

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 15 2015

SC Court of Appeals

Appeal from Jasper County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENNIS WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2014-002005

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to instruct the jury in regard to identification testimony as requested by Appellant?

STATEMENT OF THE CASE

In September of 2013, the Jasper County Grand Jury indicted Williams for burglary first degree, indictment #2013-GS-27-390. On September 8, 2014, Williams proceeded to jury trial before the Honorable Carmen T. Mullen. Stephen T. Plexico represented Williams at trial. M. Alexander Toporek and Price Sumner prosecuted the case. The jury found Williams guilty as charged. Judge Mullen sentenced Williams to twenty (20) years. A timely notice of intent to appeal was served on September 17, 2014. This appeal follows.

ARGUMENT

The trial judge erred in refusing to instruct the jury in regard to identification testimony as requested by Appellant.

On August 6, 2013, at approximately 2:30 AM, Johnnie Mae Dopson awoke and found a man in her bedroom. (R. pp. 112-114). Ms. Dopson testified that the man said, "I don't want to hurt you; I just want to get out of here." (R. p. 114, lines 10-11). The man ran out the front door, triggering the home security system. (R. p. 114, line 22 – p. 115, lines 1-6). Officer Kevin Smith was dispatched to Ms. Dopson's house in regard to a burglary in progress. (R. p. 139, lines 1-10). Ms. Dopson described the man she saw in her bedroom as a slender black male in his early twenties wearing black gloves and dressed all in black. (R. p. 140, lines 22-25). Ms. Dopson told Officer Smith that her purse was missing. (R. p. 141, lines 18-24). Officers recovered the purse on Highway 17. (R. p. 142, lines 1-16).

Officers investigated and determined that the man entered the house through a bathroom window. (R. p. 141, lines 4-10). Officer Smith walked to the back of the house to look at the bathroom window from the outside when he saw that, as a part of the home security system, there was a video camera on the corner of the house. (R. p. 141, lines 10-16). Officer Smith was able to obtain a video captured by the security camera. The video was admitted in evidence and played for the jury. (R. pp. 143-145).

Officer Smith testified that the video captured a man walking right up to the camera as well as manipulating the bathroom window. (R. p. 147, lines 2-13). Ms. Dopson testified that she watched the video the officer obtained from the security camera and identified the man seen in the video as the man she saw in her bedroom. (R. p. 122,

lines 2-12). At trial Ms. Dopson, without objection, identified Williams as the man she saw in her bedroom. (R. p. 122, lines 13-16).

Sergeant Chris McIntosh with the Ridgeland Police Department viewed the video from Ms. Dopson's house. (R. p. 154, lines 2-19). Sergeant McIntosh described the man seen in the video as a black male in his early to mid twenties with braids pulled back and lots of tattoos on both forearms. (R. p. 154, lines 20-24). On August 9, 2013, as Investigator McIntosh returned to Ms. Dopson's house for further investigation, he observed a man, driving a van, who he believed to be the man seen on the video. (R. pp. 158-161). Williams was stopped and arrested. At trial Sergeant McIntosh, without objection, identified Williams as the man he saw in the video. (R. p. 162, line 22 – p. 163, line 1).

During a charge conference Williams specifically requested a Telfaire charge. (R. pp. 184-186). After a short break to review United States v. Telfaire, 469 F.2d 552 (D.C.Cir. 1972), the judge ruled, "Mr. Plexico, in reference to the Telfaire Charge, I'd like to hear from you, too, what I have in my identification charge. And in our Bench Book, we've already used most of the Telfaire Charge in it, so it's there. So, I am not going to charge exactly what you gave me, but mine is [sic] more than adequately covers, so." (R. p. 187, lines 17-23). After reading the judge's proposed charge, Williams again objected arguing that the judge's charge did not adequately cover a one person identification. (R. p. 188, line 24 – p. 189, lines 1-5; p. 189, lines 8-12). The judge then stated, "You keep going on a one- person identification case, but you keep forgetting that it was on video. And again, that's the difference, again." (R. p. 189, lines 13-15). Williams argued that it was still a one person identification because you can not tell who

is seen in the video. (R. p. 189, lines 16-20). The judge declined to charge the requested Telfaire charge. The requested charge was marked as Court's Exhibit #2 – Defendant's Request to Charge Number 3. (R. p. 190, lines 1-23; R. p. 255). Williams again objected to the judge refusing to charge Telfaire as requested. (R. p. 192, lines 9-12; p. 193, lines 8-11).

The judge charged the jury with the law on identification testimony. The judge instructed the jury:

Now, ladies and gentlemen, at issue in this case is the identification of the defendant as the person who committed the crime charged. Now, the State has the burden of proving identity beyond a reasonable doubt. You, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant. If you are not convinced beyond a reasonable doubt the defendant was the person who committed the crime, you must find the defendant not guilty.

Ladies and gentlemen, the identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. Its value depends on the capacity and opportunity the witness had to observe the offender at the time of the offense, and to make a reliable identification later.

