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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KELVIN MICHAEL BOWEN,

APPELLANT

Appellate Case No. 2011-185566

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Appellant's federal and state constitutional rights to due process of law were violated by the admission of a witness's identification of Appellant where the out-of-court identification process was unnecessarily suggestive and conducive to irreparable mistaken identification.

STATEMENT OF THE CASE

In 2009, a Williamsburg County Grand Jury indicted Appellant for murder, burglary in the first degree, possession of a weapon during a violent crime, and criminal conspiracy. Indictments, R. 748 - 750. The prosecution, represented by Kimberly Barr and Tyler Brown, called the case to trial on January 31, 2011 before the Honorable Clifton Newman and a jury. William E. Jenkinson and Amanda Shuler represented Appellant. R. 46. The jury found Appellant guilty as charged. R. 728, line 21 – R. 729, line 4. Judge Newman sentenced Appellant to ninety-nine years for murder, thirty years for burglary in the first degree, five years for possession of a weapon during a violent crime, and five years for criminal conspiracy. R. 741, lines 14-18; sentence sheets, R. 751 - 754

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

Appellant's federal and state constitutional rights to due process of law were violated by the admission of a witness's identification of Appellant where the out-of-court identification process was unnecessarily suggestive and conducive to irreparable mistaken identification.

Relevant facts.

Preliminary hearing testimony.

Appellant's preliminary hearing occurred on June 10, 2009 before Magistrate William Ellerbe Ackerman. Kimberly Barr appeared on behalf of the state, and William E. Jenkinson, III appeared on behalf of Appellant. R 1.[1] Pamela Jean Lail, an investigator with the Williamsburg County Sheriff's Office, was the only witness called to testify. R. 3, line 21 – R. 4, line 3. She was involved in the investigation of the death of Kenyan Dorsey, the decedent on April 5, 2009. R. 4, lines 11-14. Lail found the decedent's body in a chair in front of a small television in his home. He appeared to have multiple gunshot wounds to his head. R. 6, lines 3-23. Lail learned from the decedent's mother that the decedent "ha[d] a problem" with Ronald Mack. R. 8, line 25 – R. 9, line 7. According to Lail, Mack's biological mother was Tawanda Allen Mack, and her boyfriend was Kelvin Bowen, Appellant. R. 10, lines 8-17.

Lail obtained a statement from Antonio McClary, Mack's friend. McClary claimed he observed text messages between Mack and someone identified as "Callie." R. 12, line 13 – R .13, line 6. McClary believed Allen and Mack were en route from Maryland to help

[1] Appellant uses the following abbreviations to refer to the various transcripts. The preliminary hearing transcript dated June 10, 2009 will be referred to as "Prelim." The transcript from the hearing dated January 31, 2011 will be referred to as "ID hrg." The transcript from the trial will be designated using the abbreviation "Tr."

Mack "do something." R. 13, lines 7-15. After going to a local nightclub, McClary, Mack, and others went to the home of a juvenile. McClary claimed Mack commented that "he was going to do a lick that night." R. 13, lines 15-19. McClary and Mack left the residence and got into a vehicle with Allen and Callie. R. 14, lines 9-19. While in the vehicle, Mack and Callie got a shotgun and a handgun ready. R. 15, lines 2-8.

Upon arrival at the decedent's residence, Allen remained in the vehicle, while the other three entered the residence. R. 16, lines 7-25. Initially, McClary denied entering the residence, but subsequent interviews with others indicated he did. R. 17, lines 1-5. According to McClary's initial statement, he did not see what happened in the house, but heard two shots as he ran back to the vehicle. Shortly after he arrived at the vehicle, Mack and Callie also arrived. All four left the area. Mack and McClary returned to the juvenile's residence, while Allen and Callie returned to Maryland. R. 17, lines 11-25.

After learning that Mack had transferred to a high school in Maryland, Lail informed the school's resource officer that she had an arrest warrant for Mack. Lail testified "We also explained to him that there could possibly be a male subject with Ronald Mack that we needed to identify." R. 18, lines 13-23. Shortly thereafter, Lail was notified that Mack had appeared at the school and was placed under arrest. The individual with Mack was Kelvin Michael Bowen, Jr., Appellant. Lail asked the officer to email photographs of both individuals to her. Lail then "brought Mr. McClary over and immediately upon seeing the photographs emailed he identified the one that was Callie, which the officers on the scene in Maryland identified him as Kelvin Michael Bowen, Jr." R. 19, lines 1-14.

