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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMETRUS LAWON MCCLARY,

APPELLANT.

APPELLATE CASE NO. 2022-000688

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the complainant's first-time, in-court identification of appellant violate due process?

STATEMENT OF THE CASE

Appellant was indicted in Horry County for ABHAN, first-degree burglary, kidnapping, and assault with intent to commit first-degree CSC. R. 7, l. 18 – 25. On May 9, 2022, appellant was tried before the Honorable H. Steven DeBerry, IV, and a jury. R. 1. Mary-Ellen Walter and Leigh C. Andrew represented the State. R. 1. Eric Fox and Caitlyn Caldwell represented appellant. R. 1. The jury acquitted appellant of first-degree burglary and the attempted rape. R. 602, l. 9 – 603, l. 15. The jury convicted appellant of ABHAN, second-degree burglary, and kidnapping. R. 602, l. 9 – 603, l. 15. Judge DeBerry sentenced appellant to an aggregate term of thirty-five years' imprisonment. R. 610, l. 2 – 15. This appeal follows.

STANDARD OF REVIEW

Legal issues related to improper identifications are mixed questions of law and fact reviewed for abuse of discretion or prejudicial legal error. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

ARGUMENT

The complainant's first-time, in-court identification of appellant violated due process.

The jury did not find the complainant's description of an attack that occurred at a Myrtle Beach hotel completely credible. The complainant worked as a housekeeper and was cleaning a room on the fourth floor of the hotel. R. 206, l. 11 – 207, l. 12. She said while she was cleaning a room, a man grabbed her from behind, pressed a rag over her mouth and asked, "Have you ever been raped?" R. 209, l. 5 – 23. She said the man continued his attack and attempted rape, but she fought him off. R. 210, l. 6 – 215, l. 14. The jury acquitted appellant of the attempted rape. R. 603, l. 7 – 9.

Before trial, appellant moved to suppress any in-court identification of appellant by the complainant. R. 109, l. 3 – 115, l. 19. The complainant made no prior identification. R. 109, l. 3 – 115, l. 19. She had an opportunity to view appellant in-court at an earlier hearing in the case, but defense counsel candidly admitted that he could not say for certain whether she saw him sitting at counsel table because appellant voluntarily left the hearing. R. 109, l. 3 – 115, l. 19.

But along with that opportunity to see appellant, defense counsel also argued that it was obvious who any defendant in a courtroom is and that a first-time in-court identification is inherently prejudicial and violates due process. R. 109, l. 3 – 115, l. 19. "[M]ost people, just from watching TV know, Hey, the person next to the defense attorney is probably the defendant." R. 109, l. 3 – 115, l. 19.

Defense counsel cited a case that was then pending in our appellate courts and a case from the Fourth Circuit, United States v. Greene, 704 F.3d 298 (4th Cir. 2013). R. 109, l. 3 – 115, l. 19. Appellant asked for a finding before the complainant took the stand similar to a Neil v. Biggers, 409 U.S. 188 (1972), hearing. R. 109, l. 3 – 115, l. 19. The trial judge ruled that he

would allow the identification and said he had considered the Biggers factors. R. 125, l. 23 – 128, l. 18.

After the complainant finished her description of the attack and attempted rape, the solicitor asked if she saw her assailant in the courtroom. R. 211, l. 5 – 19. The record indicates she identified appellant. R. 211, l. 5 – 19. During her direct-examination, the solicitor had the complainant identify appellant or reaffirm her identification twice more. R. 216, l. 18 – 20. R. 218, l. 9 – 11. On re-direct, the solicitor again walked the complainant through an identification, even asking if she had tried to forget his face. R. 239, l. 21 – 240, l. 11.

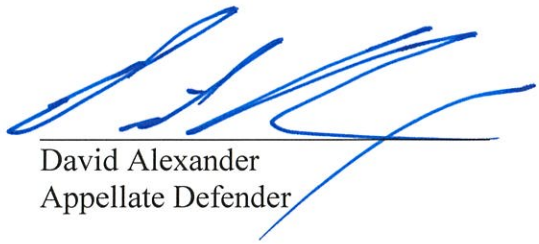
The trial judge erred in allowing the identification. As appellant argued, everyone in the courtroom knew who the defendant was by where he sat. In United States v. Greene, 704 F.3d 298 (4th Cir. 2013), the Fourth Circuit applied a Biggers analysis to an in-court identification writing, "Sitting across the courtroom from the defendant, with the judge and jury looking on, and a prosecutor drawing her attention to the defendant and asking for similarities, the witness understandably may have felt pressure to find something in the defendant that reminded her of the bank robber. These circumstances present a suggestive situation in which it is not clear whether the witness's own recollections, or outside pressures, are driving the testimony." 704 F.3d at 307. "Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor." United States v. Archibald, 734 F.2d 938, 941 (2d Cir.1984). See also United States v. Rogers, 126 F.3d 655, 658 (5th Cir.1997) (holding that asking a witness to identify an attacker in the courtroom is "obviously suggestive"). But see State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005) (holding that cross-examination and argument are the remedies for a suggestive in-court identification).

The assailant wore a rainbow wig and sunglasses that were recovered by the police. R. 210, l. 24 – 211, l. 4. R. 352, l. 14 – 21. However, the police erred when they collected the sunglasses and bagged them together with the complainant's glasses, mixing the DNA. R. 428, l. 9 – 429, l. 18. The police collected fingernail scrapings from the complainant. R. 328, l. 11 – 16. The State's DNA expert testified that appellant's DNA was found in the scrapings and on the glasses. R. 453, l. – 467, l. 13. However, the defendant called an expert witness that disputed SLED's DNA analysis. R. 72, l. 6 – 78, l. 20. Appellant's incriminating statement to the police can be discounted because he denied involvement in the crime in a prior interview and because of his youth.

The complainant had little time to see her disguised attacker, but plenty of time to see appellant in the courtroom. Allowing a witness to identify an obvious defendant for the first time in the courtroom is more suggestive than "show-up" identifications that have been condemned. See Stovall v. Denno, 388 U.S. 293 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000). This Court should find the faulty identification here violated appellant's due process rights and reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of April, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demetrus Lawson Mcclary states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge H. Steven Deberry Iv, which was held on May 9, 11, 12 & 13, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Demetrus Lawson Mcclary.

Respectfully Submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of April, 2023.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s):
(2) Trial transcript
(3) Hearing of Feb. 22 Transcript
(4) Court's Ex. 4
(5) Sentencing Sheets

I certify that this designation contains no matter which is irrelevant to this appeal.

David Alexander
Appellate Defender

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ATTORNEY FOR APPELLANT

This 24th day of April, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

David Alexander
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This 24th day of April, 2023.