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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Beaufort County
The Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2014-001920

THE STATE,

Respondent,

v.

PHILENZA PRITCHETT,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly admitted a witness' testimony identifying Appellant as one of the robbers.

II. The circuit court properly denied Appellant's request for a mere presence jury charge because the evidence did not support the requested charge.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In May 2010, the Beaufort County Grand Jury indicted Appellant Philenza Pritchett on one count of armed robbery, one count of kidnapping, one count of conspiracy, one count of unlawful carrying of a pistol, and one count of possession of a weapon during the commission of a violent crime, arising from the April 1, 2010, armed robbery of a convenience store in Beaufort County. The case was called for a jury trial on August 25, 2014, before the Honorable Brooks P. Goldsmith, Circuit Court Judge.

Prior to trial, Appellant moved to suppress the convenience store clerk's out-of-court and in-court identification of him as one of the men who robbed the store, arguing it resulted from an unduly suggestive show-up by police. The circuit court conducted a hearing under Neil v. Biggers, 409 U.S. 188 (1992), to determine admissibility of the identifications.

Makia Fulton, the convenience store clerk, testified she was working at the Kangeroo gas station in Bluffton, SC, on April 1, 2010. At approximately 2:50 a.m.,a black male and a white male entered the store, wearing black clothes, with blue bandanas over their faces, and carrying guns. The store was well lit at the time. (Trial Transcript 1 [TT1], pp. 23-27; Record on Appeal [R.], pp. _____).

During the robbery, both men spoke to Fulton, and she recognized the black male's voice as a man she knew by the name "Lenny." After getting money from the cash register, the men put Fulton in the restroom. Fulton waited a few minutes, came out of the restroom and called police, who arrived at the store very quickly. (TT1, pp. 26-28; R., pp. _____).

Fulton testified she told the responding officer what happened, including the fact she recognized the black man's voice. While she was writing a statement, the officer asked her if she would ride with him to another location because they might have someone, and he then drove her to another convenience store. (TT1, p. 28; R., pp. _____).

After they arrived at the second store, Fulton saw a white male standing by a car, and told the officers she did not know him. Officers then showed her a black male, and Fulton told them she did not know him. When the officers showed her a second black male (Appellant), Fulton told them he was the one whose voice she recognized during the robbery. (TT1, pp. 28-41; R., pp. _____).

Corporal William Polites of the Beaufort County Sheriff's Department testified he responded to the armed robbery dispatch at the convenience store, and spoke with Fulton about what happened. She gave a description of the two robbers, and stated she clearly recognized the black male's voice as a man she knew as Lenny. He subsequently drove Fulton to the second convenience store, where she positively identified Appellant as the black male who robbed her earlier. Cpl. Polities testified Fulton was "absolutely confident" of the identification. (TT1, pp. 47-58; R., pp. _____).

After hearing argument, the circuit court denied Appellant's motion to suppress Fulton's identification testimony. The court found the show-up was not unduly suggestive, Fulton testified she recognized Appellant's voice during the robbery, and she was positive in her identification of Appellant. (TT1, pp. 69-77; R., pp. _____).

Corporal William Murphy of the Beaufort County Sheriff's Department testified he participated in the response to the convenience store robbery by checking other

convenience stores in the area. He saw a car at the gas pumps of a store approximately five minutes away from the robbed store, but no one was pumping gas. He observed a white male in the driver's seat and a black male in the front passenger seat, and a black female came out of the store and got into the back seat. (TT1, pp. 102-107; R., pp. ____).

Cpl. Murphy approached the car, and saw a second black male sitting in the back seat. He also saw the butt of a gun sticking up between the center console and the driver's seat, so he drew his weapon, ordered the four occupants to raise their hands, and radioed for back-up. When others officers arrived, they removed the four occupants from the car. Appellant was seated in the back passenger side seat, and another officer found a gun under the front passenger seat directly in front of where Appellant was sitting, with the butt of the gun closest to Appellant. (TT1, pp. 107-118, 127-136; R., pp. _____).

Cpl. Polites and Fulton testified before the jury consistent with their testimony during the Biggers hearing. Fulton testified that after getting the money from the cash register, the robbers took cartons of cigarettes. The convenience store manager testified the robbers took $181 and some change from the cash register, several cartons of Newport cigarettes, and approximately six cartons of Swisher Sweets cigarellos/blunts. (TT1, pp. 140-235; R., pp. _____).

Master Sergeant Angela Viers of the Beaufort County Sheriff's Office testified Appellant was arrested after Fulton identified him, and transported to the Detention Center. Pursuant to a search warrant, officers found another pistol in the car glove compartment, and a pack of Swishers in the passenger side back door pocket. Via a back passenger seat access door to the trunk, they also found Newport cigarettes, Swisher

Sweet cigarellos, and clothing, including dark blue bandanas, matching Fulton's description of the robbers' clothing. (TT, pp. 237-272; R., pp. _____).