On cross-examination, Lail testified that she received photographs from the Maryland police and showed those photographs to McClary. She did not prepare a line-up

using the photographs "due to the immediate time frame." She explained that Petitioner had not been placed under arrest, but was "detained strictly for identity purposes." This placed a time limitation on her office to identify whether the person in the photograph was the unknown person involved in the shooting. McClary had identified him only has Callie. She did not have time to build a photo line-up as a result. R. 37, lines 1-25.

Pre-trial hearing.

On January 31, 2011, Appellant moved to suppress the identification made by McClary. The Honorable Clifton Newman presided over the hearing. R. 47, line 5 – R. 52, line 9. Investigator Lail testified regarding the identification procedures. During an interview on May 13, 2009, McClary described Callie as "real tall and scrawny" with "peasey," not low cut hair, and brown skin. R. 55, lines 1-8.

In direct contradiction of her preliminary hearing testimony, Lail testified that she never gave a photograph to McClary. Rather, she explained: "My computer is such that at the back door of the investigations unit, I sit exactly as I'm sitting now with my computer right here. Anyone coming in the back would have access to the screen and he was brought in at the same time by another investigator or whomever." R. 56, lines 6-19. She further denied even showing the photograph on her computer screen to McClary. She claimed that as soon as she uploaded the photograph from her email, "the investigator walked through with [McClary] and that's when he looked at it and immediately, spontaneously said ['W]here did you get a picture of Callie?'" R. 56, lines 19-24. On cross examination by the state, Lail claimed McClary "just happened to see [the photograph] when it came up onto [her] computer." R. 59, lines 6-9. Lail admitted that the photograph did not show

Petitioner's hair or illustrate if he were tall and scrawny as McClary described. R. 57, lines 1-13.

When confronted with her preliminary hearing testimony, Lail admitted she had testified to showing McClary a photograph of Petitioner and that time did not permit a photographic line-up. R. 61, lines 4-15. Nevertheless, the judge found the identification admissible and held there was "no indication of any unduly suggestive identification by the [s]tate." R. 61, line 24 –R. 62, line 2.

Trial.

Antonio McClary testified against Petitioner at the trial. McClary pleaded guilty to burglary for his role in the murder of the decedent. R. 267, lines 2-6. McClary admitted he entered into a plea agreement with the prosecutor. R. 308, line 20 – R. 309, line 1. As part of the agreement, the murder charge was dismissed and the burglary first degree charge was reduced to burglary in the second degree. R. 309, lines 2-10. He received a twelve-year sentence. R.309, lines 12-14. However, McClary claimed that his testimony against Appellant was not part of the plea agreement. He contended the discussion about him testifying occurred after he agreed to the terms of the plea offer. R. 309, line 22 – R. 310, line 1. Nevertheless, McClary admitted that when he pleaded guilty, the prosecutor informed the judge that "we want him to do that" in reference to McClary testifying at trial. R. 310, line 2 – R. 311, line 19.

McClary knew Mack and the decedent. R. 270, lines 6-12. McClary claimed Mack and decedent were selling drugs and members of a gang. R. 315, lines 4-12. McClary and Mack were together on the weekend the decedent was killed. R. 270, lines 13-16. On Saturday, McClary, Mack, Dontrey Barr, and Quadir Wilson were at Club Jordan "having

some fun." R. 272, line 20 – R. 273, line 4. While at the club, McClary encouraged Mack to calm down about his frustrations with the decedent. McClary assured Mack that McClary would handle it. R. 273, lines 18-25. At 1 a.m., McClary took Barr and Mack to Barr's house. R. 273, lines 9-17. After taking Wilson to his home, McClary returned to Barr's house. R. 274, lines 2-18.

Mack told McClary that he was going out to "handle his business" at the decedent's house. R. 275, lines 1-8. McClary insisted on accompanying Mack. R. 275, lines 10-25. McClary and Mack changed clothes and walked outside Barr's house where Mack's mother, Tawanda Mack Allen, and Allen's boyfriend were waiting. R. 276, lines 1-9. McClary estimated the time was 2:40 a.m. R. 276, lines 10-15. McClary referred to Allen's boyfriend as "Callie." R. 278, lines 4-5; R. 278, lines 13-14; R. 278, lines 23-24.

