VOL. VI OF VI

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

TAVARUS LEE ROGERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

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suspects were transported to police headquarters, advised of their Miranda rights, and interrogated. Both Brown and Dunaway confessed.

The United States Supreme Court held that their confessions had to be suppressed, and were not admissible at trial, because a confession obtained through custodial interrogation after an illegal arrest had to be excluded unless intervening events broke the causal connection between the illegal arrest and the confession.

There had to be "sufficiently an act of free will to purge the primary taint." Taylor v. Alabama, 457 U.S. at 689, 102 S.Ct. at 2626, *quoting* Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 416 (1963). The state, of course, bears the burden of proving that a confession is admissible.

Here, the defense correctly argued that the jail note was the fruit of the poisonous tree. The state used information obtained from appellant's confession to McHale to then procure the arrest warrants from the Magistrate after they obtained an illegal confession. However, it is important to note that the subsequent arrest warrant was served upon appellant by PFC Rivers, the jailer who testified about finding the jail note. Appellant was never released from prison after the coroner's warrant was served on him, and the taint from that warrant and the finding of the jail note on January 22, 1999, was never purged.

Appellant's inculpatory statement was made on January 8, 1999, in Charleston to Captain McHale of the Charleston County Police Department. R. 645, l. 11 – 650, l. 5. An arrest warrant was then issued on January 10, 1999, by the Magistrate. It was served on appellant on January 10, 1999, by PFC Rivers. See arrest warrants, R. 361-372. Appellant was not indicted until February 8, 1999. R. 274-297. Thus, the state seized the jail note allegedly connected to appellant on January 22, 1999, prior to his indictment.

The judge implicitly rejected the state's position that it had probable cause to arrest appellant at the time of the illegal coroner's warrant. Respectfully, it would not be logical to conclude that the state had probable cause to arrest and continue to detain appellant absent his inculpatory statement on January 8, 1999. Consequently, the jail note was the continued "fruit of the poisonous tree," and the state failed to prove that the taint of appellant's incarceration had been purged.

The admission of the jail note was not harmless. Surely the jury had to be concerned with the suggestive procedures under which Wire and Wendel made their in-court identifications. They could not identify appellant from a photo array, and they both subsequently saw him in court in an orange jumpsuit as a defendant.

The jail note was damaging because it can readily be read as implying appellant had something to hide, or as the solicitor argued, that appellant wanted to be sure everyone "had their story straight." Appellant should be granted a new trial.

Rule 403 Analysis

In the alternative, as defense counsel argued, the admission of the note was error because its prejudicial effect substantially outweighed its probative value. It was not clear to whom the note was written. Further, it is clear from McHale's testimony that appellant also was concerned about being questioned about other crimes, and it is not clear what crime the note is speaking to. The note — as a whole — is simply to vague in context, and too damaging by speculation, to justify its admission under Rule 403, SCRE.

Since it was unclear who wrote the note — although it did appear appellant handled it — and the context of the note was unclear, its prejudicial effect substantially outweighed its probative value under Rule 403. See, also, State v. Langley, 334 S.C. 643, 515 S.E.2d

98, 100 (1999); State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). Appellant should be granted a new trial.

CONCLUSION

By reasons of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Beaufort County Court of General Sessions for a new trial.

Respectfully submitted,

_____

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

This 28th day of April, 2003.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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April 28, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tavarus Rogers, Appellant.

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Unpublished Opinion No. 2004-UP-427
Heard March 10, 2004 – Filed July 7, 2004

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for Respondent.

PER CURIAM: A jury convicted Tavarus Rogers of two counts of murder, five counts of kidnapping, one count of armed robbery, and one count of first-degree burglary. Rogers contends the trial judge erred in admitting: (1) the in-court identifications of two witnesses; and (2) a note that Rogers allegedly wrote to a co-defendant while he was incarcerated on the charges that are the subject of this appeal. We affirm.

FACTS

At approximately 12:30 a.m. on January 2, 1999, Jocelyn Elizabeth Shough Wendel, James

Mitchell Riley, and Kristal Mae Wire arrived at a party held in the home of Paul Reischl on Coffin Point Road in Beaufort County, South Carolina. A number of people were present at the party including Rogers, West McKinnon, Jonathon Gadsen, Collins Gadsen, John Byars, Paul Reischl, and Toby Reischl.

Wendel and Wire testified they only knew a couple of people at the party and were introduced to the others. Both stated Rogers introduced himself as "V." After about an hour-and-a-half to two hours, Rogers, McKinnon, and the Gadsens left the party.

Approximately an hour-and-a-half later, two men knocked on the door of Paul Reischl's home. Byars opened the door and the men entered the home wielding guns. The men attempted to conceal their identity by using some type of white cloth wrapped around their faces.