Prior to closing arguments, the circuit court indicated it intended to charge the jury on the elements of each individual charge, expert testimony, identification testimony, and potentially on "the hand of one is the hand of all" (accomplice liability). When the court questioned the applicability of a mere presence charge, Appellant's counsel stated she thought the court "covered it with the being in possession of recently stolen goods" charge. Appellant did not object to the accomplice liability charge without the mere presence charge. (Trial Transcript 2 [TT2], pp. 97, 105-106; R., pp. _____).

The court charged the jury in accordance with the previous discussions, including the accomplice liability charge. Before deliberations started, Appellant asked for a mere presence instruction as to the unlawful carrying of a pistol charge, arguing it was inherent in the accomplice liability charge, and his mere presence near the gun found in the car was insufficient to convict him of unlawfully carrying that gun. Appellant also noted the State alleged he was a principal in the crimes, rather than an accomplice, so the accomplice liability charge did not apply. The State argued the evidence indicated Appellant "unlawfully carried the pistol at the convenience store at the time of the armed robbery and kidnapping," which would support the unlawful carrying charge. (TT2, pp. 128-144; R., pp. _____).

The court found the unlawful carrying of a pistol charge also applied to the gun found under the seat in front of Appellant because the evidence indicated the gun was readily accessible to him and convenient for immediate use. Based on that evidence, the

court denied Appellant's request for a mere presence instruction. (TT2, pp. 144-147; R., pp. _____).

The jury convicted Appellant on all charges, and the circuit court sentenced him to concurrent sentences totaling fifteen years incarceration. (TT2, pp. 156-157, 168; R., pp. _____). This appeal followed.

ARGUMENT

I. The circuit court properly admitted a witness' testimony identifying Appellant as one of the robbers.

Appellant contends the circuit court erred in admitting Fulton's identification testimony because her identification was based on an unduly suggestive show-up, and so unreliable it created a substantial likelihood of misidentification. In support of this contention, Appellant cites purported inconsistencies between Fulton's written statement, the police incident report and the trial testimony, while minimizing and/or ignoring critical evidence indicating Fulton's identification of Appellant was highly reliable in light of her pre-robbery, personal knowledge of Appellant, as well as the totality of the circumstances surrounding the show-up.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827, 829 (2001); State v. Govan, 372 S.C. 552, 643 S.E.2d 92, 94 (Ct. App. 2007). Admissibility of eyewitness identification testimony is committed to the trial judge's discretion, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error. Govan, 643 S.E.2d at 94; State v. Brown, 356 S.C. 496, 589 S.E.2d 781, 784 (Ct. App. 2003).

A criminal defendant may be deprived of due process of law through an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. Govan, 643 S.E.2d at 94. The 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.*

There is a two-prong inquiry to determine the admissibility of an out-of-court identification. The court must first ascertain whether the identification process was unduly suggestive, and if so, next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* "The query posited is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure may have been suggestive." State v. Carlson, 363 S.C. 586, 611 S.E.2d 283, 290 (Ct. App. 2005) (*quoting* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 [Ct. App. 1999]).

One-on-one identifications are inherently suggestive and generally disfavored, but may be proper when they occur shortly after, and near the scene of, the alleged crime, as the witness' memory is still fresh, the suspect has not had time to alter his looks or dispose of evidence, and a show-up may expedite the release of innocent suspects and enable the police to determine whether to continue searching. State v. Hoyte, 306 S.C. 561, 413 S.E.2d 806, 807 (1992); Govan, 643 S.E.2d at 95-96; Brown, 589 S.E.2d at 785; 22A C.J.S. Criminal Law §803. Factors to consider in "evaluating the likelihood of a misidentification" include: "[t]he opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of the witness'[s] prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Biggers, 409 U.S. at 199–200. An identification witness' prior knowledge of the suspect is a significant factor in determining reliability, and mitigates the suggestive nature of a show-up, making it merely confirmatory. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 427 (2012).

In this case, rather than any physical characteristic such as height, gender or race, Fulton identified Appellant based on her recognition of his voice from encounters with him at his mother's house. Both Fulton and Cpl. Polites testified Fulton told responding officers she recognized the black robber's voice, and said his name was "Lenny." The absence of that fact from Fulton's written statement and Cpl. Polities' incident report presented an issue for the jury to consider, rather than a basis to exclude the identification as a matter of law.