McClary claimed that he intended to offer to pay whatever debt the decedent owed to "stop all this." When he turned around in the car to offer this suggestion, he saw Mack and Callie loading guns – a shotgun and a nine millimeter. R. 280, lines 4-23. Upon arrival at the decedent's residence, McClary, Mack, and Callie exited the vehicle. Mack and Callie were armed and wearing gloves. R. 281, lines 16-20; R. 283, lines 11-12. The three entered the house through an unlocked door. R. 282, line 20 – R. 283, line 5. The trio split up in the house. R. 283, lines 16-25. When Mack told McClary that he could not find the decedent, McClary looked at Mack "like let's be for real. Like come on now, I'm saying. I turned and then I pointed right at him sitting in the chair and he going to act surprise and had a really surprising look." R. 284, line 9 – R. 285, line 4. Callie then entered the room. R. 285, lines 13-16. Mack fired a shot, followed by Callie shooting. McClary claimed Callie offered to let McClary shoot too, but McClary declined. R. 286, lines 2-16. All three ran to

the waiting vehicle. R. 286, lines 18-24. The foursome hurriedly left the scene. R. 291, lines 4-8. McClary and Mack returned to Barr's house, while Allen and Callie left. R. 294, lines 7-19.

Within two days of the decedent's death, the police interviewed McClary. He denied any involvement. R. 297, lines 6-16. The police re-interviewed McClary in May. R. 297, line 25 –R. 298, line 2. McClary claimed that Mack and Callie went to the decedent's house and killed him, but denied entering the house himself. R. 298, lines 13-23; R. 299, lines 1-6. He admitted this was a lie. R. 299, lines 7-8. After the second interview, McClary was arrested. R. 299, lines 18-20. Thereafter, police officers picked him up from the county jail, which was across the street from the sheriff's department. The officers explained "they had some more questions to ask [him] or whatnot." McClary entered the department and said "y'all already got Callie." The police looked at McClary and said "you know this guy right here" referring to a photograph on the computer screen. R. 299, line 21 – R. 300, line 11. On cross-examination, McClary admitted he was interviewed twice on that day in May. After the first interview, the officers accused him of lying and threatened to charge him with accessory after the fact of murder if he did not start giving them a story. R. 316, line 7 –R. 317, line 6. Further, McClary admitted that after his first statement, officers turned the recorder off and continued to talk to him. This discussion caused him to tell another story. He lied in the third statement as well. R. 317, line 9 – R. 318, line 10.

Upon further questioning by the prosecutor, McClary stated he saw a picture of an individual on Lail's computer and identified that person as Callie. R. 300, line 12 –R. 301, line 4. Over Appellant's objection, McClary then identified Appellant as Callie in court. R. 302, lines 2-24. Although McClary testified he had no doubt about the identification, he

failed to answer the prosecutor's question regarding the length of time he had to observe Callie. R. 302, line 25 – R. 303, line 6. On cross-examination, McClary testified he was taken over to the sheriff's office and shown a picture on a computer screen. R. 328, lines 17-21. As soon as McClary" walked in the picture was posted right there on the computer screen." R. 329, lines 4-9. He further admitted that he was told by police that "[t]hey wanted [him] to look at pictures to see if [he] could pick, they told [him] it was like nine of them. They said it was going to be pictured." R. 329, lines 13-19.

On cross-examination, McClary testified that he thought he described Callie to Lail as real tall with hair like an afro and muscular build. When confronted with his actual statement to Lail, he admitted he described Callie as real tall and scrawny. R. 325, line 19 – R. 326, line 20. McClary described Callie's hair as "Afro peezy." R. 327, lines 2-9. He also admitted that in the photograph that he used to identify Appellant as Callie, Appellant did not have "an Afro-peezy haircut." R. 330, lines 16-19. He admitted Appellant had a moustache in the photograph, but he never described that facial feature to officers. McClary candidly admitted that he could not tell the person's height or the person's build from the photograph. R. 331, lines 3 – 25.

After the preliminary hearing, McClary and his attorney met with Appellant and his attorney. When asked who Appellant was, McClary said he did not know him and that he was not Callie. R. 335, line 5 – R. 336, line 17. McClary testified that Callie did not have any scars on his face. However, when he looked at Appellant's face closely during the trial, he observed a six to eight inch scar across Appellant's jaw. R. 342, lines 8-10; R. 343, lines 6-13. However, McClary refused to sign a statement to that effect. R. 338, lines 7-16.