Upon entering the home, the men started hitting Byars. They then forced everyone to the floor and the first intruder began demanding money and drugs from Paul Reischl. Following these demands, he forced Reischl to a back bedroom. The second intruder, who apparently was witnessing the incident, called out to the first intruder some variation of "don't do it V," shortly after which the intruder shot Paul Reischl. The shooter then returned to the living room and confronted James Mitchell Riley. After forcing Riley to hand over his money, the intruder shot and killed him as well. Before leaving the house with the other man, the shooter told everyone in the house "you didn't see anything." After the intruders left, Wire and Wendel ran to a nearby home and called 911.

Several hours after the shooting, Wire and Wendel gave written statements to investigators. In one of her two statements, Wire recounted the incident and identified the intruders as "two black males." She, however, did not identify Rogers other than referencing the statement that was made during the incident, "V don't do it." Subsequently, investigators presented Wire with three photographic lineups. Wire was unable to identify anyone in these lineups.

Wendel also was unable to identify anyone in the three photographic lineups that were presented to her shortly after the incident. When describing the incident in her statement, Wendel noted that when the two intruders entered the home, "I recognized him 'V' as soon as he came in the door." Throughout her statement, she described the actions of "V." She also gave a physical description of "V."

On January 6, 1999, Rogers was detained on a coroner's warrant. Two days later, while incarcerated, Rogers admitted to investigating officers that he killed the two victims. On January 10 and 21, 1999, Rogers was arrested on warrants issued by a magistrate.

On February 8, 1999, a Beaufort County grand jury indicted Rogers for two counts of murder, six counts of kidnapping, one count of assault and battery with intent to kill, one count of first-degree burglary, one count of armed robbery, and one count of possession of a weapon during the commission of a violent crime.

Prior to trial, Rogers's counsel sought to suppress any in-court identifications of Rogers. Pursuant to Neal v. Biggers, 409 U.S. 188 (1972), **[1]** the judge held two in camera hearings regarding the in-court identifications of Rogers by Wire and Wendel.

During her testimony, Wire recounted the incident. She testified that she recognized the intruders because she had seen them earlier in the evening at the party. Wire identified "V" as

present in the courtroom by pointing to "the one in the orange suit." When questioned about her ability to identify "V," Wire stated she had seen the intruders earlier in the evening at the party and she recognized their voices. She further testified that the intruders' faces were not completely covered with the white cloth when they entered the home.

On cross-examination, Wire admitted that she was unable to identify anyone in the photographic lineups and she did not give a physical description of the intruders, other than their race, in her written statement. She also acknowledged that once she was ordered to the floor during the incident she never looked up. She further acknowledged that Rogers was the only African-American male in the courtroom wearing an orange detention center uniform. She also admitted that she had: seen Rogers at a bond hearing; been informed by an investigating officer that Rogers had been arrested; read newspaper articles regarding the incident; and spoken with Wendell about the incident.

Detectives Sam Roser and Matthew Averill, investigating officers, testified that they interviewed Wire after the incident and showed her the photographic lineups. Roser testified that Wire told him that she knew the intruders were African-American because their masks were partially open. She also told Roser that she identified "V" by his braided hairstyle.

At the conclusion of the testimony, Rogers's counsel argued Wire's in-court identification should be suppressed given: Wire gave no physical description of the intruders after the incident; she could not identify Rogers in the photographic lineups; she had seen Rogers at a bond hearing; and Rogers was the only African-American male in the courtroom wearing an orange detention suit. The judge denied the motion and ruled Wire's identification was admissible.

In a subsequent hearing, the judge heard testimony regarding Wendel's identification of Rogers. Wendell testified that at the time of the incident she recognized Rogers as one of the intruders because his mask fell down when he entered the home. She also knew him as the man who had introduced himself at the party. Wendell admitted that she had not been able to identify Rogers in any of the photographic lineups. During her testimony, Wendell identified Rogers by pointing to him and describing his attire as an orange jumpsuit. On cross-examination, she acknowledged that she had seen Rogers at a prior hearing and had read about the incident in the newspaper.

After the testimony concluded, Rogers's counsel moved to suppress Wendell's identification. He argued the in-court identification procedure was suggestive in that it was the equivalent of an impermissible "show-up" procedure. Additionally, he contended Wendell's identification was not reliable on the grounds: she could not identify Rogers in a photographic lineup; she had seen Rogers at prior court proceedings; she had reviewed newspaper articles regarding the incident; and she had discussed the incident with the other victims as well as her father, who had collected the newspaper articles.

The judge denied Rogers's motion to exclude Wendell's in-court identification. Aside from addressing the reliability of Wendell's identification, the judge also found Rogers could not claim undue prejudice from the identification of him in court given the fact that his counsel chose not to use an alternate procedure, i.e., placing other African-American males with similar characteristics to Rogers at the defense table or in the courtroom.

At trial, both Wendell and Wire testified regarding the incident and identified Rogers as the

man who shot the two victims. They also identified Rogers in the courtroom.

