STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Thomas L. Hughston, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KRAIG JERMAYNE ANDERSON,

APPELLANT

APPELLATE CASE NO 2018-000703

FINAL BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT

I.

The trial court erred in admitting an out-of-court identification of Appellant, where the lineup was unduly suggestive, where Appellant was the only suspect wearing a prison jumpsuit, and where the remaining reliability factors could not be met such that a substantial likelihood of misidentification existed 4

II.

The trial court erred in refusing to grant a mistrial, where the photograph of Appellant wearing a prison jumpsuit from the unduly suggestive lineup was displayed in the courtroom before the jury. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 L.Ed.2d 140 (1977) 6, 7, 8

Sellner v. State, 416 S.C. 606,787 S.E.2d 525 (2016) 3

State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994) 9

State v. Council, 335 S.C. 1, 515 S.E.2d 508, (1999) 8

State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013) 3

State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007) 9

State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) 9

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) 9

State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000) 3

State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001) 6

State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000) 3

State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same) 6

State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) 3, 5

State v. White, 371 S.C. 439, 639 S.E.2d 160 (Ct. App. 2006) 8

State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010) 3

Rules

Rule 104(c), SCRE 6

Rule 403, SCRE 9

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in admitting an out-of-court identification of Appellant, where the lineup was unduly suggestive, where Appellant was the only suspect wearing a prison jumpsuit, and where the remaining reliability factors could not be met such that a substantial likelihood of misidentification existed?

II. Whether the trial court erred in refusing to grant a mistrial, where the photograph of Appellant wearing a prison jumpsuit from the unduly suggestive lineup was displayed in the courtroom before the jury?

STATEMENT OF THE CASE

In May 2016, a Charleston County grand jury indicted Appellant for criminal sexual conduct in the first degree. On April 9, 2018, Appellant proceeded to trial before the Honorable Thomas L. Hughston and a jury. R. 1. Jessica Baldwin and Jennifer Shealy appeared on behalf of the State, and Lorelle Proctor and Taylor Seman represented Appellant.

Following a three-day trial, the jury found Appellant guilty as indicted. R. 355, ll. 14 – 16. Judge Hughston sentenced Appellant to the maximum sentence of thirty years. R. 365, ll. 14 – 17.

This brief 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).

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

ARGUMENT

I. The trial court erred in admitting an out-of-court identification of Appellant, where the lineup was unduly suggestive, where Appellant was the only suspect wearing a prison jumpsuit, and where the remaining reliability factors could not be met such that a substantial likelihood of misidentification existed.

Relevant facts

On June 18, 2014, C.W., a 24-year old woman, gave Appellant a ride from Wild Buffalo Saloon in North Charleston. R. 17, ll. 9 – 14; R. 36, ll. 11 – 25. She claimed at trial that Appellant sexually assaulted her in the woods. R. 129, l. 19 – R. 145, l. 13. Following the alleged assault, C.W. called law enforcement from a nearby Denny's. R. 145, l. 21 – R. 146, l. 9. C.W. did not know Appellant prior to June 2014.

She was asked to make a photo identification on numerous occasions; she was shown at least four total lineups. R. 19, ll. 4 – 22; (Court's Exhibits 1 – 5, Photographs, on file with this Court). C.W. did not identify Appellant in any of the first three sets of photographs; he was not in them. R. 201, ll. 20 – 25. However, she was close to identifying a man in the second lineup. R. 25, ll. 16 – 20. She stated to law enforcement that she was "85 percent sure" that a different man was the one who allegedly sexually assaulted her. R. 163, l. 16 – R. 164, l. 1.

The fourth and final lineup contained a picture of Appellant in a prison jumpsuit. Following the *in camera* testimony of C.W. and Daniel Pritchard, the law enforcement officer who showed her the lineup, defense counsel made an argument that the lineup and accompanying identification should be suppressed under Neil v. Biggers.[1] R. 31, l. 21 – R. 32, l. 15. The motion was denied. R. 34, ll. 6 – 11.

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[1] 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d (1972).

During C.W.'s testimony before the jury, counsel renewed the objection. R. 151, ll. 1 – 25.

> At the conclusion of C.W.'s testimony, defense counsel moved for a mistrial:
> Your Honor, at this time, the defense would make a motion for a mistrial. We had - - when she put in the line of pictures we had put up, we did object to it. But then when she took out the individual picture and put it up on the screen, you can tell that he's got on a jumpsuit. It looks like he's somebody that's in jail.

