STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DIANTE JERMAINE WILLIS,

APPELLANT.

APPELLATE CASE NO. 2021-001466

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing an in-court identification of appellant where the witness told the investigator she could not identify appellant from the photographic lineup, the investigator then interjected that the lineup was "old jail photos" which resulted in the witness claiming that she recognized appellant's "eyes," and the state then had the witness listen to appellant's voice on a police tape, and had appellant speak to her in court, to grow the witness's confidence in her selection since the identification procedure utilized under these circumstances was unduly suggestive and should not have been allowed under the Neil v. Biggers, 409 U.S. 188 (1972) standard?

STATEMENT OF THE CASE

Appellant was indicted by the Cherokee County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 436. His case was called to trial on November 30, 2021, before the Honorable J. Derham Cole, and a jury. Michael Morin and Christopher Lee Allen represented appellant. Assistant Solicitors Matt Kendall and Kim Leskanic were the prosecutors. R. 2.

At the conclusion of the trial on December 2, 2021, the jury found appellant guilty of both charges. R. 434, l. 19. Judge Cole sentenced appellant to life imprisonment. R. 435, ll. 12-23.

This appeal follows.

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).

ARGUMENT

The court erred by allowing an in-court identification of appellant where the witness told the investigator she could not identify appellant from the photographic lineup, the investigator then interjected that the lineup was "old jail photos" which resulted in the witness claiming that she recognized appellant's "eyes," and the state then had the witness listen to appellant's voice on a police tape, and had appellant speak to her in court, to grow the witness's confidence in her selection since the identification procedure utilized under these circumstances was unduly suggestive and should not have been allowed under the *Neil v. Biggers*, 409 U.S. 188 (1972) standard.

Relevant facts

Prior to trial, a Neil v. Biggers, 409 U.S. 188 (1972), hearing was held. Defense counsel Morin told the judge the in-court identification of appellant by witness Harley Scalf should not be allowed. R. 3, ll. 3-15. Morin elaborated that Ms. Scalf was shown a lineup and she told the officer, "I don't see him." The officer then interjected: "'Now, wait. You understand that some of these pictures might be older,' which [he] is not permitted to say about the ages, much less interrupt the witness while they are about to make a - - an identification." R. 4, ll. 1-11.

Morin said Ms. Scalf then said: "Well, maybe the eyes of this one [photograph #3], while claiming the shooter was appellant." Counsel argued that this unduly suggestive procedure was made worse by the state then playing an interview of appellant talking to law enforcement officials. The police then asked Scalf: "Is this the voice you heard?" Defense counsel said this additional unduly prejudicial step made the identification procedure "a one-person line up." R. 4, l. 1 – 5, l. 20.

The assistant solicitor then said that Ms. Scalf did claim she could identify appellant's voice from a prior altercation. The solicitor also offered that even if the judge found the lineup was indeed "overly suggestive" that Ms. Scalf could still identify appellant from living in the same neighborhood with him and seeing him on prior occasions although she could not do a facial identification. R. 5, l. 23 – 9, l. 18. The testimony of Harley Scalf which followed during the Biggers hearing supported the arguments of defense counsel.

Harley Scalf testimony

During the Biggers hearing Scalf testified that the decedent was her twin brother. On May 3, 2019, at around 9 p.m. she was putting up a swimming pool with the help of her friend, Steve Manning, and his wife in Scalf's backyard. Scalf lived on Coach Hill Drive in Gaffney, and her twin brother was also over at her house that day. R. 10, l. 11 – 11, l. 16.

Her decedent brother told her at one point that evening, through a window from inside her house that he was going home. However, the next thing Scalf heard was yelling from her front yard. When Scalf went to investigate the disturbance, she saw her brother arguing with a tall, skinny black man. R. 11, l. 8 – 12, l. 19.

Scalf admitted she never got to see the face of this tall man and she only saw his eyes. R. 13, ll. 7-22. During her brother's argument with this man, he shot Scalf's twin brother three times.[1]

Scalf testified that she had seen appellant walk up and down the road in their neighborhood on prior occasions. She said appellant always wore dark clothes, and his face would always be covered "in something." R. 14, ll. 2-23. Scalf asserted that she knew appellant lived in a two story house on Raintree Avenue not far from her own house. R. 15, l. 5 – 16, l. 6. In essence, Scalf

[1] The pathologist, Dr. Kelly Rose, later testified that the decedent died from a gunshot wound to the chest. He was also shot in his side and in the leg. R. 245-246.

claimed that even though she had never seen appellant's face, that she could identify him as being the man who shot her brother.