Toby Reischl testified Rogers was at the party and was introduced as "V." Although he could not positively identify the intruders, he testified that one of the intruders was referred to as "V." In addition to this testimony and the testimony of the investigating officers, the State introduced, over the objection of defense counsel, a note allegedly written by Rogers to his co-defendant McKinnon while the two were incarcerated.

The jury convicted Rogers of two counts of murder, five counts of kidnapping, one count of armed robbery, and one count of first-degree burglary. The judge sentenced Rogers to life imprisonment for each count of murder and the first-degree burglary charge, consecutive thirty-year terms for three of the kidnapping charges, **[2]** and a concurrent term of twenty-five years for armed robbery. Rogers appeals.

DISCUSSION

I.

Rogers argues the trial judge erred in admitting the in-court identifications of Wire and Wendel.

"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." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." Id.

"A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003). "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. Suggestiveness alone, however, does not require the exclusion of evidence. State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

"To determine the admissibility of an identification, the court must determine (1) whether the identification process was unduly suggestive and (2) if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Cheeseboro, 346 S.C. 526, 540, 532 S.E.2d 300, 308 (2001), cert. denied, 535 U.S. 933 (2002). Furthermore, as reliability is the most important factor in determining the admissibility of identification testimony, the key inquiry is whether under all the circumstances the identification was reliable even though the confrontation procedure may have been suggestive. State v. McCord, 349 S.C. 477, 481, 562 S.E.2d 689, 691 (Ct. App. 2002); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999).

Several factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification:

> (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.

McCord, 349 S.C. at 481, 562 S.E.2d at 691. "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.

Although there are questions and apparent inconsistencies involved in Wire's and Wendel's in-court identifications, we do not believe the trial judge abused his discretion in admitting their testimony. Specifically, the judge applied the correct standard in determining the admissibility of the testimony and there is evidence to support his decision. See State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law.).

Initially, we find the fact that neither Wire nor Wendel could identify Rogers in a photographic lineup is not dispositive of whether their identifications were admissible. See McCord, 349 S.C. at 483, 562 S.E.2d at 692 ("The fact that a witness is unable to make a positive identification from a photo array does not negate the reliability of their positive in-court identification." (quoting State v. Blanchard, 920 S.W.2d 147, 149 (Mo. Ct. App. 1996))); State v. Scipio, 283 S.C. 124, 126-27, 322 S.E.2d 15, 17 (1984) (finding in-court identification of defendant by victim was admissible even though victim failed to identify defendant in photographic lineup).

Similarly, the fact that the witnesses viewed Rogers at a bond hearing did not preclude a finding that their in-court identification was reliable. See State v. Cunningham, 275 S.C. 189, 193, 268 S.E.2d 289, 291 (1980) (holding victim's in-court identification was admissible even though victim saw the defendant at a preliminary hearing prior to the in-court identification); State v. Covington, 226 S.E.2d 629, 638 (N.C. 1976) ("[T]he viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so 'unnecessarily suggestive and conducive to irreparable mistaken misidentification' as would deprive defendant of his due process rights." (quoting State v. Haskins, 178 S.E.2d 610, 612 (N.C. 1971))).

Turning to the requisite identification factors, we find there is evidence to support the judge's conclusion. Both witnesses observed Rogers in a social setting for several hours before the incident. Wire testified that she was able to identify Rogers because she had seen him earlier and his face was not completely covered when he entered the home. Wendel also testified that she was able to immediately recognize Rogers when he returned to the home because she saw his face. Additionally, in her written statement, Wendel gave a detailed description of the incident. She also provided physical descriptions of "V" as well as the other intruder. Furthermore, given the witnesses were held at gunpoint their degree of attention would most likely have been acute. Although a significant amount of time elapsed, approximately three years, between the incident and the hearing concerning the in-court identification testimony, both witnesses were certain in their in-court identifications of Rogers.

Admittedly, Wire did not provide a description of the intruders in her written statements beyond describing them as "two black males." However, any uncertainty as to the identification testimony went to the weight of the evidence and not its admissibility. See State v. Distance,

594 S.E.2d 221, 226 (N.C. Ct. App. 2004) ("[A]ny uncertainty in an in-court identification goes to the weight and not the admissibility of the testimony."). This evidence was then for the jury to weigh. See State v. Stewart, 275 S.C. 447, 451, 272 S.E.2d 628, 630 (1980) (recognizing that jury is to weigh identification testimony that has some questionable feature).

Finally, even if the in-court identifications were erroneously admitted, particularly that of Wire, any error would not require reversal. See State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) (stating "under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable"); State v. Thompson, 276 S.C. 616, 620-21, 281 S.E.2d 216, 219 (1981) (recognizing admission of improper in-court identification may be harmless error where the evidence is merely cumulative to independent and overwhelming evidence of guilt), habeas corpus granted by Thompson v. Leeke, 590 F. Supp. 110 (D.S.C. 1984) (finding improper in-court identification did not constitute harmless error where: robbery victim was the only eyewitness; victim could not identify perpetrator on two occasions; investigating officer pointed out defendant as the man who robbed the victim; victim, at trial, was "almost positive" that defendant was the perpetrator; and the only other testimony identifying defendant was that of his accomplice and his accomplice's wife), aff'd, 756 F.2d 314 (4th Cir. 1985).

