STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

RECEIVED

JAN 06 2014

SC Court of Appeals

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JEROME SHIPPY,

APPELLANT

Appellate Case No. 2011-197607

BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 5

ARGUMENT

I. Did the trial court err in admitting Rita Chapman's in-court identification of Shippy? 8

II. Did the state's action of showing a photo of Shippy to Chapman immediately before trial constitute an "identification procedure"? 11

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967) 4

Manson v. Braithwaite, 432 U.S. 98 (1977) 8

Neil v. Biggers, 409 U.S. 188 (1972) 8, 9, 10, 11

People v. Herner, 607 N.Y.S.2d 822 (N.Y. App. Div. 1994) 13

People v. Taylor, 516 N.E.2d 649 (Ill. App. Ct. 1987) 13

Perry v. New Hampshire, 132 S.Ct. 716 (2012) 11

Simmons v. United States, 390 U.S. 377 (1968) 9, 13

State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002) 12

State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 153 S.E. 537 (1929) 12

State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 1967) 8

State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) 12

Stovall v. Denno, 388 U.S. 293 (1967) 8

Statutes

S.C. Code Ann. § 1-1-110 (2005) 12

S.C. Const. art. V, § 24 12

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in admitting Rita Chapman's in-court identification of Shippy?

II. Did the state's action of showing a photo of Shippy to Chapman immediately before trial constitute an "identification procedure"?

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant during its June 2010 term. The indictments charged him with malicious injury to personal property, third or greater offense and grand larceny, third or greater offense. R. 8 lines 3-11; R. 317. The state represented by Zach Ellis called the case to trial before the Honorable Roger L. Couch on August 9, 2011. Matthew Shealy represented Appellant. R. 1.

The jury returned its verdict finding Appellant not guilty of grand larceny. R. 304 lines 20-25. However, the jury found Appellant guilty of malicious injury to personal property. R. 305 lines 1-4. Judge Couch then sentenced Appellant to ten years imprisonment, which he suspended to six years imprisonment with probation for four years. R. 314 lines 12-20.

Appellant filed a timely notice of appeal. On January 9, 2012, undersigned counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) raising the following issue: The trial court erred in admitting a witness' in-court identification of Appellant because the witness' ability to identify Appellant was tainted by her exposure to an illegally seized shirt on the day of the incident by police officers and a photograph of Appellant in the prosecutor's file immediately prior to trial. By order filed on September 5, 2013, this Court denied counsel's motion to be relieved and directed the parties to brief the following issues: "Did the trial court err in admitting Rita Chapman's in-court identification of Shippy? In addition to issues regarding suggestiveness and reliability, the parties should address whether the state's action of showing a photo of Shippy to Chapman immediately before trial constituted an 'identification procedure'?" Pursuant to this Court's order, this brief follows.

STATEMENT OF FACTS

Prior to the start of trial, Appellant moved to suppress a prosecution witness' in-court identification of him. R. 33 line 23 – R. 34 line 3. In response to Appellant's motion, the prosecutor advised the court that he had shown the witness pictures and that witness informed him that "she may be able to recognize" the individual, but she was not sure. R. 38 lines 2-5. The witness informed the prosecutor that after seeing Appellant in the courtroom, she was prepared to identify him as the man she saw damaging the air conditioner. R. 38 lines 7-11. Additionally, the prosecutor informed the trial judge that police officers seized a shirt from Appellant's residence matching the description of the shirt provided by the witness. On the day of the incident, this shirt was shown to the witness by officers and the witness identified it as the shirt worn by the perpetrator. R. 35, lines 25; R. 37 lines 22-24; R. 39 lines 17-25. The trial judge ruled the shirt was seized illegally and excluded it from the case. R. 37 lines 19-20. Appellant argued that the witness' identification was tainted by her viewing of the shirt on the day of the incident and the photographs on the day of trial. R. 37 lines 21-25; R. 38 lines 12-25; R. 41 lines 2-5; R. 41 lines 23-25.

The judge required a hearing on the matter. R. 42 lines 1-5. The state called Rita Chapman to the stand. R. 42 line 7. Chapman testified that she returned to her job at an apartment complex after her lunch break on April 21, 2010. She observed an individual at an air conditioning unit of a yellow house across from her parking space. She watched him for several minutes. The individual then stood up and looked at her. Chapman proceeded into the office and contacted the authorities. R. 43 lines 14-22. She estimated that she was fifty yards from the individual at the time she observed him, R. 43 lines 23-

25, and she testified she had an unobstructed view, R. 44 lines 1-3. She described the individual she saw as a black male in an orange shirt. R. 44 lines 4-6. Chapman testified she looked at the individual for only a few seconds when he turned to face her. R. 44 lines 23-25. She then identified Appellant as the individual she saw beside the air conditioning unit. R. 45 line 25 – R. 46 line 2. When asked by the prosecutor if she were sure, she responded that she was one hundred percent certain. R. 46 lines 3-4; R. 56 lines 2-4.

