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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONIO L. WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2023-000570

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by admitting evidence of a witness' out-of-court identification of Appellant where only three of the six suspects in the lineup had facial tattoos, where the witness indicated the photograph selected was suggested to him, and where the witness denied that Appellant was the suspected shooter?

STATEMENT OF THE CASE

Antonio Lafayette Williams was indicted by the Laurens County grand jury for attempted murder and armed robbery. The charges arose from Appellant's purported involvement in a shooting incident on the night of May 23, 2021, in Fountain Inn, South Carolina. Tr. 34, ll. 18-25; Tr. 132, ln. 6—Tr. 133, ln. 14; Tr. 192, ll. 6-15; Tr. * (Indictments).

Appellant's case proceeded to trial from March 27th through 30th, 2023, before the Honorable Jocelyn J. Newman and a jury. Appellant was represented by Richard Warder, while the State was represented by Christopher Morrow, Jay Lampke, and Josh Thomas. Tr. 1. The jury found Appellant guilty of both armed robbery and attempted murder, and the trial court imposed a sentence of fifteen (15) years for each charge to run consecutively, and with credit given for 674 days of time served. Tr. 415, ll. 8-13; Tr. 423, ln. 25—Tr. 425, ln. 3.

STATEMENT OF THE FACTS

Jemiel Gowans (Gowans) and his cousin, Cory Gowans (Cousin), drove from Myrtle Beach to Gowans' home in Clinton, South Carolina, on the evening of May 23, 2021. Tr. 143, ln. 2—Tr. 144, ln. 15; Tr. 160, ll. 5-9; Tr. 168, ln. 1—Tr. 169, ln. 11; Tr. 171, ln. 4-25. On the drive, the two smoked "about 14 grams" marijuana. Tr. 160, ll. 1-9; Tr. 188, ll. 1-12. Later that evening, Gowans drove the two to an abandoned home off of Jones Road in Fountain Inn, South Carolina, to consummate a marijuana sale. A gold Toyota Avalon with three occupants pulled behind the two; Gowans got out and spoke with one of the three from the other vehicle while Cousin stayed in the Toyota Corolla listening to music. Tr. 144, ln. 13–Tr. 146, ln. 23; Tr. 173, ll. 9-18; Tr. 179, ll. 10-16. Another of the three occupants exited the Avalon; shots were fired by one of the men from the Avalon, as well as by Gowans. Cousin left the car and ran to the bushes, and Gowans was shot through both legs as he too ran.[1] Tr. 150, ln. 4–Tr. 152, ln. 18; Tr. 182, ln. 16–Tr. 183, ln. 22. The man from the Avalon who fired his gun was described as a light-skinned black male with facial tattoos and a bald head wearing a white shirt and blue jeans. Tr. 180, ln. 9–Tr. 181, ln. 23.

After the gold Avalon left with its occupants, Cousin got Gowans into the Corolla, called 911, and drove to the Hillcrest Hospital Emergency Room (ER). Tr. 126, ll. 5-14; Tr. 138, ll. 7-24; Tr. 170, ll. 5-24; Tr. 178, ln. 23–Tr. 179, ln. 5; Tr. 192, ll. 6-23. Police responded to the ER, and Cousin led them to the incident location. Once there, law enforcement recovered multiple shell casings of three different calibers: one (1) 9 mm; one (1) 10 mm; and nine (9) .40 caliber. A

[1] It was not clear whether Gowans was shot once in each leg, or if one bullet went through both legs. However, the wounds appeared to travel from right to left. Tr. 342, ll. 5-18; Tr. 351, ll. 11-12; Tr. 352, ln. 24–Tr. 353, ln. 9.

torn bag with some marijuana in it, and more marijuana next to it, was also on the ground. Tr. 192, ll. 6-23; Tr. 207, ll. 2-14; Tr. 233, ll. 2-21; Tr. 301, ln. 14—Tr. 303, ln. 16; Tr. 310, ll. 17-23.