Further, the reliability and certainty of Fulton's identification is amply demonstrated by what actually happened at the show-up. If her identification was based on the suggestive nature of the procedure, or any prior statements made to her by law enforcement, it is likely Fulton would have identified the white male she observed first, and then the first black male she saw. To the contrary, however, she truthfully stated she did not know them, and immediately identified Appellant (the second black man she saw) as the one who robbed the convenience store that night. It is undisputed she identified Appellant without hesitation, and was absolutely certain of her identification, both at the show-up and at trial.

Fulton had ample opportunity to hear Appellant's voice during the robbery, her degree of attention was heightened by the fact both men had guns, she told police she recognized the black robber's voice, the identification occurred within twenty minutes of the robbery, and she was absolutely certain Appellant was the man who robbed the store. While her physical description of the black male may have been slightly off as to height, all other factors weigh heavily toward reliability. Accordingly, the circuit court did not abuse its discretion in admitting her out-of-court and in-court identification testimony.

II. The circuit court properly denied Appellant's request for an mere presence jury charge because the evidence did not support the requested charge.

Appellant asserts the circuit court erred in denying his request for a mere presence jury charge as to the unlawful possession of a pistol charge, because the jury could have acquitted him of the armed robbery, kidnapping, conspiracy and possession of a weapon during a crime of violence charges relating to the convenience store robbery, but found he was merely present inside the car where the pistol was found. On its face, this contention is logically nonsensical, assumes the only basis for conviction on the unlawfully carrying charge was the gun found in front of him in the car, and ignores the jury charge as a whole.

"The law to be charged to the jury is to be determined by the evidence presented at trial." State v. Lee, 398 S.C. 362, 364, 380 S.E.2d 834, 835 (1989); State v. Stokes, 339 S.C. 154, 528 S.E.2d 430, 434-435 (Ct. App. 2000). In reviewing jury charges for error, the appellate court must consider the jury charge as a whole in light of the evidence and issues presented at trial. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460, 463-463 (Ct. App. 2003).

"'To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" State v. Brandt, 393 S.C. 526, 713 S.E.2d 591, 603 (2011) (*quoting* State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583 [2010]). Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues, and the appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *Id.* at 583-584.

A mere presence charge is generally appropriate under two circumstances: 1) if there is a doubt over whether the defendant is guilty as an accomplice to a crime; and 2) the defendant is charged with possession of contraband as a result of being present where contraband was found. Stokes, 528 S.E.2d at 434-435. Neither circumstance applies in this case.

Even viewing the evidence in the light most favorable to Appellant, the circuit court properly refused to charge mere presence. As a threshold matter, none of the charges against Appellant, including the unlawfully carrying a pistol charge, were premised on a theory of accomplice liability.[1] Rather, the State contended, and the evidence showed, Appellant participated as a principal in the armed robbery, kidnapping, conspiracy and carrying a pistol during a crime of violence charges, and one of the guns found in the car was located right at Appellant's feet.

Pursuant to S.C. Code Ann. §16-23-20 (2003), subject to certain enumerated exceptions not applicable in this case, it "is unlawful for anyone to carry about the person any pistol whether concealed or not." For purposes of this statute, an unlawful weapon is "about the person" if it is readily accessible and convenient for immediate use, and need not be actually touching the person of the defendant. *See* 1963-64 Op. Atty Gen, No. 1704, p. 164. The unlawfully carrying a pistol charge in this case related to both the gun Appellant carried during the robbery, and the gun found at his feet in the car, which was

[1]Appellant did not object to the accomplice liability jury charge, even in the face of the circuit court's hesitation regarding the mere presence charge. Further, knowing the court intended to give the accomplice liability charge, Appellant did not draw any connection between that charge and the mere presence charge until after the jury charges were given. At that point, it would have been almost impossible to give a mere presence charge without confusing the jury.

clearly more easily accessible to him than to any other occupant of the car, and convenient for his immediate use.[2]

Finally, Appellant's argument ignores the fact the jury convicted him on all the other charges. Thus, the jury obviously found Appellant was an active participant in the criminal activity on April 1, 2010, and it is more than highly unlikely the jury would then conclude he was "merely present" in the car at the second convenience store, with a pistol right at his feet, for purposes of the unlawfully carrying a pistol charge.

There simply was no evidence presented to support a mere presence charge relating to the unlawfully carrying of a pistol offense. Therefore, the circuit court properly denied Appellant's request for such a charge, and its ruling should be affirmed.

[2]Prosecution for both unlawfully carrying a pistol and possession of a firearm during a crime of violence does not constitute double jeopardy clause because the charges have different elements. *Cf.* State v. Kirby, 325 S.C. 390, 481 S.E.2d 150, 153-154 (Ct. App. 1996) (unlawfully carrying a pistol is not a lesser included offense of possession of a firearm during a crime of violence).

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 30th day of October, 2015.

Sally B. Ellison

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