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JUL 12 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

SC Court of Appeals

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY ROY BOYD,

APPELLANT

APPELLATE CASE NO. 2012-205986

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to hear in-camera and summarily excluding eyewitness testimony proffered by the defendant from Mr. Shirah who claimed he was at the scene of the alleged robbery just prior to and after it, who specifically recalled another male standing out at that time because he was hanging around the scene and looked very similar to the defendant, and who purportedly had "intimate details" of the events during the alleged robbery?

STATEMENT OF THE CASE

On February 15, 2011, Appellant was indicted by the Greenville County grand jury on two counts of armed robbery. R. *. On December 12, 2011, Appellant proceeded to trial before a jury and the Honorable D. Garrison Hill. Tr. 1. Appellant represented himself with the aid of court-appointed standby counsel, Scott Robinson. Tr. 8-9. Jennifer Tessitore represented the State. Tr. 1.

At the conclusion of the trial on December 14, 2011, the jury found Appellant guilty. Tr. 540-541. Judge Hill sentenced Appellant to twenty years imprisonment. Tr. 545-546.

This appeal follows.

ARGUMENT

This Court should remand Appellant's case for a new trial because the trial court wrongly excluded Mr. Shirah's testimony implicating another individual and exculpating Appellant.

FACTS

On the morning of the first day of trial, the Solicitor addressed the judge, making a final pre-trial motion before opening statements: "the State would move that [Appellant] be limited from getting into this third-party guilt evidence as far as this guy [who] Mr. Shirah saw, or claims he saw. And I'm just concerned that if – you know, if we don't deal with it now that I'm going to have to object in the middle of his opening." Tr. 107, ll. 3-8.

Mr. Shirah was Appellant's star witness. His girlfriend worked at the salon, and he had "intimate details of everything that happened" during the robbery. Tr. 110, ll. 4-9. In the colloquy following the State's objection, the parties informed the judge that just prior to the robbery, Mr. Shirah saw another black male who "looked similar to Mr. Boyd" sitting in a car in the parking lot. Tr. 109, l. 12 – Tr. 110, l. 24.

Ironically, the State's case was built on the same foundation of direct evidence—the robbery victim's identification of Appellant. The State alleged that on March 4, 2010, a beauty salon owner and a cosmetologist she employed were closing for the night when Appellant entered by himself carrying a long wooden stick. Tr. 135. He allegedly threatened the women and forced them to into a break room, demanded their valuables, and ordered them into the bathroom before leaving. Tr. 135-136. The only direct evidence available to the State was the cosmetologist's identification testimony that Appellant was the robber. Tr. 135-137.

“Well, I mean, if he said he saw somebody leave with a similar description, I can how it could be highly relevant,” the judge responded to the State’s objection. Tr. 110, ll. 17-19. “[H]e was there, he said, prior before [sic] the incident and after. And he verbally stated what he saw with his eyes, not what he speculated,” Appellant added.

The State continued to object:

As far as *State v. Gregory*¹ and *State v. Rice*² that the third-party guilt evidence that has no other [e]ffect other than to cast a mere suspicion on another or raises a conjectural inference that the crime was committed by another. . . . I mean, there’s no other indication that there’s any connection between this individual in the parking lot and this defendant’s guilt.

Tr. 112, ll. 9-16.

Appellant pleaded to the court: “[H]e saw an individual similar to me And I’ve got a three- or four-page letter of the statement and conversation. It’s in depth detail during of what this individual looked like as he sat in the car during the time of this alleged robbery.” Tr. 113, ll. 4-12.

“[T]ell me exactly, concretely what he would say if he were called as a witness on your behalf. I don’t want conclusions.” Tr. 115, ll. 22-24.

“Your Honor, he stated that night he knew for a fact it wasn’t me. Because he had seen somebody in the parking lot that looked like me.” Tr. 116, ll. 3-5.

The State was eager to put the witness’s credibility on trial.

¹ 198 S.C. 98, 16 S.E.2d 532 (1941).

² 375 S.C. 302, 652 S.E.2d 409 (2007).

It's the State's belief the Mr. Shirah provided all of this information in order to create an opportunity for him to be able to get out of jail when the Defendant's sisters paid. That's how valuable it is. They paid for his bond to get out so that Mr. Shirah could get out of jail and help Mr. Boyd.

Tr. 117, ll. 17-22.

The State's argument apparently made an impression on the court, which reversed course and found that Mr. Shirah's testimony would "simply [cast] a mere suspicion on an individual unidentified that was allegedly sitting in a burgundy vehicle outside of the scene of the crime. And that is it." Tr. 122, ll. 22-25. Continuing, the court espoused the "long-standing law embedded in American jurisprudence that you cannot bring up vague, amorphous claims about third parties committing the crime . . . unless the evidence is more than casting a mere suspicion on others." Tr. 123, ll. 5-9. The court instructed Appellant not to refer in any way to Mr. Shirah's testimony in his opening. Tr. 123, ll. 12-13.

Defendant Boyd: Will he be able to say it on his own behalf, Your Honor?

The Court: You've given me no indication – I, certainly, will let you proffer his testimony. You can bring him up here. And we'll listen to him outside the presence of the jury. And, you know, you can proffer his testimony.

Tr. 124, ll. 13-19.