Because the in-court identification testimony was not the only evidence identifying Rogers, any error would be harmless. Here, Wire, Wendel, and Toby Reischl all testified that they believed Rogers was the intruder who shot the victim because Rogers introduced himself to them at the party as "V," and each person heard the second intruder say "Don't do it V." Wire also testified she recognized the intruders from earlier in the evening by their voices. See Stewart, 275 S.C. at 451, 272 S.E.2d at 630 (finding witnesses' voice identification of defendant was admissible as to the issue of the reliability of the in-court identification). Rogers does not challenge this evidence on appeal. Additionally, Wendel was able to identify Rogers's co-defendant by the clothing he had worn during the party. Based on the foregoing, we affirm the judge's decision to admit the identification testimony.

II.

Rogers asserts the trial judge erred in refusing to suppress the note allegedly written by him to his co-defendant while incarcerated. In support of this assertion, he contends the note was obtained pursuant to an illegal arrest. Alternatively, he argues that even if the note was not fruit of the illegal arrest, it should have been excluded as being more prejudicial than probative.

Prior to trial, Rogers's counsel moved to exclude any inculpatory statements made by Rogers while illegally detained under the coroner's warrant. Because the coroner's warrant was invalid and the State did not have probable cause to arrest Rogers at the time he confessed to shooting the victims, counsel moved to suppress the admission as "fruit of the poisonous tree." See Taylor v. Alabama, 457 U.S. 687, 690 (1982) ("[A] confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" (quoting Wong Sun v. United States, 371 U.S. 471 (1963))).

After a hearing, the trial judge granted Rogers's motion. He found that at the time the statement was made the State lacked probable cause to arrest Rogers. He further held the coroner's warrant was invalid, as conceded by the State, given it was issued without legal

authority. Because the State "failed to prove that the taint of the Fourth Amendment violation was purged," the judge suppressed all of the alleged statements as the "fruit of the poisonous tree."

Based on this earlier ruling, Rogers's counsel objected at trial to the admission of the note allegedly written by Rogers to co-defendant West McKinnon. Counsel argued the note was not relevant and even if found to be relevant, admitting it into evidence would be unfairly prejudicial. He asserted there was no indication who wrote the letter or who was the intended recipient. Additionally, counsel contended the note should be excluded as evidence obtained from Rogers's illegal detention under the coroner's warrant. He asserted that the magistrate's warrant, which was issued after the coroner's warrant, did not cure the Fourth Amendment violation because this warrant would not have been obtained but for the information illegally obtained under the coroner's warrant. The trial judge denied the motion, finding the note was admissible given it was volunteered and Rogers was not being questioned at the time it was found.

Officer Richard Rivers of the Beaufort County Detention Center was then permitted to testify that on January 22, 1999, he saw Rogers slip a magazine into an adjoining cell. The magazine was retrieved and the handwritten note was found stuck between the pages. A South Carolina Law Enforcement Division fingerprint analyst found eleven prints on the note, eight of which matched those of Rogers. Phil Foote, another Beaufort County Corrections Officer, testified that West McKinnon was in the cell in which Rogers placed the magazine.

The solicitor read the note as follows:

> "What did you tell Mrs. Wilson (the Public Defender's investigator)? She said our stories are f---ed up. I told her that after we left P sh-- you drop them" – up in brackets again – "(Cee and Bro) off at C sh-- and drop me off in Saxonville at luck sh-- about 1 a.m. or later. Then I called you that morning and you took me to Lady's Island with CAP about 7 or 8 a.m. You gotta f---ing holla at me less you done told these crackas you was there at the time of the sh--, what? We gotta have our stories "top of the line", unquote. (Flush this sh-- – rip it up first*) (*Write me back*)."

"The fruit of the poisonous tree doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality, the evidence must be excluded." State v. Plath, 277 S.C. 126, 134, 284 S.E.2d 221, 226 (1981) (citing Wong Sun v. United States, 371 U.S. 471 (1963)), overruled on other grounds by State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999), and State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). "Even if the arrest was illegal, the fruit of the poisonous tree doctrine will not apply to a confession if it is freely and voluntarily given." Id. at 134-35, 284 S.E.2d at 226.

Even assuming Rogers was illegally detained when the note was seized and that its contents constituted a confession, we find the note was not the fruit of the illegal arrest. Our decision is based on our supreme court's holding in State v. Funchess, 255 S.C. 385, 179 S.E.2d 25 (1971), cert. denied, 404 U.S. 915 (1971). In Funchess, the court directly confronted this issue, stating:

> We conclude and hold that every statement or confession made by a person in

> custody as the result of an illegal arrest, is not involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility.

Id. at 391, 179 S.E.2d at 28.

