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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RONALD WOOD,

APPELLANT

APPELLATE CASE NO. 2022-000888

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by failing to suppress the out-of-court and in-court identification of Appellant where the eyewitness allegedly viewed Appellant from approximately 30 yards away with her two children in the car while on the phone with 911 and purportedly staring at the person's face, yet the witness never gave any details about the face or tattoos, and provided merely generic descriptions of clothing, age, gender, and race?

STATEMENT OF THE CASE

Appellant Ronald Wood was indicted on August 9, 2021, by the Lexington County Grand Jury for the offense of first degree burglary. R. 7, ll. 7-18; R. 229. Wood's case proceeded to a bifurcated trial from June 13th through 15th, 2021 before the Honorable Clifton Newman and a jury. R. 6; R. 44, ll. 15-19; R. 248, ll. 1-9; Supp. R. 1, ll. 16-17. Wood was represented by Stephen Story and Kelly Oppenheimer, while Angela Martin and Jamie Holladay represented the State. R. 6.

Wood was ultimately found guilty as charged. The trial court sentenced him to twenty-three (23) years imprisonment. R. 245, ll. 4-13; Supp. R. 2, ll. 12-22; R. 261, ll. 1-4; R. 264.

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.2 445, 448 (2000). "In reviewing mixed questions of fact and law, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. (citing Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994)). Further, the admissibility of evidence lies within the ambit of the trial court's discretion, and will not be reversed absent abuse of that discretion. State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by error of law." State v. Sims, 377 S.C. 598, 604, 661 S.E.2d 122, 125 (Ct App. 2008). "However, an eyewitness identification which is unreliable because of suggestive lineup procedures is constitutionally inadmissible as a matter of law." Moore, 343 S.C. at 288, 540 S.E.2 at 448.

STATEMENT OF THE FACTS

On the afternoon of April 23, 2021, Mynnda Asbill (Sister) drove to check on her family's property located at 1709 Old Charleston Road in Lexington County. Although her mother, Glenda (Mother), owned the property, she did not live there; rather, Sister indicated that her brother Alex (Brother) stayed at the residence on weeknights after work, and that she checked on it while he was at work. R. 14, l. 15—R. 15, l. 18; R. 30, ll. 2-25; R. 71, l. 21—R. 73, l. 4. Her children were with her when she her SUV onto the property that day, stopped, and saw movement of a person inside near the back door. Sister immediately backed-up her vehicle and called 911 at around 4:17 pm. R. 15, l. 21—R. 18, l. 2; R. 21, l. 15-19; R. 73, l. 12—R. 74, l. 3; R. 76, ll. 13-15. By her own testimony, she was both scared and angry. R. 21, ll. 20-23; R. 77, ll. 16-18.

From a distance of about thirty yards and while speaking with 911, Sister saw a man come out of the back door of the house. R. 19, l. 1—R. 20, l. 3; R. 21, ll. 10-13; R. 39, l. 7-12; R. 47; R. 73, ll. 19-20. Although Sister stated she focused on the man's face, she described the man to 911 largely in terms of clothing, race, gender and age—specifically, an older white man wearing blue jeans, a black shirt, and longer hair; no description whatsoever was given regarding the man's face—not his eye color or shape, nor the shape of nose or chin, nor whether he had facial hair, nor even the color of his hair. R. 19, ll. 7-15; R. 21, ll. 8-9; R. 76, ll. 20-22. Sister had a brief conversation with the man, and then he left back behind the house through the woods. R. 20, ll. 1-2; R. 21, ll. 10-14; R. 22, ll. 1-5; R. 76, ll. 22-24; R. 77, l. 25—R. 78, l.20. The total time of interaction with the man was less than one minute. R. 24, ll. 7-11.

Former Lexington County Deputy Sheriff McKenzie Saunders[1] (Saunders) arrived shortly after. Dispatch relayed the information Sister told 911. R. 32, l. 14—R. 33, l. 3. Saunders looked in the area behind the property, came back, and called for K-9 assistance. R. 33, l. 4-22; R. 112, l. 11—R. 113, l. 24. Saunders, remained at the scene, entered the house, and collected photographic evidence. Although items inside were allegedly touched by the perpetrator, such as broken window glass, a refrigerator that was moved, food containers from within it, and a dolly purportedly brought inside, police collected no fingerprints or DNA. Later, deer camera pictures from outside the house were collected; however, none of the photos depicted Appellant entering into or exiting from the house. R. 57, l. 19—R. 58, l. 5; R. 104, ll. 10-23; R. 105, l. 11—107, l. 21; R. 237, ll. 2-19.

