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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Honorable R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2022-000975

THE STATE,

Respondent,

vs.

SATWAUN WALLACE HENRYHAND,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge abuse his discretion by admitting evidence out of-court identification of Appellant by the motel clerk when the State failed to preserve the other photographs that were shown to the clerk by law enforcement, preventing Appellant from demonstrating that the procedure used was unnecessarily suggestive resulting in a substantial likelihood of misidentification?

2. Did the trial judge abuse his discretion by admitting evidence, pursuant to the excited utterance exception to the hearsay prohibition, of the motel clerk's testimony that after viewing surveillance video of the robbery her co-workers said the person in the video was Appellant?

STATEMENT OF THE CASE

Satwaun Wallace Henryhand (Appellant) was indicted by a Florence County Grand Jury in November 2021, for armed robbery. He proceeded to a jury trial on June 27, 2021, before the Honorable R. Kirk Griffin, circuit court judge. Appellant was convicted as charged. Following the verdict, the Appellant entered an Alford[1] guilty plea to an unrelated voluntary manslaughter. (R. 219:17-20). Judge Griffin sentenced Appellant to concurrent terms of imprisonment of twenty-seven years for voluntary manslaughter and armed robbery. (R. 237:2-10). Appellant filed a timely notice of appeal. This appeal follows.

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1 North Carolina v. Alford, 400 U.S. 25 (1970).

STATEMENT OF FACTS

On the afternoon of Friday, November 22, 2019, Felcia Benjamin ("Victim"), left the Suburban Inn Motel front desk for dinner at the Quincy's restaurant just across the street. (R. 73). Since she was the only employee at the front desk, Victim locked the door to the office and went to Quincy's. (R. 72-73). When she returned, Victim noticed Appellant standing by the bushes near the entrance. (R. 73; 76).

While on the phone with her fiancé, Victim unlocked the entrance to the Suburban Inn and walked to her desk. (R. 72-76). As Victim began to eat her dinner, Appellant walked in the front entrance towards Victim, put a gun up to her face, and demanded money. (R. 76). Victim informed Appellant that the money was in the safe. (R. 76-77). Victim then began to search for her keys to the safe. (R. 77). When Victim looked back up Appellant had placed a bandana over his face. (R. 77). Victim withdrew the cash register drawer and handed it to Appellant. (R. 91). Appellant left the building with the whole cash register drawer. (R. 91).

Victim's fiancé Dominque remained on the call throughout the incident and called law enforcement. (R. 75). Upon arriving at the scene and speaking with Victim, Officer Bostick requested the Suburban Inn owner produce surveillance footage from the video cameras in and around the motel premises. (R. 114).

After law enforcement arrived at the scene, they reviewed the video with Victim and some coworkers. (R. 78; 79). Officer Bostick remarked that he recognized Appellant without providing any name or identification to Victim. (R. 79). Victim recognized Appellant from the robbery but was unable to identify him by name. (R. 80). Victim's co-workers who were present for the video review immediately exclaimed that they knew who Appellant was, exclaiming he was a current customer who "had a hotel (sic) in the back of the room." (R. 79). Officer Bostick

then began the process of collecting several photographs together to present Victim with a photograph lineup. (R. 146). Officer Bostick then produced a lineup of six individuals to Victim for identification. (R. 146). Appellant was later arrested on an unrelated charge four days later and brought into custody to await trial. (R. 117).

The prosecution called law enforcement officers Justin Bostick and Tyrone Porter during the case-in-chief. Officer Bostick testified as to receiving the initial description of the armed robber from Victim, and that Victim's description matched Appellant's appearance in the surveillance video. (R. 113-114). Officer Bostick further testified that he met Appellant a few hours earlier on the day of the incident and stated that Appellant matched the description provided and was wearing the same clothing as the armed robber in Victim's description and the surveillance video. (R. 113-114). Officer Bostick also stated that he had familiarity with Appellant due to several conversations in the past. (R. 115-116).

Officer Tyrone Porter was called to testify as the lead investigator for the armed robbery incident at issue. (R. 136). Officer Porter testified that he was familiar with Appellant, and that after reviewing the surveillance video at the crime scene that he had no doubt of Appellant's identity as the armed robber. (R. 141). Officer Porter explained that because Appellant had already been identified by law enforcement, there was no requirement to produce a SLED line-up for Victim. (R. 144-145). Officer Porter explained that he personally recognized Appellant as the armed robber. (R. 145). Since Appellant's identity had been determined by law enforcement, Officer Porter stated that non-SLED photographic line-up using officer selected photographs for identification performed by Officer Bostick was sufficient to "flesh out" Appellant's identification as quickly as possible to ensure his timely arrest. (R. 151). Through recross examination and further direct examination, Officer Porter testified repeatedly that he had

personally identified Appellant through his own personal recognition from the video review. (R. 163-166).

