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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LATRONE TERRELL BUTLER,

APPELLANT

APPELLATE CASE # 2014-000189

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to suppress the in court identification when it was based on a suggestive out of court identification procedure that was inherently unreliable and conducive to irreparable mistaken identification?

2. Did the trial judge err in refusing to charge the jury with lesser included offenses of assault and battery of a high and aggravated nature and assault and battery first, second and third degrees?

STATEMENT OF THE CASE

In June of 2012, the Charleston County Grand Jury indicted Butler for carjacking, attempted murder and kidnapping, indictments #2012-GS-10-3303, 3304, 3305. On January 15, 2014, Butler proceeded to jury trial before the Honorable Roger M. Young, Senior. Mary Ford and Shirene Hansotia represented Butler at trial. Jennifer Kneece Shealy and Andrew Evans prosecuted the case. The jury returned verdicts of guilty. Judge Young sentenced Butler to twenty (20) years for carjacking, thirty (30) years consecutive for attempted murder and thirty (30) years consecutive for kidnapping. A timely notice of intent to appeal was served on January 24, 2014. This appeal follows.

STATEMENT OF FACTS

On the evening of December 5, 2011, Letty Martin knocked on the front door of Penny Jo Mizell's home on Highway 165 in Ravenel and asked Mizell to call the police because she had been carjacked. (R. 115, lines 4 – 18). Martin told Mizzell that as she was getting in her car at her home somebody approached her from behind, put something in her ribs and forced her into the car. (R. 116, lines 8-24). Martin lived in the Jericho mobile home park in Ravenel. (R. 55, lines 1-11). The address listed on the arrest warrant is 7146, Lot #XX[1] Savannah Highway. (Arrest warrant, R. p. 318). Martin, over objection, identified Appellant as the person who committed the carjacking. (R. 82, lines 7-19). Martin testified that Appellant drove down an unpaved road, stopped the car, pulled her out of the car and tried to break her neck. (R. 67, line 20 – p. 68, 69, lines 1-13). Martin testified that Appellant jumped in the car and drove off when another car approached. (R. 70, lines 3-5). Martin then walked to the Mizell house and knocked on the door. (R. 70, lines 13-22). Mizell called 911. (R. 70, lines 23-25).

Investigators with the Charleston County Sheriff's Department placed Appellant in a photo line-up based on a Crime Stoppers tip. (R. 129, line 13 – p. 130, lines 1-25). After viewing the line-up, Martin indicated that Appellant looked most like the carjacker. (R. 157, lines 22-24; p. 102, lines 19-20). Based on the identification, Investigator Perkins obtained an arrest warrant for Appellant. (R. 132, lines 14-20).

On December 8, 2011, Appellant was arrested at Hamm Grant's Club in the Hollywood/Ravenel area. (R. 133, lines 4-17). Martin's car was found parked at the club. (R. 161, line 15 – p. 162, lines 1-25). Police found the key to Martin's car in Appellant's

[1] The lot # was redacted although the street address of the mobile home park remains.

sock. (R. 168, lines 12-18). Inside Martin's car police found Appellant's wallet. (R. 193 – 196). The wallet contained Appellant's South Carolina beginner's driving permit with the address listed as 7146 Savannah Highway Lot Y. (R. 194, lines 20 – 24). The address of the Jericho mobile home park where Martin lived is 7146 Savannah Highway. The wallet also contained pay stubs from the Harvest Moon Low Country Grill. (R. 195, line 16 – p. 196, lines 1-2). Martin admitted that at some point in time when she was living at the Jericho mobile home park that she gave a black man a ride to work at the Harvest Grill. (R. 97, line 16 – p. 98, lines 1-12).

The police also found a blue jacket and a pair of jeans with blood matching the Appellant's DNA inside Martin's car. (R. 189, lines 7-13; p. 191, line 13 – p. 192, lines 1-13; p. 234 – 235, lines 1-13). Analysis of a swab from the steering wheel of Martin's car revealed a DNA profile of at least two people, Appellant being a major contributor and Martin being excluded as a contributor. (R. 237, lines 1-10). Some fingerprints found on the car matched Appellant but other fingerprints were unidentifiable and did not match Appellant. (R. 215, line 8- p. 216, lines 1-19). Martin's prints were not compared. (R. 218, lines 4-24).

ARGUMENT

1. The trial judge erred in refusing to suppress the in court identification when it was based on a suggestive out of court identification procedure that was inherently unreliable and conducive to irreparable mistaken identification.

Prior to trial the Judge held an identification hearing pursuant to Neil v. Biggers[2]. (R. 9-44). Letty Martin testified that on December 5, 2011, she was the victim of a carjacking, attempted murder and kidnapping. (R. 8, lines 16-20). She described the person who committed the crimes as a black male, five feet ten inches to six feet tall weighing about 180 pounds. (R. 9, lines 5-6). She thought the person was in his 20's, wearing a dark jacket and jeans. (R. 14, lines12 – p. 15, lines 1-25). Martin testified that she saw the man earlier that same morning knocking on her neighbor's door but to her knowledge she had not seen him prior to that day. (R. 16, line16 – p. 17, lines 1-10). Martin testified that she did not see any identifying marks on the man. (R. 15, lines 15-17).