In the instant case, there is no evidence that the note was the product of questioning by law enforcement. Instead, it is clear the note was produced and passed along voluntarily. Moreover, at the time the note was written Rogers had been served with the magistrate's warrant and apparently had spoken with a public defender. Thus, there were intervening acts that broke any causal connection between the note and the illegal arrest. Accordingly, we find the trial judge was correct in concluding the note was not the fruit of the illegal arrest.

Furthermore, we disagree with Rogers's contention that the note was not relevant and was unfairly prejudicial. While Rogers argues the note is too vague to be admitted into evidence, we believe the note constitutes circumstantial evidence of Rogers's guilt and was not so prejudicial as to outweigh it probative value. See Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.").

CONCLUSION

Based on the foregoing, we affirm the admission of the in-court identifications of Rogers as well as the admission of the note written while Rogers was incarcerated.

AFFIRMED.

HUFF and STILWELL, JJ. and CURETON, AJ., concur.

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[1] Neil v. Biggers, 409 U.S. 188 (1972) (wherein the United States Supreme Court developed a two-prong inquiry to determine the admissibility of an out-of-court identification).

[2] Although the jury convicted Rogers of five counts of kidnapping, which included the two counts involving the murder victims, the judge apparently declined to sentence Rogers for the remaining kidnapping charges given he was also convicted of the murders. See State v. Perry, 278 S.C. 490, 495, 299 S.E.2d 324, 327 (1983), cert. denied, 461 U.S. 908 (1983) (holding, pursuant to section 16-3-910, life imprisonment sentence for kidnapping murder victim was precluded where defendant was sentenced to life imprisonment for murder).

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Supreme Court 2004

Court of Appeals 2004

Unpublished Opinions

THE STATE OF SOUTH CAROLINA
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v.

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Unpublished Opinion No. 2004-UP-427
Heard March 10, 2004 – Filed July 7, 2004

AFFIRMED

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney

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PER CURIAM: A jury convicted Tavarus Rogers of two counts of murder, five counts of kidnapping, one count of armed robbery, and one count of first-degree burglary. Rogers contends the trial judge erred in admitting: (1) the in-court identifications of two witnesses; and (2) a note that Rogers allegedly wrote to a co-defendant while he was incarcerated on the charges that are the subject of this appeal. We affirm.

FACTS

At approximately 12:30 a.m. on January 2, 1999, Jocelyn Elizabeth Shough Wendel, James Mitchell Riley, and Kristal Mae Wire arrived at a party held in the home of Paul Reischl on Coffin Point Road in Beaufort County, South Carolina. A number of people were present at the party including Rogers, West McKinnon, Jonathon Gadsen, Collins Gadsen, John Byars, Paul Reischl, and Toby Reischl.

Wendel and Wire testified they only knew a couple of people at the party and were introduced to the others. Both stated Rogers introduced himself as "V." After about an hour-and-a-half to two hours, Rogers, McKinnon, and the Gadsens left the party.

Approximately an hour-and-a-half later, two men knocked on the door of Paul Reischl's home. Byars opened the door and the men entered the home wielding guns. The men attempted to conceal their identity by using some type of white cloth wrapped around their faces.

Upon entering the home, the men started hitting Byars. They then forced everyone to the floor and the first intruder began demanding money and drugs from Paul Reischl. Following these demands, he forced Reischl to a back bedroom. The second intruder, who apparently was witnessing the incident, called out to the first intruder some variation of "don't do it V," shortly after which the intruder shot Paul Reischl. The shooter then returned to the living room and confronted James Mitchell Riley. After forcing Riley to hand over his money, the intruder shot and killed him as well. Before leaving the house with the other man, the shooter

told everyone in the house "you didn't see anything." After the intruders left, Wire and Wendel ran to a nearby home and called 911.

Several hours after the shooting, Wire and Wendel gave written statements to investigators. In one of her two statements, Wire recounted the incident and identified the intruders as "two black males." She, however, did not identify Rogers other than referencing the statement that was made during the incident, "V don't do it." Subsequently, investigators presented Wire with three photographic lineups. Wire was unable to identify anyone in these lineups.

Wendel also was unable to identify anyone in the three photographic lineups that were presented to her shortly after the incident. When describing the incident in her statement, Wendel noted that when the two intruders entered the home, "I recognized him 'V' as soon as he came in the door." Throughout her statement, she described the actions of "V." She also gave a physical description of "V."

On January 6, 1999, Rogers was detained on a coroner's warrant. Two days later, while incarcerated, Rogers admitted to investigating officers that he killed the two victims. On January 10 and 21, 1999, Rogers was arrested on warrants issued by a magistrate.

On February 8, 1999, a Beaufort County grand jury indicted Rogers for two counts of murder, six counts of kidnapping, one count of assault and battery with intent to kill, one count of first-degree burglary, one count of armed robbery, and one count of possession of a weapon during the commission of a violent crime.