At the conclusion of the evidentiary phase of trial, the trial judge charged the jury on the applicable law. (R. 199). As part of his instructions, the trial judge charged the jury that it must determine whether the identity of Appellant had been established and that the jury could not find Appellant guilty if it had reasonable doubt as to Appellant's identification. (R. 207). Upon reviewing the evidence at trial, the jury returned a unanimous finding of guilt for Appellant in the armed robbery. (R. 217). Appellant received a sentence of 27 years along with another 27 year sentence for an unrelated voluntary manslaughter guilty plea. (R. 237).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only and are bound by the trial court's fact findings unless clearly erroneous. State v. Winkler, 388 S.C. 574, 600, 698 S.E.2d 596, 582 (2010). The admission or exclusion of evidence is vested in the sound discretion of the trial judge, whose decision will not be reversed absent a prejudicial abuse of discretion. State v. Saltz, 346 S.C. 113, 121, 551, S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the lower court either lack evidentiary support or are controlled by an error of law. State v. Pittman, 373 S.C. 527, 577, 657 S.E.2d 144, 170 (2007). The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

ARGUMENT

I. The trial court did not err in admitting the Victim's identification of appellant, because it was not unnecessarily suggestive under the circumstances and there was no substantial likelihood of misidentification.

Relevant Facts

Victim stated that the photo lineup was a collection of photos that was presented to her without suggestion; though she stated she could not recall if law enforcement informed her Appellant might not be included. (R. 80). The State was not able to produce the entire lineup, only the picture Victim identified. (R. 54). Victim immediately identified Appellant as the man who robbed her at gunpoint, which the prosecution entered into evidence. (R. 80). Defense counsel initially made no objection to the image, but upon entering the photo into evidence preserved the objection from pre-trial motion. (R. 82). The court overruled the objection and admitted the photograph. (R. 82; State's Exhibit 5). The prosecution noted that the picture has a tattoo on the left eye that was not included in Victim's description. (R. 54; 82). Victim admitted that although she could not recall discussing the tattoo, she was certain as to the identity of Appellant as the person who robbed her. (R. 99).

The trial judge examined the lineup under the Neil v. Biggers test for the possibility of the lineup being unduly suggestive and unnecessary. (R. 57-60). Specifically, the court addressed whether Victim had adequate time to identify Appellant in order to determine if the lineup was unduly suggestive. (R. 58). The court reviewed the circumstances, acknowledging that Victim saw Appellant unmasked for over two minutes, that the she gave detailed description of Appellant, that the lineup was within minutes of the armed robbery, and that law enforcement at no point suggested that Appellant was one of the six people included in the lineup. (R. 57-60). The court ruled that under the totality of circumstances, there was nothing unduly suggestive

about the photo identification of Appellant by Victim; and even if it was suggestive, he would allow the identification under Biggers. (R. 59-60).

Discussion

The trial judge correctly found the lineup was not unduly suggestive because the court held an appropriate pretrial identification hearing and there was no evidence the lineup was intentionally destroyed or removed.

An identification is improper if the state arranges unnecessarily suggestive circumstances; and those circumstances pose a substantial likelihood of irreparable misidentification. Neil v. Biggers, 409 U.S. 188, 197-8 (1972). The United States Supreme Court discusses this issue further in Perry v. New Hampshire, where the court stating that "The Constitution protects a[n] Appellant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording Appellant means to persuade the jury that the evidence should be discounted as unworthy of evidence." 565 U.S. 228 (2012). The due process clause will only preclude evidence when that evidence "is so extremely unfair that its admission violates the fundamental conceptions of justice." Dowling v. United States, 493 U.S. 342, 352 (1990).

Several jurisdictions have established a presumption that lost photographs do not establish a constitutional violation. In Montgomery v. Greer, the Seventh Circuit Court of Appeals found that the loss of photographs was unprofessional but did not show bad faith or rise to the level of a constitutional violation. Montgomery v. Greer, 956 F.2d 677, 681 (7th Cir. 1992). See also Sales v. Harris, 675 F.2d 532, 538 (2d Cir. 1982) ("we do not draw an inference of suggestiveness from the failure of the police to preserve the photo array."); Com. v. Brown, 380 N.E.2d 113 (Mass. 1978) (Even though the Commonwealth was unable to produce the entire group of photographs, the court did not err in permitting the Commonwealth to present evidence

of the photographic identification, because there was no indication that the procedures were impermissibly suggestive and the eyewitness had the opportunity to view the assailant several times on the evening of the incident.).