The prosecution called Ronald Mack to testify. At the time of Appellant's trial, Mack had pled guilty to murder and received a fifty-year sentence for his role in the death of the decedent. R. 195, lines 10-17. Mack did not remember what he told law enforcement on May 26, 2009 or what he informed the Court when he entered his guilty plea. R. 197 lines 23-25; R. 198, lines 3-6. Mack did not remember telling law enforcement that he had called Appellant to drive from Maryland to assist him in killing the decedent or that Appellant had the shotgun. R. 199, lines 19-23; R. 199, line 23 – R. 200, line 1. Mack admitted that he killed the decedent, but denied Appellant was present. R. 202, line 25 – R. 203, line 6. He further denied calling Appellant by the name "Callie." R. 203, lines 10-12.[2]

On cross-examination, Mack testified that the first time he saw Appellant was Mother's Day weekend in Kingstree when Appellant and Mack's mother picked Mack up to return to Maryland. R. 221, lines 13-25. Although Mack admitted giving a statement to law enforcement, he testified the statement was not true as it concerned Appellant. R. 223, lines 4-12. Mack reaffirmed his earlier testimony that Appellant was not present for and did not participate in the murder of decedent. R. 224, lines 19-23. Mack testified unequivocally that Appellant was not Callie. R. 225, lines 2-6.

Appellant presented an alibi defense. Appellant's son, Kelvin B., testified that on the weekend of April 4, 2009, he was with Appellant at their home in Maryland. He recalled receiving an electronic basketball court as an early birthday present from Appellant. The two spent the day assembling the basketball court and then playing with it. Afterwards, the two watched television and played video games. Later in the evening, the family called

[2] The prosecution introduced Mack's statement to law enforcement as an exhibit to impeach his testimony. R. 241, line 14 – R. 244, line 22; R. 535, line 5 – R. 542, line 5.

a cousin in Texas to wish her a happy birthday. The following day, on April 5, 2009, when Kelvin B. woke up, Appellant was home and cooked breakfast for them. R. 601, lines 6-9;R. 602, lines 8-24;R. 603, lines 2-10; R. 603, lines 15-24; R. 604, lines 14-22; R. 605, lines 2-23; R. 606, lines 2-5; R. 606, lines 15-22. On cross-examination, Kelvin B. testified that Appellant is from California, but is not called Callie. R. 610, lines 9-12.

Appellant's wife, Tiffany Bowen, also testified. Tiffany candidly admitted that she and Appellant began having marital problems in April or May of 2009. R. 612, line 18 – R. 613, line 4. Eventually, Tiffany learned Appellant was seeing Tawanda Mack Allen. Subsequently, she and Appellant argued about his relationship with Allen. R. 613, lines 5-12. On April 1, 2009, Appellant returned home from a trip to California visiting family. R. 614, lines 1-11. When she left her home on Saturday for an appointment, Appellant and Kelvin B. were at the home. R. 614, lines 15-21. Tiffany returned around 2:30 p.m. R 614, lines 22-24. She discovered that Appellant had given Kelvin B. his birthday present early without discussing it her first. The family watched television and contacted her cousin by phone to wish her a happy birthday. R. 615, lines 2-21.

On Mother's Day weekend in 2009, Tiffany and Appellant argued over Allen. Appellant left their home on Friday. On Sunday, the two talked and Appellant returned home that evening. The following weekend, the two argued again. Appellant left, promising to end the relationship with Allen and attend marriage counseling. On Sunday night, Appellant called to say he was on his way home. Tiffany did not hear from him again until Tuesday morning when he called to say he had been arrested. R. 615, line 22 – R. 617, line 1.

Tiffany testified that Appellant always kept his hair cut low and never had an afro hair cut or style. R. 617, lines 17-23; R. 618, lines 17-19. She further testified that she had never heard anyone call him Callie. R. 617, lines 24-25.

Discussion.