Police developed a six-pack photographic lineup through SLED based upon the DMV photograph of Appellant Antonio Williams. Of the six photographs in the lineup, only three had facial tattoos. When presented with the lineup on May 24, 2021, Gowans selected Appellant's photograph, which was top center in the lineup. Tr. 75, ln. 13—Tr 78, ln. 12; Tr. 217, ln. 7–Tr. 226, ln. 3; Tr. * (Court's exhibit #3); Tr. * (Court's exhibit #3); Tr. * (State's # 16).

Appellant's case proceeded to a jury trial from March 27th through 30th, 2023. Tr. 1. A pretrial hearing was held pursuant to Neil v. Biggers,[2] challenging the out-of-court identification by Gowans. Tr. 65, ll. 13-18. After the sole witness testified, Appellant argued the lineup was tainted. Tr. 81, ln. 19—Tr. 83, ln. 5. While acknowledging that half of the photographs in the lineup did not have facial tattoos, the trial court held that the procedure was not unduly suggestive. The court further held that, even if it was suggestive, there was "an appropriate degree of reliability in the procedure." Tr. 83, ln. 25—Tr. 84, ln. 14; Tr. 84, ln. 22—Tr. 85, ln. 22; Tr. * (Court's exhibit #3) Tr. * (Court's exhibit #4).

During trial, the State referred to the photographic lineup in its opening statement to the jury. Tr. 117, ln. 18–Tr. 118, ln. 9. However, when Gowans testified regarding the identity of the person who shot him, he indicated that the only photograph corresponding with the description he gave to police was the one he chose. He further indicated police suggested "something to [him] about number two, as if he had already knew." Finally, Gowans acknowledged he was high on

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[2] 490 U.S. 188, 93 S.Ct. 375 (1972).

drugs within hours of the incident, as well as during the lineup procedure. Accordingly, he disavowed the lineup.[3] Tr. 154, ln. 6—Tr. 159, ln. 6; Tr. 160, ln. 1—Tr. 162, ln. 22.

After the lineup was admitted into evidence, the State published it to the jury. Additionally, the State referred to the lineup throughout the trial, including in its closing argument. Tr. 278, ln. 5–Tr. 279, ln. 20; Tr. 313, ln. 8–Tr. 314, ln. 6; Tr. 375, ln. 19–Tr. 376, ln. 20; Tr. * (State's exhibit #16).

The jury convicted Appellant as charged on both offenses. The trial court imposed consecutive sentences of fifteen (15) years for each offense, with credit given for 674 days of time served. Tr. 415, ll. 8-13; Tr. 423, ln. 25—Tr. 425, ln. 3.

This appeal follows.

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[3] Although the State asserted Appellant contacted Gowans and Cousin in March 2023 in order to influence them prior to trial, and produced jail tapes in support of its argument, both Gowans and Cousin denied such influence upon their testimony. Tr. 163, ln. 19—Tr. 164, ln. 13; Tr. 188, ln. 19—Tr. 189, ln. 12; Tr. 254, ln. 6—Tr. 255, ln. 4; Tr. 270, ln. 22—Tr. 271, ln. 1.

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"). "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). "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. "However, an eyewitness identification which is unreliable because of suggestive lineup procedures is constitutionally inadmissible as a matter of law." Id.

ARGUMENT

The trial court reversibly erred by admitting evidence of a witness' out-of-court identification of Appellant where only three of the six suspects in the lineup had facial tattoos, where the witness indicated the photograph selected was suggested to him, and where the witness denied that Appellant was the suspected shooter.

Gowans' out-of-court eyewitness identification of Appellant should have been suppressed because police utilized an unduly suggestive procedure in the form of a tainted lineup. Over objection,[4] the trial court erroneously permitted the State to admit the photographic lineup identifying Appellant as the man who shot Gowans, despite fully half of the six photographs failing to include facial tattoos.

"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 identification was nevertheless so reliable that no substantial likelihood of misidentification existed.