Detective Christina Smith with the Charleston County Sheriff's Office testified that on December 7, 2011, she showed Martin a six person photo line-up. (R. 27, line 15 – p. 28, 29, lines 1-18; State's Exhibit #15, R. p. 317). Martin identified Appellant from the photo line up. (State's exhibit #15, R. p. 317). On the report Martin wrote, "He looks most like the person that carjacked me and tried to kill me." (State's Exhibit #14, R. p. 316).

Appellant testified at the pretrial hearing that he had about seventeen tattoos. (R. 37, lines 2-6). Appellant testified that he had tattoos on the top part of his hands, his neck and his arms. (R. 37, line 7 – p. 38, 39 lines 1-3). Martin testified that the carjacker was not wearing gloves. (R. 15, lines 12-14).

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[2] 409 U.S. 188, 93 S.Ct. 375 (1972).

At the close of the pre-trial identification hearing, Appellant argued that the line-up itself was suggestive because Appellant's photo was highlighted and was last in the line-up. (R. 40, line 19 – p. 41, lines 1-5). The prosecution replied, "Your Honor, I think that obviously there is nothing suggestive about the line-up except Mr. Butler is lighter and perhaps grabs the attention more greatly." (R. 42, lines 13-16). The judge found the identification procedure was not suggestive. The judge stated:

> Well, I find there is nothing suggestive at all about the process, much less unduly suggestive. It's a textbook procedure outlined. Went over the questions with her with a disinterested person, someone who is not involved in the investigation at all so she wouldn't have any way of tipping the victim of looking at any particular one of the photos. And as far as the argument that his picture has more of a highlight or a glare, I mean, I just don't see it. All of these gentlemen have a little bit of a glare to their picture. I mean it's a flash, is what we're talking about, and I don't see where that draws any attention to the defendant's picture over any of the others such that it would make it an unduly suggestive process.

(R. 43, line 15 – p. 44, lines 1-4).

During trial Appellant objected to admission of State's Exhibit #14, the photographic line-up report, based on the previous hearing and motion on identification. (R. 77, lines 21-25). The judge overruled the objection. (R. 78, lines 1-2). Appellant also objected to Martin's in court identification. (R. 81, line 5 – p. 82, lines 1-12). The judge overruled the objection. (R. 82, lines 13-14). The judge erred in refusing to find the out of court identification procedure suggestive and in failing to suppress any in court identification.

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). 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. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*

In State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (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. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

The judge abused his discretion in refusing to find the photo line up highlighting

the photograph of Appellant unduly suggestive. The State admitted that Appellant's photo in the six person photo lineup ". . . is lighter and perhaps grabs the attention more greatly." The trial judge should have found that the photo lineup shown to Martin was unduly suggestive.

Once the suggestive prong was met, the judge should have determined, based on the totality of the circumstances, that the out-of-court identification was unreliable and a substantial likelihood of misidentification existed. As to the Biggers factors, during the pre-trial identification hearing Appellant argued that Martin "stated multiple times that she was too scared to look at the man. Many of the times she didn't get to look at them" (R. 41, lines 11-14). Appellant also argued that Martin's prior description was "a very, very generic description, black male, in his 20's, about five-eleven." (R. 41, lines 14-15). Appellant notes that the prior description does not include skin tone and there is no mention of tattoos. (R. 41, lines 17-25). Martin was not certain of her identification of Appellant and instead stated that he looked most like the carjacker. Based on the totality of the circumstances surrounding the suggestive show up identification procedure, there is a substantial likelihood that appellant was irreparably misidentified and the identification is unreliable as a matter of law.

2. The trial judge erred in refusing to charge the jury with lesser included offenses of assault and battery of a high and aggravated nature, assault and battery first, second and third degree.

During the charge conference Appellant requested lesser included offenses. (R. 253, lines 24-25). Later the judge asked, "While she's doing that, let's talk about lesser included. She wants ABHAN and all the A and B charges. What is the evidence that entitles you to those charges, entitles your client to those charges?" (R. 257, lines 22-25). Appellant argued that the jury could find that there was no intent to kill. (R. 258, lines 1-16). Appellant also argued that the lesser included offenses would be appropriate based on the degree of bodily injury. (R. 259, lines 18-25). The trial judge disagreed stating, "You would be entitled to those charges if there was some way to construe the evidence as fitting all those elements without intent to ill, but there is no way to view this evidence, as I see it, other than with an intent to kill because he did it until she passed out and then he started to do it again and then another car came along. A car came along and spooked him and he dropped he and ran off. I don't know how you construe that as other than an intent to kill, and I've thought about it." (R. 260, lines 1-10). The judge erred in refusing to charge the lesser included offenses of assault and battery of a high and aggravated nature, assault and battery in the first, second and third degrees.