When law enforcement use an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification, an individual's right to due process of law is violated. Stovall v. Denno, 388 U.S. 293 (1967); State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, the in-court identification is not admissible. Manson v. Brathwaite, 432 U.S. 98 (1977); Moore, 343 S.C. at 286, 540 S.E.2d at 447. In Neil v. Biggers, 409 U.S. 188 (1992), the United States Supreme Court created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, the trial court must ascertain whether the identification process was unduly suggestive. Next, the trial court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. at 198. The central issue is whether the identification was reliable even though the confrontation procedure was suggestive under the totality of the circumstances. Id. The following factors should be considered when evaluating the totality of the circumstances: (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 demonstration by the witness; and (5) the length of time between the crime and the confrontation. Id. at 199; see also State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

Our courts have found some identification procedures patently suggestive. For example, in State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), our Supreme Court held a line-up procedure wherein three victims were in the same room, sitting within feet of each other, while observing photographic line-ups was blatantly unacceptable. Id. at 81-82, 600 S.E.2d at 527. Nevertheless, the Court found the identification was admissible based upon the totality of the circumstances. Those circumstances included the victims not conversing during the line-up and not being aware of whom the other victims selected, if anyone. The victims testified the observed the assailant from one minute to ten minutes and their prior descriptions generally matched that of the person identified. All testified they were certain of their identifications, which were made two days after the incident. Id. at 83, 600 S.E.2d at 527.

Our Supreme Court held a show-up identification was unduly suggestive in Moore, supra. A witness observed two people exiting her neighbor's home when she knew the neighbor was away. She called the police and provided a general description of the men, primarily focused on the clothing. Id. at 285, 540 S.E.2d at 447. Ninety minutes later, officers took the witness to an area where to men were being detained. The witness positively identified the two men as the perpetrators. Her identification was based upon the clothing she observed. She admitted she had not really seen their faces earlier. Id. at 285-286, 540 S.E.2d at 447. As explained by the Court, "[s]ingle person show-ups are particularly disfavored in the law." Id. at 287, 540 S.E.2d at 448 (citing Stovall, 388 U.S. at 302 and State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993)). The procedure in Moore was unduly suggestive. Id. Further, the Court found the identification unreliable as a matter of law. In the case presented, the Court found the only factor with any

reliability was the amount of time between the crime and the confrontation, which was ninety minutes. The other factors clearly outweighed that one where the witness observed the two perpetrators for a brief time at a significant distance, the degree of attention was not great, and the accuracy of her description was tenuous. Id. at 449, 540 S.E.2d at 290.

Crediting Lail's preliminary hearing testimony, the police engaged in a single-photograph array identification procedure with McClary. Such identification procedures are inherently unreliable and unduly suggestive. Lail testified that Appellant was being detained only for identification purposes, and as a result, time was of the essence. She had no ability to prepare a proper multi-photograph line-up, using photographs similar to the one of Appellant in her possession. Based on the time constraints, Lail showed McClary the single photograph of Appellant she received from the Maryland police officers.

Even using Lail's starkly contrasting pretrial hearing testimony, the police action in creating the suggestive identification procedure must not be discounted. Lail was aware that officers had gone to the jail to pick up McClary and deliver him to her for further questioning. Lail was aware of the door officers would use to take McClary into the sheriff's department. Lail was aware that her computer screen was visible from the door entering the sheriff's department. Without question, Lail arranged for McClary to observe a single-photograph at the sheriff's department. The trial judge erred in failing to conclude the identification procedure was not unduly suggestive.

Erroneously determining the photo identification procedure was not unduly suggestive, the trial judge never examined the totality of the circumstances to determine if the identification was reliable. Turning to the first factor, McClary had very little time to view Callie. The entire encounter between the two lasted less than one hour and occurred

during the nighttime in poorly lit environments. McClary testified that he did not look at Callie very much during their time together. He looked out the window while the two were in the vehicle together, and the trio separated in the house. McClary's attention was not strong. He testified that he was still in the frame of mind for "clubbing." McClary's description of Callie did not match Appellant's physical features. Appellant did not have the same hairstyle or body build as the man described by McClary. Additionally, McClary failed to describe obvious facial features of Appellant – a mustache and a long scar. Finally, McClary's identification of Appellant occurred over a month after the crime.

CONCLUSION

Appellant respectfully requests this Court find the identification procedure unduly suggestive, the identification unreliable as a matter of law, and remand the matter for a new trial. In the alternative, Appellant requests this Court find the identification procedure unduly suggestive and remand the matter for a determination of the reliability factors.

Respectfully submitted,

Susan B Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of September, 2013.

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 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."

September 3, 2013

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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd of September, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 3rd day of September, 2013.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.