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4 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."). Accordingly, the matter should be deemed preserved.

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 inherently suggestive. Specifically, police utilized a photographic lineup of six pictures, yet three of the six were noticeably missing the most prominent feature described by the eyewitness: facial tattoos. Tr. * (lineup). Additionally, Gowans readily indicated the only photograph corresponding with the description he gave to police was the one he chose, and that police suggested "something to [him] about number two, as if he had already knew." Accordingly, he disavowed the lineup. Tr. 154, ln. 6—Tr. 159, ln. 6; Tr. 160, ln. 1—Tr. 162, ln. 22. As such, evidence in the record indicated the identification procedure was inherently suggestive.

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 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, Gowans' opportunity to view the perpetrator, as well as his degree of attention, was limited at best. He saw the shooter for only a short period of time at night when it was "pitch black" by an abandoned house. Tr. 146, ln. 15—Tr. 147, ln. 8. Further, Gowans' trial testimony revealed that he was under the influence of drugs not only at the time he saw his assailant, but also at the time he made the identification. Tr. 154, ln. 6—Tr. 159, ln. 6; Tr. 160, ln. 1—Tr. 162, ln. 22. Under such circumstances, Gowans' opportunity to view the perpetrator was limited and his degree of attention impaired.

Next, the accuracy of his prior description of the perpetrator was relatively generic. Although Gowans described the man to police almost exclusively in terms of clothing, race, gender and age no description whatsoever was given regarding the man's face beyond tattoos being on it—not his eye color or shape, nor shape of nose or chin, nor facial hair, nor even the color of his hair.

This also goes to the next factor: certainty. Although Gowans purportedly indicated a high level of certainty in the eyes of law enforcement, his own testimony belied such belief; rather, Gowans indicated he made the identification with police over him while suggesting they knew who did it, and "said something about number two." As such, Gowans' disavowal of his prior identification highlights his low level of certainty. Tr. 74, ll. 7-11; Tr. 157, ln. 6—Tr. 159, ln. 10; Tr. 279, ll. 2-4; Tr. 313, ln. 8–Tr. 314, ll. 7-10.

Finally, the length of time between the offense and show-up confrontation was a little less than one day. While not an exceptionally long period of time, it was nonetheless long enough for Gowans to begin going about other matters. He had time to finish his treatment at Hillcrest Hospital and leave to his home where he and his girlfriend were ultimately approached by police the following day. Tr. 67, ll. 9-23; Tr. 311, ll. 3-12; Tr. 342, ll. 19-25. In light of all circumstances from all factors

involved, Gowans's initial identification of Appellant was unreliable. As such, evidence regarding his out-of-court identification of Appellant should have been suppressed.

Further, Appellant was prejudiced by Gowans' out-of-court identification. 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 Gowans' out-of-court identification of Appellant as the perpetrator in order to gain convictions against him. Without the identification, the State had no other direct evidence to place Appellant as the shooter. Although Appellant's defense was mere presence, the State provided no fingerprints or DNA from items likely touched by the actual armed robber, such as shell casings, or the ripped cellophane bags of marijuana. Tr. 120, ln. 7—Tr. 121, ln. 6; Tr. 383, ll. 14-19. Further, no firearms were collected linking Appellant as the shooter. What is more, the State repeatedly relied upon the tainted identification in its closing argument to tie the rest of its evidence together against Appellant. Tr. 278, ln. 5–Tr. 279, ln. 20; Tr. 313, ln. 8–Tr. 314, ln. 6; Tr. 375, ln. 19–Tr. 376, ln. 20; Tr. * (State's exhibit #16). Accordingly, Appellant was prejudiced as the error was not harmless beyond a reasonable doubt.

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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 the out-of-court identification of Appellant. Therefore, it is the State's burden to prove the error was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Appellant Antonio Lafayette Williams, Jr., respectfully requests reversal of his convictions and sentences, and remand for a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of March, 2024.