene. Tr. 114, lines 2 – 3; Tr. 116, lines 18 – 20. He claimed he asked Simmons, who had shot him, and that Simmons replied "Jerod Swinton." Tr. 116, lines 13-15; Tr. 117, line 25 – Tr. 118, line 4. The second officer to arrive on the scene, Christopher Ware, testified that he too asked Simmons who had shot him and Simmons responded, "Jerod Swinton." Tr. 138, lines 5-12.

Alan Kramitz, another officer with the North Charleston Police Department, learned of the shooting from his sergeant. Pursuant to instructions from his sergeant, Kramitz obtained a photograph of Appellant and reported to the hospital to make contact with Simmons. Tr. 154, lines 8-18. When Kramitz began testifying regarding his showing Simmons the photograph, trial counsel renewed her prior objection. Tr. 156, lines 5-11. The judge permitted an "on-going objection as to this line of questioning." Tr. 156, lines 12-14. Kramitz testified that Simmons informed him that "Jerod Swinton"

was responsible for the shooting. Tr. 157, lines 12-15. At the prosecutor's suggestion, Kramitz testified that he took the photograph to the hospital to obtain "extra confirmation" that Simmons had been Appellant's friend for a long period of time and knew him very well. Tr. 157, lines 19-25. Kramitz showed the photograph to Simmons, while Simmons was in the hospital and undergoing lifesaving measures, who reacted by identifying the person depicted in the photograph as the person who shot him. Tr. 158, lines 17-25. He further testified that Simmons called the person by name – "Jerod Swinton." Tr. 159, lines 1-2.

On cross-examination, Kramitz revealed that he developed a sequential photo line-up in this case, but did not use it. Rather than using the line-up containing numerous photographs, Kramitz chose to use a single photograph. Tr. 162, line 24 – Tr. 163, line 11. On re-direct, Kramitz testified he put together a six-person photo array, which included Appellant's photograph. However, he chose to use a single photograph because he did not "see any point in a six-photograph line-up" in light of Simmons and Appellant having known each other for a long period of time and the nature of Simmons' injuries. Tr. 166, lines 2-18. According to Kramitz, a six-person photo array is useful where the victim does not know the suspect at all. Tr. 166, line 24 – Tr. 167, line 10.

During the discussion of the admission of the photograph used by Kramitz at the hospital to obtain an identification of Appellant by Simmons as the alleged perpetrator, Appellant stated: "Your Honor, I understand the decision of the Court in regards to the Biggers. This is somebody that the victim knew. I think that makes a difference." Tr. 170, lines 14-16. Thereafter, Appellant argued the photograph was inadmissible as

having not been provided in discovery. Ultimately, the court permitted the photograph to be admitted as redacted. Tr. 170, line 18 – Tr. 172, line 24.

The prosecution presented no physical evidence connecting Appellant to the shooting of Simmons. The police recovered no shell casings from the scene and found no weapon. Tr. 118, line 17 – Tr. 119, line 4; Tr. 121, lines 11-24; Tr. 123, lines 18-21; Tr. 125, lines 9-10; Tr. 125, line 23 – Tr. 126, line 8. The prosecution presented a video from a security camera from a Goodwill store, which was near where the shooting occurred. The video showed a person in dark clothing. According to the testifying officer, the relevant portion is "just a second, if that" and the person's face is not identifiable. Tr. 161, lines 2-21; R. * (State's #2).[2]

Discussion

When law enforcement use an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification, an individual's right to due process of law is violated. Stovall v. Denno, 388 U.S. 293 (1967); State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, the in-court identification is not admissible. Manson v. Brathwaite, 432 U.S. 98 (1977); Moore, 343 S.C. at 286, 540 S.E.2d at 447. In Neil v. Biggers, 409 U.S. 188 (1992), the United States Supreme Court created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, the trial court must ascertain whether the identification process was unduly suggestive. Next, the trial court must determine whether the out-of-court

[2] During deliberations, the jury asked for the exact time of the video. The judge informed the jurors "[t]here was no testimony as to the exact time." Tr. 226, lines 4-8; R. * (Court's Exhibit #3).

identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. at 198. The central issue is whether the identification was reliable even though the confrontation procedure was suggestive under the totality of the circumstances. Id. The following factors should be considered when evaluating the totality of the circumstances: (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 demonstration by the witness; and (5) the length of time between the crime and the confrontation. Id. at 199; see also State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

Our courts have found some identification procedures patently suggestive. For example, in State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), our Supreme Court held a line-up procedure wherein three victims were in the same room, sitting within feet of each other, while observing photographic line-ups was blatantly unacceptable. Id. at 81-82, 600 S.E.2d at 527. Nevertheless, the Court found the identification was admissible based upon the totality of the circumstances. Those circumstances included the victims not conversing during the line-up and not being aware of whom the other victims selected, if anyone. The victims testified they observed the assailant from one minute to ten minutes and their prior descriptions generally matched that of the person identified. All testified they were certain of their identifications, which were made two days after the incident. Id. at 83, 600 S.E.2d at 527.