Scalf estimated that the argument between the shooter and her brother lasted about ten minutes. However, she admitted she never got to look at shooter's face during that time period. R. 17, ll. 5-21. The argument was apparently about the shooter accusing Scalf's brother of making "false accusations" against him on some prior occasion. R. 20, ll. 6-24. Scalf remembered that the shooter then "took off running." R. 21, ll. 6-8.

Scalf recalled being shown a photo lineup by Investigator Jeff Cole or another officer. She was told that the person who committed the crime might not be in the lineup. Scalf also remembered the officer telling her that the photographs were "old jail photos" when she apparently could not identify anyone in the line-up. R. 24, ll. 21-23. Scalf admitted she did not make an identification of appellant but only told the officer "that looks like his eyes." R. 25, ll. 13-14. Scalf admitted she was not certain appellant was the shooter, and her only claim was that his eyes "look familiar." R. 26, ll. 2-13.

Scalf said on the morning of the trial she was played a small "clip" of appellant's voice by the prosecution. She remarked that "it was the same kind of deep tone" as the shooter's voice, and she now maintained she was "a thousand percent" sure of her identification of appellant. R. 31, l. 5 -32, l. 13.

Over defense counsel's objection at the pre-trial hearing the judge ordered appellant to say "Stop making false allegations against me" so Scalf could hear appellant's voice. R. 32. l. 15 – 36, l. 23. After hearing appellant speak these words as ordered, Scalf said appellant was the person she had heard speaking to her brother during the fatal argument. R. 36, l. 13 – 37, l. 2.

On cross-examination Scalf said the solicitor's office had played a tape for her with appellant's voice on it. Scalf then announced that she could identify appellant's voice from that tape "and the way he stands and all." R. 38, l. 4 – 39, l. 24; R. 43, l. 24 – 44, l. 6.

Investigator Christopher Parnell then testified that on the night of the shooting he showed a photographic lineup to Scalf. He told her she needed to be one hundred percent certain before she circled any number identifying the shooter. Parnell remembered Scalf looked at each photograph but was she not certain of any of those men being the shooter. Parnell then explained to Scalf that the photographs in the lineup were "maybe a little dated." Scalf then told Parnell that photograph number three "had similar eyes to what she saw previously, during the incident." R. 47, l. 25 – 50, l. 9.

Parnell admitted there was significant wavering on Scalf's part during this photographic line-up identification process. R. 50, ll. 15-17. Parnell acknowledged that Scalf qualified that her opinion was based on the "eyes" of the person in the lineup after he told her "keep in mind, these are old [photographs]" after she could not make an identification. R. 55, l. 2 – 56, l. 22.

Trial argument

Defense counsel Morin then argued that the identification procedure was improper. Scalf admitted that she never saw the suspect's face and she could not make an identification. The officer interrupted her to interject that these were old photographs. The prosecution then played Scalf a tape with appellant's voice on it and asked her to confirm that it was the shooter's voice. R. 57, l. 7 – 60, l. 10.

The solicitor agreed that Scalf's identification based on the suspect's eyes standing alone was insufficient. However, the solicitor said the state's contention was all of the factors had to be considered together. He argued Scalf should be allowed to identify appellant in court as the

shooter. The solicitor said if the court would **not** allow an in-court identification that Scalf should still be allowed to testify about a prior altercation she was aware of involving appellant, and that she knew appellant lived on Raintree Street. R. 61, l. 14 – 63, l. 2.

Defense counsel told the judge that Detective Parnell interrupting Scalf and telling her the photographs were old and not current photographs was very suggestive and improper. R. 65, l. 2 – 67, l. 9.

The judge said he did not think the identification procedure in this case was suggestive, but he inquired of the solicitor how he intended to handle this unusual situation at trial. The solicitor responded that he did not intend to introduce the lineup but said Scalf should be able to say the eyes of the suspect look similar. R. 67, l. 10 – 70, l. 6.

The judge then ruled that he had not seen anything that led him to believe that Scalf was not sincere in her belief that appellant was the shooter. The judge said the suggestive or impermissibly suggestive accusation about the police conduct was not persuasive to him, and he offered that the jury may not believe her identification. The judge ruled that Scalf would be allowed to make an in-court identification of appellant during the trial. R. 72, l. 7 – 73, l. 17.