K-9 Deputy Torell Jones (Jones) responded and began tracking with his dog Xander (Xander). R. 113, ll. 20-21 163, l. 16—R. 164, l. 13. During the track by Jones and Xander, at least two suspects were developed, images of whom were shown to Sister by Saunders. Sister did not identify them as the man she saw. R. 34, ll. 7-15; R. 84, ll. 15—R. 85, l. 14; R. 116, ll. 2-23; R. 191, l.7—R. 193, l. 11. After the first track was unsuccessful, Jones took Xander back to 1709 Old Charleston Road and started a second track. R. 115, ll. 10-21; R. 193, ll. 15-20; R. 194, ll. 17-23. After covering approximately one mile total, Jones and Xander came across Appellant near Caulks Ferry Road in Lexington County. R. 196, ll. 24-25. Xander was commanded to apprehend; he jumped on and bit Appellant, and Jones put Appellant into custody. R. 196, ll. 8-17; R. 212, l. 1—R. 213, l. 15.

Sister was aware deputies were using K-9's in the case. R. 84, ll. 12-14. Approximately two hours after the entire incident began, Saunders called Sister and told her "that someone was in

[1] At the time of trial, Saunders was employed by the University of South Carolina Police Department. R. 109, l. 17—110, l. 4.

custody," and to come to the roadside location where Appellant was in handcuffs with police.[2] R. 24, l. 15—R. 25, l. 2; R. 85, l. 24—R. 86, 15; R. 122, ll. 2-11. There, with Appellant bitten by a K-9, handcuffed, and with police on the roadside, Sister identified him as the man coming out of the house at 1709 Old Charleston Road. R. 24, l. 15 – R. 26, l. 1; R. 87, l. 2-13; R. 212, l. 1—R. 213, l. 15.

Appellant's trial began on June 13, 2021. R. 6. During his pre-trial motions hearing, Appellant asserted *inter alia* that the identification by Sister was unduly suggestive as it was show-up conducted on the roadside with Appellant in custody, and that under the totality of the circumstances it created a substantial risk of misidentification. Accordingly, Appellant sought suppression of both the in-court and out-of-court identification of Appellant by Sister. R. 38, l. 21—R. 39, l. 23. Although the State conceded "show-ups are never what the State would want to be done," it ultimately asserted that "the show-up identification is not to the degree that it should be suppressed." R. 41, ll. 19-22. After discussing several facts from the Biggers hearing, the trial court determined that it was "a reliable identification... by [Sister], the person being in custody not withstanding." R. 48, l. 1-2, 10. Appellant's motion was denied, and the identifications were permitted over objection. R. 89, l. 25—R. 91, l. 7; R. 122, ll. 15-20.

At the end of the bifurcated trial, Appellant was found guilty of First-Degree Burglary. Appellant was sentenced to twenty-three (23) years imprisonment. R. 245, ll. 4-13; Supp. R. 2, ll. 12-22; R. 261, ll. 1-4; R. 264.

This appeal follows.

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2 Saunders's recollection was slightly different, testifying, "I told her I had an individual detained." R. 122, l. 11.

ARGUMENT

The trial court erred by failing to suppress the out-of-court and in-court identifications of Appellant where the eyewitness allegedly viewed Appellant from approximately 30 yards away with her two children in the car while on the phone with 911 and purportedly staring at the person's face, yet the witness never gave any details about the face or tattoos, and provided merely generic descriptions of clothing, age, gender, and race.

Sister's in and out-of-court eyewitness identifications of Appellant should have been suppressed because police utilized the unduly suggestive procedure of a show-up two hours after the alleged incident occurred. Over objection,[3] the State was erroneously permitted to elicit testimony from Sister identifying Appellant as the man she saw coming out of the house at 1709 Old Charleston Road, and under arrest by police on the side of Caulk's Ferry Road. R. 24, l. 15 – R. 26, l. 1; R. 87, l. 2-13; R. 89, l. 25—R. 91, l. 7; R. 122, ll. 15-20; R. 212, l. 1—R. 213, l. 15.

"A criminal defendant may be deprived of due process of law by an identification procedure 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) (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). Thus, the general rule concerning identification "is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (citing State v. Cash, 257 S.C. 249 185 S.E.2d 525 (1971)).

