STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2011-196626

The State, Respondent,

vs.

Donald R. Altman, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in refusing to suppress the identification of Appellant. Further, the issue is clearly not preserved for review on appeal.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in refusing to suppress the identification of Appellant. Further, the issue is clearly not preserved for review on appeal.

Appellant contends the trial court erred in refusing to suppress the out-of-court identification of Appellant. He maintains the State violated the requirements of Brady v. Maryland, 373 U.S. 83 (1963). Further, he asserts the out-of-court identification procedure was unduly suggestive and, therefore, not valid. First, the issue is clearly not preserved for review on appeal because Appellant did not make a contemporaneous motion to the identification and never raised an issue related to Brady. Further, on the merits, the failure to turn over a photograph did not constitute a Brady violation and the identification by the victim was very reliable and admissible.

Preservation

In order to preserve an issue for review, there must be a contemporaneous objection that is ruled upon by the trial court. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005); State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object . . ., Appellant is procedurally barred from raising these issues for the first time on appeal."). A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured." State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991); see also, State v. Garris, 394 S.C. 336, 348, 714 S.E.2d 888, 894-895 (Ct. App. 2011) (finding objection to the testimony after the State rested its case instead

of when testimony actually admitted was insufficient to preserve and issue for the Court's review); State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object."). Further, the failure to contemporaneously object cannot be later bootstrapped by another motion. See State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object . . . cannot be later bootstrapped by a motion for a mistrial.").

At trial, Appellant's counsel cross-examined the victim regarding her identification of Appellant as the one shoplifting from the store. She testified Officer Thomas brought a picture of Appellant for her to identify. The following colloquy occurred:

> Q. And the police never came to you, showed you any type of a photo lineup in this case. Right?
> A. No, they did. He actually brought a photo to me the next morning.
> Q. The police showed you a photo lineup the next morning?
> A. A photo picture of him.
> Q. not a lineup?
> A. No, not a lineup.
> Q. They brought you a picture?
> A. Yes.
> Q. Just one picture?
> A. One picture.
> ....
> Q. What officer was that?
> A. Thomas.
> Q. Officer Thomas. And he, Officer Thomas told you that was Donald Altman. Right?
> A. No he didn't. He asked me was that the person. And I told him yes.

(T.84-85; R. 47-48). Appellant never objected after finding out this information. At this time he did not move for a mistrial or ask the court to exclude the identification by the

victim. Instead, Appellant waited until the end of the State's case to raise any issue related to the identification or the photograph which was shown to the victim. As a result, the issue is not preserved for review on appeal because no contemporaneous motion or objection was raised.

Additionally, when Appellant did raise the issue, he did so as a motion for directed verdict. Specifically, he stated:

> Your Honor, at this point, we would make our--The State has rested and we would make our motion for a directed verdict in this case. . . . And I would argue to this court that the suggestiveness that took part as far as her being showed a single photograph of Mr. Altman, a day after this alleged incident it would be overly suggestive to obtain her identification of Mr. Altman in this case. And without her testimony, without that identification, the State doesn't have any identification. And I would like to ask, Your Honor, to direct a verdict in favor of the Defense in this case.

(T.96; R. 59).

Appellant, however, failed to properly renew this motion at the end of the defense's case or after the State's reply. Instead indicating no motions when asked by the trial court. (T.120; R.83). In order to preserve the issue raised on appeal, Appellant was required to move for a directed verdict and obtain a ruling by the trial court immediately after the State presented its case and again at the close of the case if Appellant presented any evidence. State v. Rosemond, 348 S.C. 621, 628, 560 S.E.2d 636, 640 (Ct. App. 2002); State v. Bailey, 368 S.C. 39, 626 S.E.2d 898, 900, n. 4 (Ct. App. 2006) (if defendant presents evidence after denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency of the evidence). As a result, the motion for a directed

verdict, even if sufficient to raise the issue for the first time without a prior contemporaneous objection, is not preserved for review on appeal.

Finally, Appellant never raised an issue related to Brady. He never moved for a mistrial or to exclude the identification on the basis the photograph was not turned over during discovery. As a result, the issue cannot be raised on appeal. See State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (to preserve an issue for review there must be a contemporaneous objection ruled upon by the trial court). Further, a party may not raise one issue below and argue a different issue on appeal. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding issue not preserved when appellant did not object to testimony at trial on the grounds raised on appeal).

Merits

The issue is also without merit. The trial court properly found the identification reliable even in light of a single person photograph being shown to the victim. Further, the failure to turn over the photograph did not violate Brady.[1] The photograph was clearly not exculpatory because the victim used the photograph to provide an identification of Appellant as the shoplifter.[2]

Identification

In criminal cases, the appellate court sits to review errors of law only. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). "Generally, the decision to admit an

[1] It should be noted Appellant has not argued error under Rule 5, SCRCrimP.