Evidence at trial

Harley Scalf was the first witness at trial. She testified on May 3, 2019, she was helping install a pool in her backyard on Coach Hill Road in Gaffney, South Carolina when she heard an argument in the front yard between "her brother and a tall man." Scalf described this man as a black man who was tall and "kind of skinny." "He was yelling at my brother." R. 97, l. 8 – 99, l. 24.

Scalf remembered this man yelling at her brother "You're the one that wants to make false accusations." R. 100, ll. 1-5. Scalf said her brother kept "telling him he had the wrong person, to

go home." R. 100, ll. 5-8. Scalf recalled the tall man then turned and shot her brother several times. Scalf was ducked down behind the car when she heard the first gun shot. R. 100, l. 6 – 101, l. 8. The shooter then ran through her neighbor's yard and towards Raintree Avenue. R. 101, ll. 13-14.

Scalf testified she had seen this man in her neighborhood before. He was always dressed in dark clothing. She knew he lived in a white two-story house on Raintree Avenue. R. 102, ll. 1-17.

Scalf repeated her pre-trial hearing testimony that she had seen the shooter walking many times in the neighborhood. R. 102, l. 7 – 105, l. 12. Scalf said she also recognized the shooter's voice. R. 105, ll. 13-24. Scalf contended that she also knew the shooter from the way he walked, and said she could identify him from "just his eyes." R. 106, l. 21 – 107, l. 3. Scalf then identified appellant as the man who shot and killed her brother. R. 106, l. 25 – 107, l. 7. Scalf maintained she was "a thousand percent sure" appellant was the man who shot her brother. R. 109, ll. 4-7.

On cross-examination Scalf admitted her identification was from "his eyes." R. 118, l. 23 – 119, l. 7. She had not seen his face. R. 118, ll. 23-25.

Scalf also acknowledged that after the shooting she told the police the shooter was "a tall black man, a black shirt, long pants," and that she was not sure if he had a bandanna on. She did not tell the police that this man she claimed was appellant had a gun. R. 124, ll. 10-24.

Kyla Scalf was the decedent's sister-in-law. Kyla remembered that on the night of the shooting she was helping put up a pool with Harley and Steven. R. 128, l. 14 – 129, l. 13. She heard arguing in the front yard and she said they ran around the house to see what was going on. The argument between the decedent and the man identified by Harley Scalf as appellant was occurring. Kyla remembered Harley saying "I am a female, I am not trying to hurt you. I just

want to get my brother in the house." This man then pushed the decedent, the decedent pushed him back and the man shot the decedent several times and "took off running." R. 131, l. 14 – 134, l. 15.

Kyla claimed the shooter was the same man she had seen walking up and down the street on prior occasions. R. 134, ll. 1 – 22. Even though Kyla did not see the shooter's face she was "completely certain" that the person who she had seen walking in her neighborhood earlier was the shooter. R. 134, l. 1 – 135, l. 8.

John Earls was living at 202 Raintree Lane on the night of the shooting. He remembered he was cooking something in the microwave when he heard some noise outside. He went outside and saw a man who looked confused and scared. Earls asked the man if he was alright but the man ignored him. Prior to seeing this man outside Earl said he thought he had heard a couple of gunshots. R. 143, l. 22 – 145, l. 21. Earls said he thought this man was wearing a Pittsburg Steelers black jersey. R. 147, ll. 1-20.

Sherriff's Deputy Jeffrey Cole had grown up next door to the decedent's house and close to the house where appellant lived. R. 176, l. 6 – 177, l. 1. On the night of the shooting Cole remembered driving to the suspect's home. He said he was unable to get anyone to answer the door so he started roping off the scene. He heard a scuffling sound and noticed someone moving in the area. He flashed his flashlight and observed someone running. Cole chased the man who was running and he said that he caught him. R. 178, l. 9 – 186, l. 20. Cole remembered that appellant was taken into investigatory custody, and a gunshot residue swab was done on his hands. R. 186, l. 5 – 187, l. 3.

A search of the car in appellant's yard and a search of appellant's house did not turn up a firearm. The police did find a Bluetooth pair of headphones in appellant's car. R. 192, ll. 5-23.

The gunshot residue testing was consistent with appellant having fired a gun or been in the vicinity of someone else firing a gun that day. R. 343, l. 7 – 346, l. 19.