A two-prong inquiry is used to determine the admissibility of an out-of-court identification: (1) whether the identification process was unduly suggestive; and if so, (2) whether the out-of-court

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[3] Once the trial court made it's pretrial ruling on this constitutional matter, the ruling was final,. See, e.g., State v. Jones, 435 S.C. 138, 866 S.E.2d 558 (2021) (holding that when a trial court rules after a hearing on a constitutional issue, "the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review.").

identification was so nevertheless so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447; see also Neil v. Biggers, 409 U.S. 188, 198-200, 93 S.Ct. 375, 382 (1972).

In the case at bar, the first prong of inquiry is readily met. The State utilized an identification method "particularly disfavored in the law": the single-person show-up. Moore, 343 S.C. at 287, 540 S.E.2d at 448 (citing Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967 (1967)). This is so "because they are suggestive by their very nature." Mansfield, 343 S.C. at 78, 538 S.E.2d at 263 (citing State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999)). Here, Sister had already left the 1709 Old Charleston Road address. She knew police were using dogs to track the man. R. 84, ll. 12-14. She was called two hours after the incident by police, told "that someone was in custody," and to come to the roadside on Caulk's Ferry Road. R. 85, l. 24—R. 24; R. 122, l. 11.[4] Upon her arrival, she was greeted by the sight of Appellant, who was bitten by the tracking dog, wearing some clothing similar to that described by Sister, restrained by handcuffs, and in custody of uniformed police. As in Moore, "it is patent the show-up procedure used was unduly suggestive." Moore, 343 S.C. at 287, 540 S.E.2d at 448.

Thus, the matter turns on the second prong of reliability. Several factors should be considered when evaluating the totality of the circumstances to determine the likelihood of misidentification, including the following: (1) the witness' opportunity to view the perpetrator at the time of the offense; (2) the witness' degree of attention; (3) the accuracy of the witness' 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 offense and confrontation. See Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977) (citing Biggers, 409 U.S. at 199-200, 93

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[4] Saunders's recollection was slightly different, testifying, "I told her I had an individual detained." R. 122, l. 11.

S.Ct. at 382); Traylor, 360 S.C. at 82, 600 S.E.2d at 527. "Only after a determination as to the reliability of a witness' identification has been made by the trial court may the witness testify before the jury." Moore, 343 S.C. at 289, 540 S.E.2d at 449 (citing State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)). "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." Traylor, 360 S.C. at 81, 600 S.E.2d at 526.

Here, the factors taken as a whole militate toward suppression. First, Sister's opportunity to view the perpetrator, as well as her degree of attention, was limited at best. "This is not a case in which the witness had an opportunity to observe the defendant at close proximity for some considerable period of time." Moore, 343 S.C. at 289, 540 S.E.2d at 449. Rather, she saw the man for less than a minute at approximately thirty yards away. Moreover, she did so with emotional and mental distractions: Sister was feeling both scared and angry because she had her two young children with her in the vehicle, as well as the 911 operator in her ear as she remained on the phone. R. 19, l. 1—R. 20, l. 3; R. 21, ll. 10-13; R. 21, ll. 20-23; R. 24, ll. 7-11; R. 39, l. 7-12; R. 47; R. 73, ll. 19-20; R. 77, ll. 16-18. Under such brief, yet highly stressful and distracting circumstances, Sister's opportunity to view the perpetrator was limited and her degree of attention likely impaired.

Next, the accuracy of her prior description of the perpetrator was relatively generic. Although Sister stated she focused on the man's face, she described the man to 911 almost exclusively in terms of clothing, race, gender and age—specifically, an older white man wearing blue jeans, a black shirt, and longer hair; no description whatsoever was given regarding the man's face—not his eye color or shape, nor shape of nose or chin, nor facial hair, nor even the color of his hair. R. 19, ll. 7-15; R. 21, ll. 8-9; R. 76, ll. 20-22. We know this description is relatively generic because police stopped suspects with similar descriptions during the K-9 track. Notably, police sent

photos of those suspects for Sister to view and did not perform a show-up identification procedure. R. 34, ll. 7-15; R. 84, ll. 15—R. 85, l. 14; R. 116, ll. 2-23; R. 191, l.7—R. 193, l. 11. However, once Sister was exposed to the unduly suggestive procedure of the show-up—with all of the accompanying suggestive circumstances—Sister immediately said it is the man from the house at 1709 Old Charleston Road.