S.C. Code Ann. § **16-3-600(B)** provides:

> (1)A person commits the offense of **assault and battery of a high and aggravated** nature if the person unlawfully injures another person, and:
>
> (a) great bodily injury to another person results; or
> (b) the act is accomplished by means likely to produce death or great bodily injury.
>
> (2) A person who violates this subsection is guilty of a felony, and, upon conviction, must be imprisoned for not more than twenty years.

(3) Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder, as defined in Section 16-3-29. (emphasis added).

S.C. Code **§16-3-600(C)** provides:

(1) A person commits the offense of **assault and battery in the first degree** if the person unlawfully:

(a) injures another person, and the act:

(i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or

(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or

(b) offers or attempts to injure another person with the present ability to do so, and the act:

(i) is accomplished by means likely to produce death or great bodily injury; or

(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft. (emphasis added).

(2) A person who violates this subsection is guilty of a felony, and, upon conviction, must be imprisoned for not more than ten years.

(3) Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

S.C. Code Ann. **§ 16-3-600(D)** provides:

(1) A person commits the offense of **assault and battery in the second degree** if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:

(a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or
(b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

(2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than two thousand five hundred dollars, or imprisoned for not more than three years, or both.

(3) Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.(emphasis added).

S.C. Code Ann. **§16-3-600(E)** provides:

(1) A person commits the offense of **assault and battery in the third degree** if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so.

(2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than five hundred dollars, or imprisoned for not more than thirty days, or both.

(3) Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, as defined in subsection (D)(1), assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

See State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014), reh'g denied (Apr. 2, 2014).

At trial Martin testified, "He stopped the car and got out and came around and took my arm and pulled me out of the car, walked me to the trunk, to the back of the car, told me to put my purse on the trunk, and then he put his hand on my forehead and one on my chin and started jerking my head." (R. 68, lines 3-7). Martin further testified that she remembered his arm across her neck and the next thing she knew she woke up on the ground. (R. 69, lines 5-9). Martin then testified that, "He jerked me up off the ground and started trying to break my neck again." (R. 69, lines 11-12).

In describing the assault Martin never testified that Appellant threatened her with a weapon. Martin stated that she suffered whiplash. (R. 68, lines 20-25; p. 76, lines 12-14). Martin testified that she had abrasions, bruises and was pretty sore. (R. 74-76). Emergency medical services came to the Mizell house on the evening of the incident and checked Martin but she did not go to the hospital. (R. 75, lines 24, p. 76, lines 1-8).

There is evidence in the record from which the jury could have concluded that Appellant was guilty of only the lesser included offenses of assault and battery of a high and aggravated nature, assault and battery first second or even third degree. The jury could have determined that Appellant did not intend to kill Martin. The jury could have determined that Martin was injured during the commission of a robbery or theft, evidence of assault and battery first degree. The jury could have determined that Martin's injury was great, evidence of assault and battery of a high and aggravated nature. The jury could have determined that Martin's injury was moderate or simple, evidence of assault and battery second or third degree.

In State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) the South Carolina Supreme Court wrote, "The law to be charged to the jury is determined by the evidence presented at trial. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991). Conversely, a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. Id. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989)."

The refusal to charge the lesser included offenses is not harmless. If there is evidence in the record from which the jury could infer the defendant is guilty of the lesser-included offense, rather than the crime charged, the trial judge must instruct the jury on the lesser-included offense. Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812,

815 (2005) ("[A] judge is required to charge a jury on a lesser-included offense 'if there is any evidence from which it could be inferred the lesser, *rather than the greater,* offense was committed.' " (quoting State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996))).

In State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014), reh'g denied (Apr. 2, 2014), the South Carolina Supreme Court wrote:

> When considering whether an error with respect to a jury instruction was harmless, we must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998) (citation omitted). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. Thus, whether or not the error was harmless is a fact-intensive inquiry. State v. Jefferies, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.") (citation omitted).

In State v. Gilmore, 396 S.C. 72, 76-77, 719 S.E.2d 688, 690-91 (Ct. App. 2011) the South Carolina Court of Appeals wrote:

> In criminal cases, we review the decisions of the trial court only for errors of law. State v. Gibson, 390 S.C. 347, 353, 701 S.E.2d 766, 769 (Ct.App.2010). Therefore, in the context of a trial court's decision not to charge a requested lesser-included offense, we review the trial court's decision de novo. We must reverse and remand for a new trial if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged.

Pursuant to either analysis, the error is not harmless. Pursuant to Middleton, based on the evidence presented at trial, the error in failing to charge the lesser included offenses contributed to the verdict. Based on Gilmore, the evidence in the record is such that the jury could have found Appellant guilty of the lesser offenses instead of the crime

charged. The judge error in refusing to instruct the jury with the lesser included offenses requires reversal.

CONCLUSION

Based on the argument presented in issue one, the convictions and sentences should be reversed and the case remanded for a new trial. Based on the argument presented is issue two, the attempted murder conviction should be reversed and the case remanded for a new trial on that charge.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of March, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 3, 2015

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of March, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of March, 2015.

Burley Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2014.