Our Supreme Court held a show-up identification was unduly suggestive in Moore, supra. A witness observed two people exiting her neighbor's home when she knew the neighbor was away. She called the police and provided a general description of the men,

primarily focused on the clothing. Id. at 285, 540 S.E.2d at 447. Ninety minutes later, officers took the witness to an area where to men were being detained. The witness positively identified the two men as the perpetrators. Her identification was based upon the clothing she observed. She admitted she had not really seen their faces earlier. Id. at 285-286, 540 S.E.2d at 447. As explained by the Court, "[s]ingle person show-ups are particularly disfavored in the law." Id. at 287, 540 S.E.2d at 448 (citing Stovall, 388 U.S. at 302; State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993); In the Interest of Jamal Rashee A., 308 S.C. 392, 418 S.E.2d 326 (Ct. App. 1992)). The procedure in Moore was unduly suggestive. Id. Further, the Court found the identification unreliable as a matter of law because only one factor demonstrated reliability, which was clearly outweighed by the other factors, where the witness observed the two perpetrators for a brief time at a significant distance, the degree of attention was not great, and the accuracy of her description was tenuous. Id. at 449, 540 S.E.2d at 290.

Single photo arrays are akin to a single person show-up in that the alleged victim and/or eyewitness views only a single person to make an identification. In fact, the United States Supreme Court declared identifications arising from single photo displays are generally viewed with suspicion. Simmons v. United States, 390 U.S. 377, 383 (1968).

In 1973, the South Carolina Supreme Court held a pretrial hearing was unnecessary where a witness knew the accused. The Court reasoned the requirement of pretrial procedural safeguards were an "attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards." State v. McLeod, 260 S.C. 445, 448, 196 S.E.2d 645, 646 (1973). As such "[t]he rules [were] designed for application where the accused and the victim [were] strangers to each other; they were

never intended to apply where the victim knew the accused." Id. Less than one month after Appellant's trial, on June 6, 2012, the South Carolina Supreme Court issued its decision in State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). Relying upon Perry v. New Hampshire, 565 U.S. ___, 132 S.Ct. 716 (2012), our Supreme Court held due process "mandates that preliminary judicial inquiry is required once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused." Liverman, 398 S.C. at 140, 727 S.E.2d at 427 (emphasis added). The Court explained that Perry "reemphasized the necessity of pretrial judicial review when an identification is infected by improper police influence." Id. Further, the Court explicitly overruled McLeod. Id. at 140-141, 727 S.E.2d at 427.

Although the trial court in Liverman did not require a pretrial hearing to determine the admissibility of the identification pursuant to Biggers, supra, the trial court required the state to proffer the testimony of the witness concerning the witness's prior association with Liverman, the circumstances surrounding the witness's observations of the alleged criminal act, and the circumstances surrounding the witness's identification pursuant to a show-up arranged by the police. Id. at 135-136, 727 S.E.2d at 424. Although the Supreme Court found the hearing failed to fully comport with the requirements of due process, the Court found the error was harmless. The Court recognized "the fact that an identification witness knows the accused remains a significant factor in determining reliability [and t]he suggestive nature of the show-up is mitigated by the witness's prior knowledge of the accused." Id. at 141, 727 S.E.2d at 427. The Court also agreed with "those jurisdictions that consider the show-up

identification procedure, normally considered unduly suggestive, as merely confirmatory." Id. at 142, 727 S.E.2d at 427. In Liverman, the Court held the identification was admissible where the witness testified he knew Liverman before the shooting and identified him by his nickname to the police prior to the suggestive police orchestrated show-up. The Court concluded the in-court identification by the witness was the result of the prior association between the two and his observation of Liverman at the time of the shooting, and not the result of the suggestive show-up. Id. at 142, 727 S.E.2d at 428.

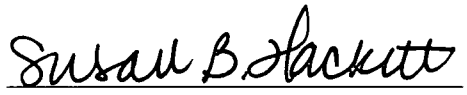
Without question Appellant was entitled to a pretrial hearing regarding the admissibility of Simmons' identification of Appellant as the alleged shooter. The trial court erred in failing to conduct a hearing to determine the admissibility of Simmons' identification in light of the suggestive procedures used by the police. The record lacks sufficient information concerning Simmons' ability to observe the shooter at the time of the shooting. According to Simmons, the shooting occurred in an alleyway after midnight, but the record lacks evidence concerning the lighting conditions or the length of time Simmons had to observe his shooter. The record also lacks sufficient information concerning the reliability of Simmons' identification of Appellant to police because his precise medical condition at the time the officer presented him with a photograph of Appellant was not introduced. The officer testified Simmons was in the hospital and undergoing medical treatment, but Simmons' ability to recall, comprehend, and intelligently communicate was not explored as it should have been in a pretrial hearing. Common sense dictates Simmons received ample amounts of medication for pain, which would influence his mental faculties, soon after receiving medical treatment. The record

does reveal an inconsistency among the witnesses regarding how the shooter was identified. Specifically, Simmons testified that he identified the shooter by a nickname – Rod Black. However, multiple police officers testified Simmons identified the shooter by his given name – Jerod Swinton. Additionally, Simmons' wife claimed Simmons identified the shooter by the nickname of Rob Black, as distinct from Rod Black. The conflicting testimony of the witnesses coupled with the lack of evidence in the record requires a new trial to permit a hearing to explore the admissibility of the identification.

CONCLUSION

Appellant requests this Court reverse his conviction and sentence and remand his case for a new trial. In the alternative, Appellant requests this Court remand the matter for a hearing in compliance with Liverman, supra.

Respectfully submitted,



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This 18th day of June, 2013.