Cherokee Sherriff's Officer Christopher Parnell interrogated appellant beginning at 1:40 in the morning after appellant had been arrested earlier that evening at 9:45 p.m. Parnell said appellant was brought to the police station without a shirt and with no shoes on. Appellant denied being present - - "out there" -- or being the shooter. R. 367 l. 21 – 373, l. 4.

Parnell said appellant told him he had been wearing a Clemson jersey that evening, he had been sleeping in the truck, and that he had also lost an earbud that evening. Parnell believed these parts of what appellant told him but he admitted he was not happy with the fact appellant denied being the shooter. R. 371, l. 25 – 373, l. 22.

Parnell also admitted that appellant told him that the police could find an earbud case in his car, as well as his shoes and a Panda speaker in his car. R. 375, ll. 4-17. This was also all true. Appellant also told Parnell that when he ran that night he realized it was an officer behind him so he stopped and he put his hands up and got on his knees. R. 176, ll. 20-23. Parnell openly admitted lying to appellant in an effort to get him to confess.[2]

Discussion

A criminal defendant may be deprived of due process of law by an identification procedure arranged by the police which is unnecessarily suggestive and conducive to an irreparable misidentification. 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 substantial likelihood of an irreparable misidentification. See State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).

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2 State's Exhibit No. 53, the videotape of the interrogation is on file for this Court to view.

The Supreme Court in Neil v. Biggers, 409 U.S. 188 (1972) held that due process requires courts to assess, on a case-by-case basis, whether an identification resulted from a unnecessary and unduly suggestive police procedure which lead to a substantial likelihood of misidentification.

Here, Harley Scalf admitted to Investigator Parnell that she could not identify the perpetrator by face. Officer Parnell admitted Scalf was significantly wavering because of her inability to identify anyone from the photo lineup.

Even though Parnell had told Scalf to be one hundred percent sure of her identification, and that the perpetrator may not be in the line-up (although he knew appellant was photograph #3), he interrupted Scalf and interjected that the photos were aged jail photographs when she did not identify anyone. His encouragement of Scalf to make an identification, despite her strong uncertainty, caused Scalf to then made an identification of photograph number three because it looked "like his eyes."

This record shows that the police and indeed the solicitor were very unsure about this identification being admissible in court for good reason. The prosecution therefore arranged for Scalf to hear appellant's voice on tape. Scalf then said she also recognized the voice on the tape as being the same voice that she heard from the shooter on the night of the shooting. As defense counsel told the judge this was now a one man show-up identification. One-man show-up identifications are generally suggestive, and therefore suspect or disfavored. See 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); 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"); State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000).

The judge also ordered appellant to speak during the in camera hearing so that Scalf could again hear his voice. Scalf then said she was "one thousand percent certain" of her identification.

All of this was unduly suggestive and an-court identification should not have been allowed by Scalf since it had the substantial likelihood of being an irreparable misidentification.[3] See Neil v. Biggers.

Further, the judge's reasoning that Scalf seemed honest in her belief that appellant was the shooter in his final analysis was not applying the correct legal standard as to identification. The correct legal standard was whether unnecessarily suggestive police procedures arranged by a law enforcement officer were so unduly suggestive that they created a substantial likelihood of misidentification. See, also, Perry v. New Hampshire, 565 U.S. 228, 237-239 (2012); State v. Warner, 436 S.C. 395, 872 S.E.2d 638 (2022); State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017). That is what occurred in this case.

This was also a strange case because it was largely based on suspicion that appellant was the shooter because he was a man who acted strangely in walking up and down the street wearing dark clothing, and who made odd assertions that people were making untrue accusations about him. The extremely prejudicial positive in-court identification by Harley Scalf should not have been allowed in this case, and appellant should be granted a new trial.

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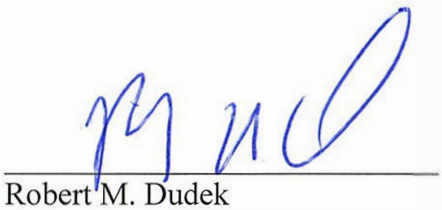
[3] Since this constitutional issue was litigated pre-trial the defense was not obligated to repeat its objection in the presence of the jury before an in-court identification. See State v. Jones, 435 S.C. 138, 866 S.E.2d 558 (2021).

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Cherokee County Court of General Sessions for a new trial.



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This 30th day May, 2023.