The trial court properly found that the identification was not unduly suggestive. While the State only produced the photograph Victim identified as Appellant, there is no evidence of bad faith or suggestiveness. (R. 54). Victim stated that she was not forced or suggested to pick a specific photograph. (R. 80). Victim immediately identified Appellant when looking at a series of five or six photographs. (R. 80). The court properly found that the procedure was not unduly suggestive because there was no evidence to show the photo lineup was impermissibly suggestive.

Moreover, even if the lineup was suggestive, there was – just as the trial judge found– no substantial likelihood for misidentification. Biggers, 409 U.S. at 199-200. In evaluating the suggestiveness of an out of court witness identification, the court must consider: (1) the witnesses opportunity to view the perpetrator, (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, 109 (1977).

The trial court judge correctly ruled that the 150 seconds of the robbery coupled with the face-to-face encounter with Appellant prior to Victim entering the Suburban Inn was sufficient for Victim to view Appellant. (R. 58). Regarding the degree of attention, the judge ruled that the threat of a firearm in the immediate vicinity of Victim at the peril of her own life was more than sufficient. (R. 58). Regarding the description, the trial judge ruled the specific detail in which the clothing was described was sufficient. (R. 58). The level of certainty was established as she

immediately picked out Appellant's photograph from the lineup upon presentation. (R. 58). Finally, the length of time between the crime and the lineup was reviewed, with both events occurring within half an hour of each other being recent enough to establish credibility. (R. 59). The trial judge found no evidence of any undue suggestiveness and made note that even if there had been suggestive there was no substantial likelihood of misidentification under the factors in Biggers. (R. 59-60).

The trial court did not err in its decision to admit the identification, because the identification was not unduly suggestive and did not pose a substantial likelihood of misidentification. This Court should affirm.

II. The trial court did not err in admitting Victim's testimony pursuant to the excited utterance exception to the hearsay rule.

Relevant Facts

At trial, Victim's testimony included a statement that upon review of the surveillance video immediately following the robbery, Victim's co-workers exclaimed that the man in the video was Appellant. (R. 79). Appellant argues that the State did not carry the burden of proof for the excited utterance exception of the co-workers at the time of the statement, and that the error is not harmless.

Victim recounted her experience to the jury. (R. 71). During direct examination, Victim stated that co-workers identified Appellant during the video review of the crime.[2] (R. 79). Defense raised an objection to the statement as hearsay, while the prosecution cited the excited utterance exception. (R. 79). The court ruled excited utterance applied and allowed the statement. (R. 79). Victim stated she did not know who Appellant was until the day of the robbery; however, she acknowledged that law enforcement and her co-workers knew Appellant's identity. (R. 79-80).

The co-workers' identification satisfies the elements of the excited utterance exception because the statement related to the robbery, was made while co-worker was under the stress of the robbery, and the robbery caused co-workers' stress.

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[2] From the transcript of the trial the exact line of questioning was (R. 79):

Mr. White (Prosecution): And did [law enforcement] indicate that they knew who the individual was that -

Victim: Well, after they watched it [co-workers] said – called his name. I didn't know who he was because I didn't know everybody who was there. Like my coworkers, they knew who he was and said something about he was staying in one of the rooms in the back –

Mr. Harvin (Defense): Objection, hearsay

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The general rule is that hearsay is not admissible. Rule 802, SCRE. State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 690–91 (2007). Among the exceptions available to hearsay is the excited utterance exception which is available regardless of the availability of the declarant. Id. For a statement to be an excited utterance, three elements that must be met: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Washington, 379 S.C. 120, 124, 665 S.E. 602, 604 (2008). Consideration of admission is made under totality of the circumstances with broad deference left to the sound discretion of the trial court. Id.

The rationale is that a startling event suspends a witness's process of reflective thought, thus reducing the likelihood of fabrication. State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998). The trial court must look at the totality of the circumstances [Id.], which may include the declarant's demeanor and age, and the severity of a startling event. State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002). The mere fact that a statement was made some time after the incident does not disqualify it as an excited utterance, as long as circumstances surrounding the statement indicate its reliability. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (statement after 11 hours admissible); Sims, supra (statement after 12 hours admissible where 5-year-old had stayed with mom's body all night); Cf. State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (App. 1999) (statement after 9-10 hours not admissible, where victim had chance to tell earlier).

Here, the State argued Victim's testimony about her co-workers' response to viewing the surveillance footage fit within the excited utterance exception, and the trial judge agreed,

overruling defense counsel's objection that the testimony. (R. 79). Regarding the first element, the statement of the co-worker was made upon reviewing the surveillance video of an armed robbery within just fifteen minutes of its occurrence at the declarant's place of work. In addition to recency of the actual crime, the revelation was made immediately upon viewing the surveillance video by the declarant without hesitation. (R. 79). Regarding the second element, the statement was not only made with knowledge that a violent crime had just been committed, but the declarant also knew that the crime had been committed by someone they knew and interacted with frequently. Lastly, the declarant was under immense stress knowing that a violent crime had been committed by a known party within their immediate physical vicinity and primary place of work, and who had not yet been apprehended by law enforcement. Declarant was under stress resulting from the incident, which was evidenced by her statement conflating the words "hotel" with "room" was illogical but for her experiencing the emotional shock. Id. The circumstances surrounding the robbery indicate reliability. Under the totality of the circumstances, Appellant has failed to show the court's findings are an abuse of discretion.