Prior to trial, Rogers's counsel sought to suppress any in-court identifications of Rogers. Pursuant to Neal v. Biggers, 409 U.S. 188 (1972), [1] the judge held two in camera hearings regarding the in-court identifications of Rogers by Wire and Wendel.

During her testimony, Wire recounted the incident. She testified that she recognized the intruders because she had seen them earlier in the evening at the party. Wire identified "V" as present in the courtroom by pointing to "the one in the orange suit." When questioned about her ability to identify "V," Wire stated she had seen the intruders earlier in the evening at the party and she recognized their voices. She further testified that the intruders' faces were not completely covered with the white cloth when they entered the home.

On cross-examination, Wire admitted that she was unable to identify anyone in the photographic lineups and she did not give a

physical description of the intruders, other than their race, in her written statement. She also acknowledged that once she was ordered to the floor during the incident she never looked up. She further acknowledged that Rogers was the only African-American male in the courtroom wearing an orange detention center uniform. She also admitted that she had: seen Rogers at a bond hearing; been informed by an investigating officer that Rogers had been arrested; read newspaper articles regarding the incident; and spoken with Wendell about the incident.

Detectives Sam Roser and Matthew Averill, investigating officers, testified that they interviewed Wire after the incident and showed her the photographic lineups. Roser testified that Wire told him that she knew the intruders were African-American because their masks were partially open. She also told Roser that she identified "V" by his braided hairstyle.

At the conclusion of the testimony, Rogers's counsel argued Wire's in-court identification should be suppressed given: Wire gave no physical description of the intruders after the incident; she could not identify Rogers in the photographic lineups; she had seen Rogers at a bond hearing; and Rogers was the only African-American male in the courtroom wearing an orange detention suit. The judge denied the motion and ruled Wire's identification was admissible.

In a subsequent hearing, the judge heard testimony regarding Wendel's identification of Rogers. Wendell testified that at the time of the incident she recognized Rogers as one of the intruders because his mask fell down when he entered the home. She also knew him as the man who had introduced himself at the party. Wendell admitted that she had not been able to identify Rogers in any of the photographic lineups. During her testimony, Wendell identified Rogers by pointing to him and describing his attire as an orange jumpsuit. On cross-examination, she acknowledged that she had seen Rogers at a prior hearing and had read about the incident in the newspaper.

After the testimony concluded, Rogers's counsel moved to suppress Wendell's identification. He argued the in-court identification procedure was suggestive in that it was the equivalent of an impermissible "show-up" procedure. Additionally, he contended Wendell's identification was not reliable on the grounds: she could not identify Rogers in a photographic lineup; she had seen Rogers at prior court proceedings; she had reviewed newspaper articles regarding the incident; and she had discussed the incident with the other victims as well as her father, who had collected the newspaper articles.

The judge denied Rogers's motion to exclude Wendell's in-court

identification. Aside from addressing the reliability of Wendell's identification, the judge also found Rogers could not claim undue prejudice from the identification of him in court given the fact that his counsel chose not to use an alternate procedure, i.e., placing other African-American males with similar characteristics to Rogers at the defense table or in the courtroom.

At trial, both Wendell and Wire testified regarding the incident and identified Rogers as the man who shot the two victims. They also identified Rogers in the courtroom.

Toby Reischl testified Rogers was at the party and was introduced as "V." Although he could not positively identify the intruders, he testified that one of the intruders was referred to as "V." In addition to this testimony and the testimony of the investigating officers, the State introduced, over the objection of defense counsel, a note allegedly written by Rogers to his co-defendant McKinnon while the two were incarcerated.

The jury convicted Rogers of two counts of murder, five counts of kidnapping, one count of armed robbery, and one count of first-degree burglary. The judge sentenced Rogers to life imprisonment for each count of murder and the first-degree burglary charge, consecutive thirty-year terms for three of the kidnapping charges, [2] and a concurrent term of twenty-five years for armed robbery. Rogers appeals.

DISCUSSION

I.

Rogers argues the trial judge erred in admitting the in-court identifications of Wire and Wendel.

"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." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." Id.

"A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003). "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. Suggestiveness alone, however, does not require the exclusion of evidence. State

v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

"To determine the admissibility of an identification, the court must determine (1) whether the identification process was unduly suggestive and (2) if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Cheeseboro, 346 S.C. 526, 540, 532 S.E.2d 300, 308 (2001), cert. denied, 535 U.S. 933 (2002). Furthermore, as reliability is the most important factor in determining the admissibility of identification testimony, the key inquiry is whether under all the circumstances the identification was reliable even though the confrontation procedure may have been suggestive. State v. McCord, 349 S.C. 477, 481, 562 S.E.2d 689, 691 (Ct. App. 2002); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999).

Several factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification:

> (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.

McCord, 349 S.C. at 481, 562 S.E.2d at 691. "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.

Although there are questions and apparent inconsistencies involved in Wire's and Wendel's in-court identifications, we do not believe the trial judge abused his discretion in admitting their testimony. Specifically, the judge applied the correct standard in determining the admissibility of the testimony and there is evidence to support his decision. See State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law.).