Over the next two days, the State called ten witnesses. Tr. 2-4. The cosmetologist was the only witness the State offered to identify Appellant. Tr. 192-197. No other direct evidence linked Appellant to the robbery. On the third day, Appellant finally had the opportunity to present his defense, or so he believed:

Mr. Robinson: Your Honor, . . . [in the police report, the officer] talks about speaking to two witnesses that had

information about a burgundy vehicle and a gentleman named Petey that matched the description. And I wanted to see if the Court is going to allow him to ask that question. That was in his investigative report. And I think the Court may have ruled on that, but I want to make sure.

...

The Court: From Mr. Shirah. Is that his name? Shirah?

...

Ms. Tessitore: That is the third-party guilt evidence, and then some.

...

The Court: Yes. . . . But that would be subject to my earlier ruling, and that would not be admissible.

Mr. Robinson: Yes, sir. I just wanted to make sure.

The Court: You can bring the jury on in.

Tr. 341, l. 2 – Tr. 342, l. 11.

Appellant was emasculated of his star witness, the only person whose direct-evidence testimony could neutralize the cosmetologist's identification to create reasonable doubt in the minds of the jurors. Appellant could only take the stand in his own defense to plead his innocence to the jury: he was an ordinary man who unfortunately came upon the jewelry taken in the robbery in a small bag on the street. Tr. 471, l. 10 – Tr. 472, l. 4. Notwithstanding, the jury deliberated for around fifty-five minutes before finding Petitioner guilty on both counts of robbery. Tr. 540-541. The court sentenced Petitioner to twenty years imprisonment. Tr. 545-546.

DISCUSSION

This Court should remand Appellant's case for a new trial because the trial court wrongly excluded Mr. Shirah's testimony implicating another individual and exculpating Appellant. A defendant may introduce evidence showing that he is innocent because another person committed the crime:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-35 (1941) (quoting 22 C.J.S. *Criminal Law* § 1085, p. 560 (1918)).

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the United States Supreme Court held that no justification existed for the South Carolina Supreme Court's rule that allowed the exclusion of evidence relating to third-party guilt without thoroughly evaluating that evidence first:

[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. . . . It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "a meaningful opportunity to present a complete defense."

Id. at 331 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

In this case, Appellant informed the trial court that Mr. Shirah had "intimate details" of the events during the robbery. Mr. Shirah would aver that he was at the salon just prior to and after the robbery, and he specifically recalled a black male who stood out

because he was hanging around the salon and could have been mistaken for Appellant. For further assurances, Appellant proffered a multi-page statement detailing what the individual looked like as he sat in the car during the time of the alleged robbery. Thus, Appellant did more than raise a mere specter of a third-party by speculating as to another person's motive or opportunity to commit the robbery. He adduced testimony that he was not at the scene of the crime and another individual who looked similar was loitering there and arousing suspicion. At a minimum, sound discretion required acknowledging Appellant raised sufficient allegations to justify hearing from the witness in camera to determine whether the testimony sustained a reasonable inference of Appellant's innocence. *Compare State v. Liverman*, 398 S.C. 130, 138-39, 727 S.E.2d 422, 426 (2012) (stating rule that if state proffers eyewitness identification testimony, due process requires in camera hearing to consider, under the totality of the circumstances, the reliability of the identification).

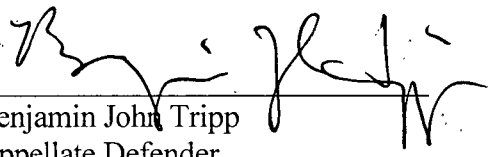
The trial court initially recognized the importance of the testimony when it noted how evidence that someone with a similar description was leaving the salon could be "highly relevant." In such a case, the proper course is to admit the evidence and let the jury decide the weight to be given to the testimony. Accordingly, the court agreed to let Appellant proffer the evidence later at trial so it could make a more informed decision. Nevertheless, the State ultimately thwarted this course by prematurely putting Mr. Shirah's credibility at issue with the accusation of bias. When Appellant's standby counsel attempted to revisit the issue in the defense's presentation of its case, the court summarily ruled the testimony inadmissible under its prior ruling and without any further inquiry. The result was no less than denying Appellant his constitutional right to present

a meaningful defense. Therefore, the court improperly exercised its discretion in excluding Mr. Shirah's testimony and foreclosing Appellant's primary avenue of defense.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court remand Petitioner's case for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of July, 2013.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Billy Roy Boyd 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 D. Garrison Hill, which was held on December 14, 2011, 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 Billy Roy Boyd.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of July, 2013.

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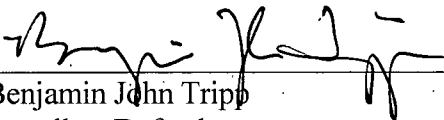
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Transcript (December 9, 2011)
- (3) Entire Trial Transcript (December 12 – 14, 2011)

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

July 12th, 2013


Benjamin John Tripp
Appellate Defender

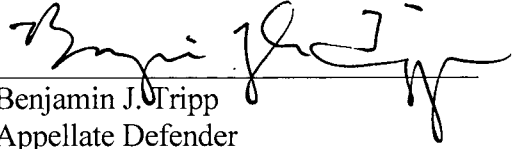
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Attorney for Appellant

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 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."

July 12, 2013


Benjamin J. Tripp
Appellate Defender

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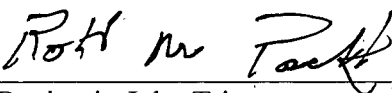
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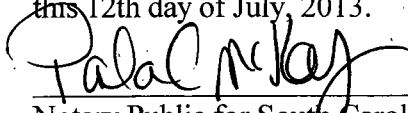
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Billy Roy Boyd, #349065 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of July, 2013.


for Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of July, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.