Ladies and gentlemen, you must consider the believability of an identification witness in the same way as any other witness. You may consider whether the witness had adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time is available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.

Ladies and gentlemen, once again, I instruct you, the burden of proof is on the State, and extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime. If, after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

(R. p. 222, line 5 – p. 223, lines 1-14).

Williams objected to the identification charge as given, specifically asking the judge to charge parts 2 -6 of the requested charge. (R. p. 228, line 19 – p. 229, lines 1-2). The judge again refused to charge on identification as requested by Williams, finding her charge complied with Telfaire. (R. p. 229, lines 3-11). The trial judge erred.

In State v. Green, Op. No. 2012-212739, 2015 WL 1044121, at *5 (S.C. Ct. App. Filed Mar. 11, 2015), reh'g denied (Apr. 21, 2015), this Court wrote:

“An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion.” State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 421–22 (2011) (internal quotation marks omitted). “To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *Id.* at 270, 721 S.E.2d at 422 (internal quotation marks omitted). “A jury charge which is substantially correct and covers the law does not require reversal.” State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). “[T]he trial court is required to charge only the current and correct law of South Carolina.” *Id.* (alteration in original) (internal quotation marks omitted).

In State v. Motes, the defendant argued the trial court erred in refusing to give a “Telfaire” instruction, which was designed to “focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification.” 264 S.C. 317, 326, 215 S.E.2d 190, 194 (1975). Our supreme court found no prejudice in refusing the requested instruction because the trial court instructed the jury that it must find the testimony identified the defendant as the offender beyond a reasonable doubt. *Id.* The court also noted identification in the case presented no “peculiar problem” because two witnesses, one of whom was the defendant's wife and another who “had ample opportunity” to observe the defendant, both identified him as the perpetrator. *Id.* at 326–27, 215 S.E.2d at 194.

(footnote #3 omitted).

In Green this Court found that the “standard identification charge” was adequate. This Court found no error in the judge refusing to further instruct the jury on identification as requested by the defendant. The present case is distinguished from both Green and Motes. In Green a detective recognized the defendant from a surveillance

video and then placed the defendant photo in a six person photo line up. When the detective showed the six person photo line up to the robbery victim, the victim identified the defendant as the robber. In Motes the defendant was identified as the shooter by both the operator of the pool hall where the shooting took place and by the defendant's wife.

In the present case Ms. Dopson identified Williams **after** viewing the security video¹. As requested, the judge should have charged the jury, "In apprising the identification testimony of a witness, you should consider the following: (2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made." (R. p. 255). Ms. Dopson was never asked to identify Williams from a six person line up. As requested, the judge should have charged the jury, "In apprising the identification testimony of a witness, you should consider the following: (5) You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness." (R. p. 255). While officers identified Williams from the video, trial counsel argued that the video was of such poor quality that the identification was unreliable rendering the case of identification by a single witness, Ms. Dopson.

The identification in this case was the equivalent of a one witness identification and required further instruction on identification. In State v. Jones, 344 S.C. 48, 59-60, 543 S.E.2d 541, 547 (2001), the Court wrote:

¹ Ms. Dopson's identification was not challenged at trial. This issue may need to be raised in post conviction relief.

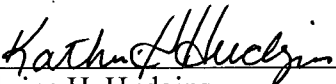
In State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975), this Court recognized that the court in Telfaire was dealing with the “**one witness**” identification rule, and the model instruction there was designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification. See also State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (in single witness identification cases, court should instruct jury burden of proving identity of defendant rests with the state). The present case does not involve a single witness identification and, given the witnesses' degree of certainty, there appears very little likelihood of mistaken identification. We find a Telfaire charge was unnecessary.

Unlike in Jones, the standard identification charge was not adequate in the present case. The requested Telfaire instruction was necessary. The failure to instruct the jury, as requested, in regard to whether the identification was the product of the witness's own recollection and failure to instruct the jury, as requested, about the unreliability of a one witness identification constituted an abuse of discretion under the facts of this case. Williams was prejudiced by the judge's failure to charge the jury on identification, as requested.

CONCLUSION

Based on the above argument, Williams' conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of May, 2015.

STATE OF SOUTH CAROLINA

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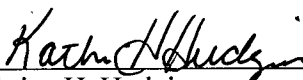
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dennis Williams states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on September 8-9, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Dennis Williams.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

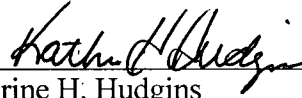
ATTORNEY FOR APPELLANT

This 15th day of May, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

May 15, 2015



Kathrine H. Hudgins
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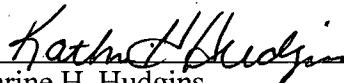
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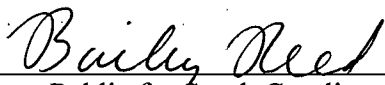
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon John Walt Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Dennis Williams, #361359 at Kirkland Correctional Institution, this 15th day of May, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of May, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021