Initially, we find the fact that neither Wire nor Wendel could identify Rogers in a photographic lineup is not dispositive of whether their identifications were admissible. See McCord, 349 S.C. at 483, 562 S.E.2d at 692 ("The fact that a witness is unable to make a positive identification from a photo array does not negate the reliability of their positive in-court identification." (quoting State v. Blanchard, 920 S.W.2d 147, 149 (Mo. Ct. App. 1996))); State v.

Scipio, 283 S.C. 124, 126-27, 322 S.E.2d 15, 17 (1984) (finding in-court identification of defendant by victim was admissible even though victim failed to identify defendant in photographic lineup).

Similarly, the fact that the witnesses viewed Rogers at a bond hearing did not preclude a finding that their in-court identification was reliable. See State v. Cunningham, 275 S.C. 189, 193, 268 S.E.2d 289, 291 (1980) (holding victim's in-court identification was admissible even though victim saw the defendant at a preliminary hearing prior to the in-court identification); State v. Covington, 226 S.E.2d 629, 638 (N.C. 1976) ("[T]he viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so 'unnecessarily suggestive and conducive to irreparable mistaken misidentification' as would deprive defendant of his due process rights." (quoting State v. Haskins, 178 S.E.2d 610, 612 (N.C. 1971))).

Turning to the requisite identification factors, we find there is evidence to support the judge's conclusion. Both witnesses observed Rogers in a social setting for several hours before the incident. Wire testified that she was able to identify Rogers because she had seen him earlier and his face was not completely covered when he entered the home. Wendel also testified that she was able to immediately recognize Rogers when he returned to the home because she saw his face. Additionally, in her written statement, Wendel gave a detailed description of the incident. She also provided physical descriptions of "V" as well as the other intruder. Furthermore, given the witnesses were held at gunpoint their degree of attention would most likely have been acute. Although a significant amount of time elapsed, approximately three years, between the incident and the hearing concerning the in-court identification testimony, both witnesses were certain in their in-court identifications of Rogers.

Admittedly, Wire did not provide a description of the intruders in her written statements beyond describing them as "two black males." However, any uncertainty as to the identification testimony went to the weight of the evidence and not its admissibility. See State v. Distance, 594 S.E.2d 221, 226 (N.C. Ct. App. 2004) ("[A]ny uncertainty in an in-court identification goes to the weight and not the admissibility of the testimony."). This evidence was then for the jury to weigh. See State v. Stewart, 275 S.C. 447, 451, 272 S.E.2d 628, 630 (1980) (recognizing that jury is to weigh identification testimony that has some questionable feature).

Finally, even if the in-court identifications were erroneously

admitted, particularly that of Wire, any error would not require reversal. See State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) (stating "under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable"); State v. Thompson, 276 S.C. 616, 620-21, 281 S.E.2d 216, 219 (1981) (recognizing admission of improper in-court identification may be harmless error where the evidence is merely cumulative to independent and overwhelming evidence of guilt), habeas corpus granted by Thompson v. Leeke, 590 F. Supp. 110 (D.S.C. 1984) (finding improper in-court identification did not constitute harmless error where: robbery victim was the only eyewitness; victim could not identify perpetrator on two occasions; investigating officer pointed out defendant as the man who robbed the victim; victim, at trial, was "almost positive" that defendant was the perpetrator; and the only other testimony identifying defendant was that of his accomplice and his accomplice's wife), aff'd, 756 F.2d 314 (4th Cir. 1985).

Because the in-court identification testimony was not the only evidence identifying Rogers, any error would be harmless. Here, Wire, Wendel, and Toby Reischl all testified that they believed Rogers was the intruder who shot the victim because Rogers introduced himself to them at the party as "V," and each person heard the second intruder say "Don't do it V." Wire also testified she recognized the intruders from earlier in the evening by their voices. See Stewart, 275 S.C. at 451, 272 S.E.2d at 630 (finding witnesses' voice identification of defendant was admissible as to the issue of the reliability of the in-court identification). Rogers does not challenge this evidence on appeal. Additionally, Wendel was able to identify Rogers's co-defendant by the clothing he had worn during the party. Based on the foregoing, we affirm the judge's decision to admit the identification testimony.

II.

Rogers asserts the trial judge erred in refusing to suppress the note allegedly written by him to his co-defendant while incarcerated. In support of this assertion, he contends the note was obtained pursuant to an illegal arrest. Alternatively, he argues that even if the note was not fruit of the illegal arrest, it should have been excluded as being more prejudicial than probative.

Prior to trial, Rogers's counsel moved to exclude any inculpatory statements made by Rogers while illegally detained under the coroner's warrant. Because the coroner's warrant was invalid and the State did not have probable cause to arrest Rogers at the time he confessed to shooting the victims, counsel moved to suppress the admission as "fruit of the poisonous tree." See Taylor v.