R. 168, l. 22 – R. 169, l. 19. The trial judge did not find that the photographs were unduly suggestive and did not grant the mistrial motion. R. 169, ll. 16 – 19.

Discussion

"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." Id.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's 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 crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

South Carolina courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); see also Rule 104(c), SCRE (providing that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

The fact that Appellant appeared in the lineup in a prison jumpsuit is unduly suggestive to anyone viewing the photographs that Appellant was either arrested or potentially involved with law enforcement by virtue of allegedly committing a crime. An individual faced with making an identification is likely drawn to the prison jumpsuit, thereby influencing the decision. Because law enforcement created the lineups, the government decided which pictures to include. R. 200, ll. 16 – 19. Wielding that power, law enforcement made them unduly suggestive. The fourth photograph of Court's Exhibit 5 / State's Exhibit 61 bearing C.W.'s signature allegedly pictures Appellant. However, Appellant is wearing a prison jumpsuit as evidenced by the distinct collar and inseam area.

C.W. participated in multiple photographic lineups. R. 149, ll. 1 – 6. Because the fourth and final one was unduly suggestive, a review of the reliability factors is required by due process. The five factors are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's 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 crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

C.W. testified that the encounter with Appellant allegedly took place in the early morning hours, around 3:00 a.m. R. 17, ll. 9 – 17. Questions were asked of whether she could see Appellant at the saloon where they supposedly spoke earlier, but case law sets forth that the first factor include an analysis of viewing the alleged perpetrator *at the time of the crime*. Although C.W. claimed that Appellant was in front of her during the assault, the prosecution failed to elicit information about the lighting or whether C.W. had the opportunity to view him at the time. Thus, this factor weighs against a reliability determination.

Secondly, C.W. admitted that she had been drinking earlier at the bar. R. 18, ll. 17 – 20. She stated that she would not have been surprised if she had consumed four beers and four shots in the evening. R. 162, ll. 4 – 6. Therefore, it logically follows that her degree of attention—potential inebriation included—may not have been very high. Once more, this factor weighs against a reliability determination.

The third factor, the accuracy of the witness's prior description of the perpetrator, was not discussed in detail during the *in camera* hearing. As a result, this factor cannot weigh in favor of reliability.

Fourth, the level of certainty demonstrated by the witness at the confrontation was high—at a prior lineup. R. 23, l. 20 – R. 24, l. 5. C.W. confirmed, with a confidence level of between eighty and eighty-five percent, that she was sure that a man other than Appellant was the perpetrator. Id. As a result, C.W.'s subsequent identification, although perhaps confident as well, is tainted by her previous misidentification. If the confidence level was so high the first time, testimony regarding accuracy and certainty the second attempt is illusory and untrustworthy.

Lastly, fifteen months separated the night in question and the final identification. R. 20, ll. 18 – 24. Therefore, this final factor weighs against a finding of reliability.

II. The trial court erred in refusing to grant a mistrial, where the photograph of Appellant wearing a prison jumpsuit from the unduly suggestive lineup was displayed in the courtroom before the jury.

After the photograph depicting Appellant in a prison jumpsuit appeared on the screen in the courtroom, a mistrial should have been granted.

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 12–13, 515 S.E.2d 508, 514 (1999); State v. White, 371 S.C. 439, 443–44, 639 S.E.2d 160, 162 (Ct. App. 2006). A mistrial should be declared only when absolutely necessary. Council, 335 S.C. at 13, 515 S.E.2d at 514. In order to receive a mistrial, a defendant must show error and resulting prejudice. Id. It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial. White, 371 S.C. at 444, 639 S.E.2d at 162.

Generally, evidence of prior crimes or bad acts is not admissible to prove the crime for which the defendant is charged. State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Such evidence is admissible when it tends to show (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime on trial. Id. The evidence of prior crimes or bad acts must be relevant to prove the alleged crime. State v. Campbell, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct. App. 1994). When the prior bad acts are "strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). "[E]ven if [the] prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007). This balancing process is reflected in Rule 403, SCRE.

The danger of unfair prejudice substantially outweighs and probative value gleaned by publishing the picture of Appellant in jail attire to the jury. Doing so invaded the province of the jury; the photograph removed the proverbial robe of innocence from Appellant. He was judged according to this photograph and not whether he was innocent or guilty of the crime for which he was on trial.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction based upon the trial court's error in failing to exclude the prejudicial photograph and failing to grant a mistrial when the photograph was shown to the jury in the courtroom.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of March, 2019

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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 4, 2019

Taylor D. Gilliam
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589