On cross-examination, Chapman revealed that the prosecutor had shown her at least one photograph of Appellant while the two were preparing for trial. R. 47 lines 15-17. On re-direct, the prosecutor asked Chapman if the only reason she knew that Appellant was the man she saw damaging an air conditioning unit was based upon knowing that the shirt she identified on the day of the incident had been connected to Appellant. R. 52 lines 12-23. Chapman responded it was. R. 52 line 23. When asked if she recognized the Appellant, she responded she did. R. 52 line 24 – R. 53 line 1. The prosecutor then asked if the shirt was the reason she was identifying Appellant or if she "recognize[d] him on his own." R. 54 lines 4-7. Chapman responded she recognized him on his own and the shirt was not the basis for her identification. R. 54 lines 8-11.

At the conclusion of the hearing, Appellant argued Chapman's identification was tainted by the police officers showing her the shirt seized from Appellant's residence on the day of the incident. R. 74 line 23 – R. 75 line 1; R. 75 lines 14-19. Ultimately, the trial judge ruled the identification was admissible. R. 78 lines 14-25.

In front of the jury, the prosecution called Chapman as its first witness. R. 100 line 1. Chapman described the events as she had in the pre-trial hearing. R. 102 line 21 –

R. 103 line 8. Over Appellant's objection, Chapman then identified Appellant as the individual she observed beside the air conditioning unit. R. 106 line 12 – R. 107 line 9.

ARGUMENT

I. The trial court erred in admitting Rita Chapman's in-court identification of Appellant.

A defendant may be deprived of his due process rights through an identification procedure that is unnecessarily suggestive and encourages irreparable mistaken identification. State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 1967)(citing Stovall v. Denno, 388 U.S. 293 (1967)). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification." Id. at 502-03, 589 S.E.2d at 784.

In Neil v. Biggers, 409 U.S. 188, 198 (1972), the United States Supreme Court articulated a set of factors by which a trial court judge should evaluate both out-of-court identifications and their subsequent use by a witness in court. Those factors include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Id. at 199. The Court stated that the trial court judge should look at the totality of the circumstances when evaluating the likelihood of misidentification. Id. at 196. "Reliability is the linchpin in determining admissibility of identification testimony" and the Biggers factors must be weighed against the "corrupting effect of the suggestive identification itself." Manson v. Braithwaite, 432 U.S. 98, 114 (1977).

The United States Supreme Court recognized that single photographic lineups are inherently suggestion. Simmons v. United States, 390 U.S. 377, 383 (1968). The Court explained that after a suggestive lineup, such as using a single photograph, "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." Id. at 383-384.

Here, the prosecutor showing Chapman the single photograph of Appellant immediately prior to trial was unduly suggestive as it is a single photograph line-up conducted by a governmental agent.[1] Therefore, an analysis of the Biggers factors is required. The first factor to consider is Chapman's opportunity to observe the perpetrator at the time of the crime. Chapman testified that she observed the individual for several minutes, but that she saw his face for only a few seconds. Although her view was not obstructed, she was approximately half of a football field away. As a result, her opportunity to view the individual at the time of the crime was not significant. The witness did not testify concerning her degree of attention to the perpetrator rendering an analysis of the second factor nearly impossible. Chapman's description of the individual at the time of the crime was extremely vague. She described the person as a black male in an orange shirt with black stripes. She provided no additional details and saw nothing distinguishing about the individual. Thus, the third factor – the accuracy of the witness' description – weighs in favor of excluding the identification. Regarding the fourth factor, Chapman claimed in her testimony that she was one hundred percent certain that

---

[1] Appellant further addressed whether the prosecutor's showing a photograph of Appellant to the witness immediately before trial was an identification procedure in Issue II, infra.

Appellant was the perpetrator. However, prior to trial and the solicitor showing her a picture of the accused, she had been unable to identify the perpetrator with any degree of certainty. Finally, the temporal factor weighs in favor of excluding the identification as well. The crime occurred on April 21, 2010, and Appellant's trial began over a year later on August 9, 2011. For well over a year, Chapman had been unable to identify the individual and unable to provide a more specific description. Yet, on the day of trial, she suddenly identified Appellant as the perpetrator. An analysis of the Biggers factors does not overcome the inherently suggestive one-photograph identification employed by the prosecutor in this matter. Therefore, the trial court erred in failing to exclude Chapman's identification of Appellant.