When courts have previously found trial courts to rule in err, the primary consideration is the proximity in time and emotional composure of the witness. In State v. Washington, a statement to police did not qualify as an excited utterance because the statement was made ninety minutes after an incident during a formal police interview. Washington, 379 S.C. at 124, 665 S.E.2d at 60. Unlike in Washington, the statement by declarant here was much quicker—just fifteen minutes later—and not made in response to any questions—formal or otherwise—at the time of its utterance. (R. 79). In State v. Sims, panicked and hysterical statements made by an eyewitness at the crime scene were found to be sufficient for admission as excited utterance. State v. Sims, 304 S.C. 409, 405 S.E. 2d 377 (1991). Here the stress evident in the conflation of

words at the revelation of the crime to the declarant fits the Sims ruling. The trial court did not err in ruling Victim's testimony fit within the excited utterance exception.

This Court may rely on any other reason appearing in the record to affirm the lower court's judgment. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). Even if the statement does not satisfy the elements of an excited utterance, the statement is still admissible as a present sense impression. A present sense impression is admissible as a hearsay exception regardless of availability of the declarant. Rule 803, SCRE. A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803, SCRE. "The rationale for admissibility [under the present sense impression exception] is that the statement is reliable, since it is contemporaneous with the event or occurrence and there was no time for reflection, faulty recollection, or deliberate misrepresentation." State v. Washington, 424 S.C. 374, 399, 818 S.E.2d 459, 472 (Ct. App. 2018), overruled on other grounds by State v. Washington, 431 S.C. 394, 848 S.E.2d 779. Here, declarant made this identification immediately after seeing Appellant on the video, which provided no time for reflection or deliberate misrepresentation. (R. 79). Thus, the statement is also admissible as a present sense impression.

Error in admitting testimony is harmless when considered in the light of overwhelming existence of a defendant's guilt. State v. Hughes, 419 S.C. 149, 159 796 S.E.2d 174, 179 (Ct. App. 2017). Appellant argues that the issue of mistaken identification was compounded by the admission of Victim's testimony of her co-workers declaration at the crime scene investigation. The State produced testimony of Victim, Officer Bostick, and Officer Porter's independent and concurring identification of Appellant at the crime scene.

Admission of evidence in error is harmless when the erroneously admitted evidence is merely cumulative in light of the cumulative evidence of Appellant's guilt. In State v Mitchell, the South Carolina Supreme Court found that error is harmless when it could not reasonably affect the result of a trial. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d. 150, 151 (1985). In Mitchell, the court ruled hearsay testimony of a law enforcement officer regarding the ownership of a black jacket associated with a crime by Appellants wife during interview was inadmissible as hearsay. Id. Though the court affirmed the trial court did err in admitting the hearsay, the court ruled because there was abundant evidence in the record from which the jury could have found appellant guilty notwithstanding the hearsay, the error was harmless. Id. In State v. Chavis, the South Carolina Supreme Court ruled that despite the admission of testimony of two witnesses used to support other witness statements was inadmissible as hearsay; however, the overwhelming evidence of substantial guilt of the defendant ruled the error harmless. State v. Chavis, 412 S.C. 101, 109, 771. S.E.2d 336 (2015). Like Mitchell and Chavis, even if the excited utterance is excluded, there is ample evidence from Victim's testimony and independent witnesses to provide substantial evidence for evaluation by the jury. Identity of Appellant was substantiated by multiple witness statements at trial. The reliability of the statement is for the weight and not substance of the evidence for evaluation which is part of the "element of untrustworthiness which is the customary grist for the jury mill." Mason v. Brahwaite, 432 U.S. at 116. Like Chavis, Mitchell, and Hughes, Appellant's argument for the error in admitting excited utterance testimony by Victim does not pass the requirements to be considered anything but harmless err.

There is nothing within the totality of the circumstances that indicate the declarant did not meet excited utterance criteria as applied by this Court in Washington and Sims. Even if the

admission was in err, the error could only be harmless in light over the overwhelming evidence provided by independent witnesses which could result in the finding of guilt by the jury. The trial court did not err in admitting Victim's testimony of declarant's excited utterance. This Court should affirm.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Grace Sommer, certify I have served the within Final Brief of Respondent on Katherine Hudgins, Esquire, counsel on record for the Appellant by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served. This 1st day of February, 2024.

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