This also goes to the next factor: certainty. Sister undeniably indicated a high level of certainty. Yet as indicated above, this certainty was likely born of the circumstances under which Appellant was presented. Any person would expect that the suspect in police custody was the same man that police dogs were tracking, and when summoned by police to view this "person in custody" Sister's expectations would be both heightened and confirmed by the circumstances she saw: a dog-bitten man in handcuffs and police custody on the roadside with similar clothing to that of the perpetrator. As such, Sister's certainty is both unsurprising, and an example of why show-ups are so strongly disfavored in the law.

Finally, the length of time between the offense and show-up confrontation was approximately two hours. While not an exceptionally long period of time, it was nonetheless long enough for Sister to begin going about other matters. She had time to finish talking with police at the incident location, leave, and later get a call from police to come view the "person in custody" they had on the side of Caulk's Ferry Road. In light of all circumstances from all other factors involved, Sister's identification of Appellant was unreliable. As such, her in-court and out-of-court identifications of Appellant should have been suppressed.

Further, Appellant was prejudiced by admission of testimony regarding Sister's in-court and out-of-court identifications. A constitutional error may be harmless only where the reviewing court is able to declare a belief "beyond a reasonable doubt that the error complained of did not contribute

to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986).[5] "No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990).

In the case at bar, the State relied upon Sister's in-court and out-of-court identification of Appellant as the perpetrator in order to gain the conviction. Without such identification, the State had no other direct evidence to place Appellant inside the house of 1709 Old Charleston Road. The State provided no DNA from the glass allegedly broken by the burglar, nor fingerprints or DNA from items purportedly touch and moved by the perpetrator, such as the refrigerator, containers of food taken out of the refrigerator, or even the dolly allegedly taken inside by Appellant. Further, the deer camera photographs from outside the scene do not show Appellant entering into or exiting from the house either. R. 57, l. 19—R. 58, l. 5; R. 104, ll. 10-23; R. 105, l. 11—128, l. 21; R. 237, ll. 2-19. What is more, the State repeatedly relied upon these identifications in its closing argument to tie the rest of its evidence together against Appellant. R. 227, l. 22—R. 228, l. 5; R. 228, l. 16—R. 230, l. 6; R. 231, l. 2—R. 232, l. 16; R. 234, l. 8-17. Thus, Sister's testimony placing Appellant as the man coming out of the house is the only direct evidence the State had to meet a material element of burglary: crossing the threshold into the dwelling.[6] In other words, without Sister's in-

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[5] Additionally, it is the burden of the party benefitting from the trial error to prove it was harmless beyond a reasonable doubt. See, e.g., Chapman, 386 U.S. at 24, 87 S.Ct. at 828. In the present case, the State benefitted from the trial court's erroneous admission of evidence regarding pre-trial and in-court identification of Appellant. Therefore, it is the State's burden to prove the error was harmless beyond a reasonable doubt.

[6] "A person is guilty of first degree burglary if the person *enters* a dwelling without consent and with the intent to commit a crime in the dwelling, and" other aggravating circumstance are present. S.C. Code Ann. § 16-11-311 (West, Westlaw current through 2022 Act. No. 268) (emphasis added); see also State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)

court and out-of-court identification of Appellant, the State would not likely have satisfied all elements required for burglary of any degree. Accordingly, Appellant was prejudiced as the error was not harmless beyond a reasonable doubt, and the actions taken by the defense in no way absolved the court of its prejudicial error.

(reversing where no direct or substantial circumstantial evidence was present showing appellant entered the dwelling).

CONCLUSION

For the foregoing reasons, Ronald Wood respectfully requests this Court to reverse his conviction, and grant a new trial.

Respectfully submitted,

Breen Stevens
Appellate Defender

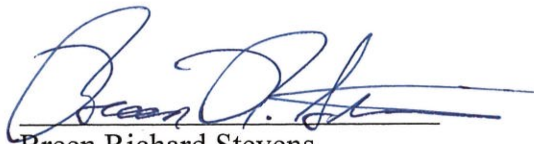
ATTORNEY FOR APPELLANT

This 12th day of June, 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."

June 12, 2023



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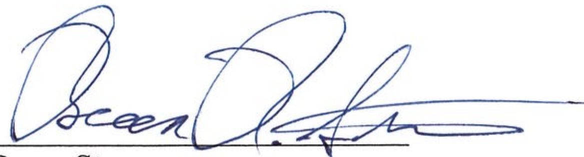
RONALD WOOD,

APPELLANT

APPELLATE CASE NO. 2022-000888

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon David A. Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 12th day of June, 2023.



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