Alabama, 457 U.S. 687, 690 (1982) ("[A] confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" (quoting Wong Sun v. United States, 371 U.S. 471 (1963))).

After a hearing, the trial judge granted Rogers's motion. He found that at the time the statement was made the State lacked probable cause to arrest Rogers. He further held the coroner's warrant was invalid, as conceded by the State, given it was issued without legal authority. Because the State "failed to prove that the taint of the Fourth Amendment violation was purged," the judge suppressed all of the alleged statements as the "fruit of the poisonous tree."

Based on this earlier ruling, Rogers's counsel objected at trial to the admission of the note allegedly written by Rogers to co-defendant West McKinnon. Counsel argued the note was not relevant and even if found to be relevant, admitting it into evidence would be unfairly prejudicial. He asserted there was no indication who wrote the letter or who was the intended recipient. Additionally, counsel contended the note should be excluded as evidence obtained from Rogers's illegal detention under the coroner's warrant. He asserted that the magistrate's warrant, which was issued after the coroner's warrant, did not cure the Fourth Amendment violation because this warrant would not have been obtained but for the information illegally obtained under the coroner's warrant. The trial judge denied the motion, finding the note was admissible given it was volunteered and Rogers was not being questioned at the time it was found.

Officer Richard Rivers of the Beaufort County Detention Center was then permitted to testify that on January 22, 1999, he saw Rogers slip a magazine into an adjoining cell. The magazine was retrieved and the handwritten note was found stuck between the pages. A South Carolina Law Enforcement Division fingerprint analyst found eleven prints on the note, eight of which matched those of Rogers. Phil Foote, another Beaufort County Corrections Officer, testified that West McKinnon was in the cell in which Rogers placed the magazine.

The solicitor read the note as follows:

> "What did you tell Mrs. Wilson (the Public Defender's investigator)? She said our stories are f---ed up. I told her that after we left P sh-- you drop them" – up in brackets again – "(Cee and Bro) off at C sh-- and drop me off in Saxonville at luck sh-- about 1 a.m. or later. Then I called you that morning and you took me to Lady's Island with CAP about 7 or 8 a.m. You gotta f---

> ing holla at me less you done told these crackas you was there at the time of the sh--, what? We gotta have our stories "top of the line", unquote. (Flush this sh-- -- rip it up first*) (*Write me back*)."

"The fruit of the poisonous tree doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality, the evidence must be excluded." State v. Plath, 277 S.C. 126, 134, 284 S.E.2d 221, 226 (1981) (citing Wong Sun v. United States, 371 U.S. 471 (1963)), overruled on other grounds by State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999), and State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). "Even if the arrest was illegal, the fruit of the poisonous tree doctrine will not apply to a confession if it is freely and voluntarily given." Id. at 134-35, 284 S.E.2d at 226.

Even assuming Rogers was illegally detained when the note was seized and that its contents constituted a confession, we find the note was not the fruit of the illegal arrest. Our decision is based on our supreme court's holding in State v. Funchess, 255 S.C. 385, 179 S.E.2d 25 (1971), cert. denied, 404 U.S. 915 (1971). In Funchess, the court directly confronted this issue, stating:

> We conclude and hold that every statement or confession made by a person in custody as the result of an illegal arrest, is not involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility.

Id. at 391, 179 S.E.2d at 28.

In the instant case, there is no evidence that the note was the product of questioning by law enforcement. Instead, it is clear the note was produced and passed along voluntarily. Moreover, at the time the note was written Rogers had been served with the magistrate's warrant and apparently had spoken with a public defender. Thus, there were intervening acts that broke any causal connection between the note and the illegal arrest. Accordingly, we find the trial judge was correct in concluding the note was not the fruit of the illegal arrest.

Furthermore, we disagree with Rogers's contention that the note was not relevant and was unfairly prejudicial. While Rogers argues the note is too vague to be admitted into evidence, we believe the note constitutes circumstantial evidence of Rogers's guilt and was not so prejudicial as to outweigh it probative value.

See Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.").

CONCLUSION

Based on the foregoing, we affirm the admission of the in-court identifications of Rogers as well as the admission of the note written while Rogers was incarcerated.

AFFIRMED.

HUFF and STILWELL, JJ. and CURETON, AJ., concur.

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[1] Neil v. Biggers, 409 U.S. 188 (1972) (wherein the United States Supreme Court developed a two-prong inquiry to determine the admissibility of an out-of-court identification).

[2] Although the jury convicted Rogers of five counts of kidnapping, which included the two counts involving the murder victims, the judge apparently declined to sentence Rogers for the remaining kidnapping charges given he was also convicted of the murders. See State v. Perry, 278 S.C. 490, 495, 299 S.E.2d 324, 327 (1983), cert. denied, 461 U.S. 908 (1983) (holding, pursuant to section 16-3-910, life imprisonment sentence for kidnapping murder victim was precluded where defendant was sentenced to life imprisonment for murder).