[2] Appellant's brief indicates Officer Thomas told the victim Appellant was the man in the photograph. (App. Br. 9). The testimony in the record clearly belies this assertion. When asked if Officer Thomas told her the picture was of Appellant, the victim specifically testified: "No he didn't. He asked me was that the person. And I told him yes."

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." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (citing State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct.App.1993)).

The trial court properly found, even if the procedure used by law enforcement of showing the victim a single photograph was suggestive, the identification was nonetheless reliable because of the victim's prior knowledge of Appellant. "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." Liverman, 398 S.C. at ___, 727 S.E.2d at 425-426.

The United States Supreme Court developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188 (1972). "First, a court must ascertain whether the identification process was unduly suggestive. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526-27 (2004) (citing Moore, 343 S.C. at 288, 540 S.E.2d at 448). "Reliability is the linchpin in determining the admissibility of identification testimony." State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999).

In the instant case, the reliability of the identification in this case was clearly such that no substantial likelihood of misidentification existed. Officer Thomas testified the victim "stated to me she was very familiar with him, just minus his name." (T.72; R. 35). The victim then testified she saw Appellant on prior days in the store. She testified she recognized him when he took the items from the store. (T.78-79; R. 41-42). She indicated she was about 12 feet away from him when he stole the merchandise and left the store. (T.79; R. 42). The victim testified she had seen Appellant in the store "twenty times or so." (T.118; R.81).

The victim testified to a particular incident where Appellant and the woman found in the car with Appellant entered the store and she asked to go to the restroom. When she went to the restroom, the victim heard the alarm sound because the woman had attempted to exit through the back door. The victim testified: "So at that point on, I knew when they both came into the store, I had to watch them 'cause nobody every goes out my back door and sounds the alarm. That's why I distinctly remember who he is." (T.119; R. 82). She testified there was no doubt in her mind Appellant was the person who stole from the store because she was watching him as soon as he entered. (T.119; R. 82). Accordingly, the trial court correctly found the identification reliable.

Brady

The United States Supreme Court holding in Brady v. Maryland requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S., at 87, 83 S.Ct., at 1196. Defendants making a claim under Brady must demonstrate that 1) the evidence was favorable to the defense; 2) it was in the possession of or known to the prosecution; 3) it was suppressed by the

prosecution; and 4) it was material to guilt or punishment. State v. Bryant, 372 S.C. 305, 314-315, 642 S.E.2d 582, 587-588 (2007) (citing Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)); State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219-220 (Ct. App. 1998). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." U.S. v. Bagley, 473 U.S. 667, 682 (1985).

The evidence in this case, a photograph of Appellant which, according to the victim's testimony, she used to identify Appellant, was not favorable to the defense. The victim was able to identify Appellant, a person she has known and has seen in the store numerous times, through the photograph. It was not impeaching because in no way did the photograph contradict her statement or identification. As a result, the evidence was not favorable to the defense, and, therefore, the State's failure to disclose the evidence did not violate Brady.[3]

Harmless Error

Further any error is entirely harmless in light of the overwhelming evidence in the record and the cumulative nature of the identification. "An error is harmless if the defendant's guilt has been conclusively proven by competent evidence, such that no other result could have been reached." State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). Further, the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d

[3] Additionally, it is arguable the evidence was not material because Appellant learned of it and was able to use it in conducting cross-examination of the witness. See Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (finding information is not deemed "material" if the defense discovers the information in time to adequately use it at trial).

445, 448-49 (2003); see also, State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

Officer Popov testified he saw Appellant driving the vehicle which was identified leaving the store. Further, the vehicle contained the items taken from the store in front of the clerk. Finally, he testified he matched Appellant's DMV photo, which he obtained after running the license plate[4] through the DMV, to the person he saw driving the car. (T.40-42; 50; R. 3-5; 13).

Additionally, Officer Thomas testified the vehicle located with the stolen merchandise belonged to Appellant. (T.57-69; R. 20-32). Further, Officer Thomas identified Appellant in the courtroom without objection. (T.69; R. 32). He testified the victim described Appellant and that she had seen him multiple times before. (T.72; R. 35). As a result, there was ample evidence identifying Appellant as the individual who shoplifted from the convenience store.

[4] The tag was altered to read EXU585, but the real license plate was FXU535, which was visible on the tag and on the license tag's registration sticker. (T.56-57; R. 19-20). The plate for FXU535 belonged to Appellant. (T.57; R. 20).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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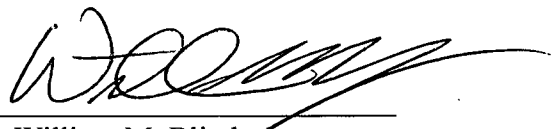
BY: 
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March 15, 2013

STATE OF SOUTH CAROLINA

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vs.

Donald R. Altman, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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March 15, 2013

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Dayne Phillips, Esquire
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I further certify that all parties required by Rule to be served have been served. This 15th day of March, 2013.

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