II. The state's action of showing a photo of Shippy to Chapman immediately before trial constituted an "identification procedure."

Although many cases refer to suggestive behavior by police during identification procedures, the United States Supreme Court has made clear it is not a requirement that the police or law enforcement be involved in the identification procedure. Rather, what triggers the analysis of Biggers is state action. Recently, the United States Supreme Court explained its decisions concerning suggestive identification procedures "turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array." Perry v. New Hampshire, 132 S.Ct. 716, 721 (2012)(emphasis added). The Perry decision clarified that eyewitness identification procedures so infected with suggestiveness by state actors violates due process so as to require the exclusion of the identification. The due process check was not linked to "suspicion of eyewitness testimony generally," but only to the improper arrangement by the state of circumstances surrounding a witness's identification. Id. at 726. According to the Court, "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Id. at 728 (emphasis added).

The act of a prosecutor showing a photograph to a witness prior to trial to determine if the witness could identify the perpetrator clearly falls within the ambit of state conduct and of an identification procedure. Showing the witness a photograph of Appellant could serve no purpose other than to cue the witness to identify Appellant as the alleged perpetrator. Appellant is unaware of any South Carolina case considering whether the

participation of the prosecutor in an identification procedure invokes the protections of due process, an examination of the role of the prosecutor in South Carolina and case law in other jurisdictions supports the conclusion that due process guards against unnecessarily suggestive procedures used during the identification process by prosecutors, who are part of the law enforcement arm of South Carolina. Although "the only reference to solicitors in the constitution is in the article creating the judicial department," this section provided that the General Assembly shall provide by law for their duties. State v. Langford, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012); see S.C. Const. art. V, § 24. "Section 1-1-110 of the South Carolina Code (2005) squarely place[d] solicitors in the executive branch." Langford, 400 S.C. at 434, 735 S.E.2d at 478. In fact, the Attorney General is the "chief law officer of the State." In this role, the Attorney General

> may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require, and may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights.

State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002)(quoting State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 68, 153 S.E. 537, 560 (1929)).

New York's Supreme Court Appellate Division warned prosecutors against using photographs of a defendant to refresh the recollections of witnesses prior to trial testimony. The New York court determined that the prosecutor's act of merely showing the testifying witness the lineup and asking the witness if she remembered the line and which number she had selected was not a suggestive identification procedure because the procedure did not require the witness to identify the defendant. However, the New York court explained that if a prosecutor used photographs of a defendant to refresh recollections during trial

preparation, the prosecutor "should inform the trial court immediately ... so that the court may, if it deems necessary, hold a hearing to determine whether the viewing was suggestive and may taint the witness' in-court identification of defendant." People v. Herner, 607 N.Y.S.2d 822 (N.Y. App. Div. 1994). According to the Illinois Appellate Court,

> [t]he danger of misidentification of the defendant is tremendously increased where his picture has been pointed out to the victim as the robber by the prosecutor immediately before the victim's in-court identification of the defendant. The witness inherently retains in his memory when he testifies the image of the photograph, thus reducing the trustworthiness of the witness' courtroom identification.

People v. Taylor, 516 N.E.2d 649, 657 (Ill. App. Ct. 1987).

Without question, the prosecutor is a state actor. Without question, the prosecutor represents the executive branch of state government – the branch charged with enforcement of the laws. Without question, the prosecutor in the instant matter was acting on behalf of the state when he showed a single photograph of Appellant to the only eyewitness in the case. Without question, the prosecutor's act of showing the single photograph to the only eyewitness was to engage in an identification procedure with the witness. The prosecutor's act of showing the photograph of Appellant to Rita Chapman prior to her testimony was a prior out-of-court identification procedure invoking the protections of the Due Process Clause. In light of the prosecutor showing Chapman a single photograph of Appellant, the procedure used was unduly suggestive. See Simmons, 390 U.S. at 383. Therefore, the trial court, and this Court, was required to evaluate the reliability factors to determine if the unduly suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification as explained in Issue I, supra.

CONCLUSION

Appellant respectfully asks this Court to reverse his conviction and sentence and remand the matter for a new trial.

Respectfully submitted,

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of January, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

RECEIVED
JAN 06 2014
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JEROME SHIPPY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Christopher Jerome Shippy, #222423, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 6th day of January, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of January, 2014.

______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .