ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY L. MCCARRELL,

APPELLANT

APPELLATE CASE NO. 2014-001586

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing a witness to testify regarding his identification of Appellant where the witness's identification was tainted by law enforcement's use of unnecessarily suggestive identification procedure?

STATEMENT OF THE CASE

On February 19, 2013, a Greenville County grand jury indicted Appellant for criminal sexual conduct with a minor in the second degree (2012-GS-23-967) and lewd act upon a child (2012-GS-23-968). On June 24, 2014, a Greenville County grand jury indicted Appellant for grand larceny (2012-GS-23-2622) and contributing to the delinquency of a minor (2012-GS-23-1662). R. 315; R. 318; R.321; R. 324. The state, represented by Lisa A. Bentley and Andrew Culbreath, called all four cases to trial before the Honorable Robin B. Stilwell and a jury on July 7, 2014. Alex Stalvey represented Appellant. R. 1. Appellant was not present for his trial. R. 4, lines 8-14; R. 23, line 16 – R. 24, line 25; R. 45, line 22 – R. 47, line 5.

At the conclusion of the trial, the jury found Appellant guilty as charged. R. 305, line 14 – R. 306, line 2. Judge Stilwell placed the sentences under seal in light of Appellant's absence. R. 306, line 12 – R. 310, line 23. On July 10, 2014, Judge Stilwell unsealed the sentences and imposed them on Appellant. Specifically, he sentenced Appellant to three years' imprisonment for contributing to the delinquency of a minor, to five year's imprisonment for grand larceny, to fifteen years' imprisonment for lewd act, and to twenty years' imprisonment for criminal sexual conduct with a minor in the second degree. R. 311, line 9 – R. 312, line 24; R. 317; R. 320; R. 323; R. 326.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF THE FACTS

On November 14, 2011, Tamila and Jesse Woodard were trying to get their lives back on track after being addicted to drugs and having their children removed. R. 65, lines 4-21; R. 66, lines 6-17; R. 83, lines 9-25; R. 84, lines 1-6; R. 98, line 4 – R. 100, line 6. On that date, Tamila left for work around 4 p.m. She removed her rings and left them in the kitchen. R. 67, line 15 – R. 68, line 8.

While Jesse was outside smoking, he saw his neighbor, Minor, and Appellant. The three began discussing tattoos. Jesse invited Minor and Appellant to his home to look at tattoo books. R. 85, lines 1-21. During this visit, Jesse walked Appellant around his home. While Appellant was following Jesse out of the kitchen, Jesse heard "something hit the floor … like a tink." Jesse saw Appellant move quickly as well. However, Jess did not "really think anything about it." The two walked back to the living room and resumed their conversation with Minor about tattoos. R. 87, line 23 – R. 88, line 15.[1] Minor and Appellant left after socializing for less than an hour. R. 89, lines 11-12.

When Tamila returned home around 8:00 p.m., she realized her rings were missing. R. 68, lines 7-8; R. 73, lines 1-18; R. 74, lines 9-11; R. 89, line 20 – R. 90, line 16. Jesse told Woodard that Appellant and Minor had visited earlier. R. 74, lines 16-18; R. 90, lines 19-23. Jesse walked to Minor's home to inquire about the missing rings. R. 75, line 19 – R. 76, line 16; R. 90, line 23 – R. 91, line 22. The Woodards then contacted the local police to report stolen property. R. 76, lines 17-23; R. 92, lines 3-9.

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[1] According to Minor, Jesse touched up her tattoo while they were at his home on November 14, 2011. R. 173, line 8 – R. 174, line 15.

Deputy Brian Lovelace responded to the call on November 14, 2011. He met with the Woodards in their home shortly after 10 p.m. R. 103, line 7 – R. 105, line 7. When Lovelace learned of Minor's and Appellant's presence in the home earlier in the evening, he went to Minor's home and obtained permission to pat down Appellant and Minor. Lovelace did not find the rings on them. R. 105, lines 8-22; R. 107, lines 7-20.

Nevertheless, Appellant was arrested for theft of the rings based on Jesse's statements. R. 114, lines 15-19. Shortly after the arrest, Appellant's daughter, Brooklin Pollard, called the Investigator Brady Maschak on the case. During a meeting, Pollard gave Maschak one of the missing rings. R. 115, line 4 – R. 116, lines 17. Additionally, Pollard provided Maschak with text messages from her phone to show how Pollard came to be in possession of the ring. R. 117, lines 19-23. While reviewing the text messages, Maschak became alarmed when a message indicated Minor was willing "to take the fall" because she thought she was pregnant by Appellant. R. 123, line 11 – R. 124, line 20.

Maschak contacted Investigator Robert Perry for help with investigating a potential criminal sexual conduct case. R. 124, lines 18-22. The two then met with Minor at her home. R. 125, lines 2-13. When Minor admitted she had possession of the rings and knew that Appellant had stolen them, Minor was charged with receiving stolen goods. R. 125, line 22 – R. 127, line 17. Minor disclosed to Perry that she and Appellant had engaged in a sexual relationship for several months prior to his arrest. R. 228, line 19 – R. 229, line 1. At trial, Minor claimed she saw Appellant steal the rings and that she and Appellant engaged in a sexual relationship for several months. R. 154, line 20 – R. 165, line 24; R. 168, lines 16-22; R. 173, lines 8-22.

ARGUMENT

The trial judge erred in allowing a witness to testify regarding his identification of Appellant where the witness's identification was tainted by law enforcement's use of unnecessarily suggestive identification procedure.

Relevant facts

Prior to trial, a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972) was conducted to determine the admissibility of the out-of-court and in-court identifications of Appellant by a witness. Jesse Woodard explained that rings had gone missing from his home on November 14, 2011. R. 8, line 25 – R. 9, line 3. Regarding Jesse's ability to observe "the suspect in this case," Jesse testified:

> Q. Now, let me take you back to the time when you first observed the suspect in this case. How long did you get a chance to observe him from where you were?
>
> A. It was - - I mean, we spent a little bit of time in my house together, so it wasn't like just a flash. We had probably an hour or so maybe.
>
> Q. Okay. So you, actually, met him?
>
> A. Right, yes, sir.
>
> Q. He was in your home?
>
> A. Formal agreement, shake hands, how you doing.
>
> Q. You spent some time with him inside?
>
> A. Yes, sir.
>
> Q. Did you have a good chance to get to look at him while he was inside?
>
> A. Yes, sir.
>
> Q. Was the lighting okay in your home?
>
> A. Yes, Sir.

Q. Okay. About how far away from him were you at times? Arms length [*sic*], close to handshake?

A. Yes, sir.

R. 10, line 13 – R. 11, line 8.

Subsequently, on December 19, 2011, he met with the police for a photographic line-up. R. 9, lines 4-22. Jesse testified that the police wanted him to "circle or point out one of the six pictures that were on the piece of paper." R. 9, line 23 – R. 10, line 2. The officer asked if Jesse "recognize[d] anybody from the case" in the photos. R. 10, lines 3-6. However, Jesse claimed no one pressured or coerced him to make a particular selection. R. 10, lines 7-9. Prior to making his selection, he looked "each picture over carefully." R. 11, line 24 – R. 12, line 1. Jess indicated to the investigator that he "recognized someone" by circling one of the photographs. R. 12, lines 2-9; (State's Exhibit #6). Jesse saw only one line-up, but he was confident that he "had selected the correct individual." R. 13, lines 18-25.

Investigator Brady Maschak conducted the photographic line-up with Jesse. Maschak was aware that Appellant was a suspect based on Deputy Brian Lovelace's report. Using Lovelace's information, Maschak created a line-up with Appellant's photograph as number five and then he "picked all the other ones out of the photographs" the sheriff's office had. All of the photographs were in black and white. R. 15, lines 1-15; R. 16, lines 13-24; R. 19, lines 13-19. To prepare the line-up, Maschak selected individuals who had similar physical characteristics: "[a]ge, race, of course, sex, similar characteristics. So, of course, they were different people, but they all have similar features." Maschak used a computer system to acquire the additional photographs. He explained that the system would

produce a list of individuals who had been arrested using the physical description provided by the officer. Thereafter, the officer would "sift through to pick" the ones with a close resemblance. R. 15, lines 16-20; R. 20, lines 3-14. He tried to match facial hair and hairstyle "as close as possible." R. 15, lines 23 R. 16, line 2.

Thereafter, Maschak and Jesse engaged in the following exchange, including Maschak's instructions to Jesse:

> Told him that - - just the standard, how we always do it. Talked to him, the person may or may not be in the photo line-up. If you're not 100 percent sure, let us know, and not to just pick one just to pick one because, of course, there's cases where you may have a name, but it might not match who we're talking about. So I told him the person that was in his residence may or may not be in the photo. He said he understood. I told him carefully look over the photos. He said he understood. I put it on the table, he looked at them and stated number five was the person that was there.

R. 16, line 25 – R. 17, line 14. Maschak surmised that Jesse had a clear understanding based on those instructions that he did not have to pick anyone. Further, Maschak claimed that he asked Jesse if he were "100 percent sure" and Jesse responded affirmatively. Jesse selected Appellant's photograph. R. 17, lines 15-22.

Appellant argued for suppression of the identification based upon the suggestibility of the photographic line-up. According to Appellant, two of the individuals had a darker complexion than the other individuals. The different complexions "would narrow down" the choices. Further, Appellant argued that although the individuals may be chronologically the same age, their appearances showed different ages. R. 22, lines 1-17. Judge Stilwell rejected this argument:

> Okay. I do find that in accordance with Neil v. Biggers and State v. Moore that the photo lineup and identification is not unduly suggestive. I have in my hand … State's Exhibit No. 6, which has the six individuals. I do find that they are similar in age, complexion, facial hair and otherwise.

> Also, in looking at the five enumerated factors in Neil v. Biggers, I find that the identification is at a threshold admissible. Certainly, the weight to be given to any identification should be an issue for the jury, ultimately to determine.

R. 22, line 19 – R. 23, line 4.

During the trial, Jesse testified regarding the police showing him a line-up on December 19, 2011, and his identification of Appellant as the person who entered his house with Minor on November 14, 2011. There was no objection to the testimony or the introduction of the line-up. R. 94, line 7 – R. 97, line 25. Similarly, there was no objection to Maschak's testimony regarding the photographic line-up. R. 112, line 3 – R. 114, line 9.

Discussion

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. If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, the in-court identification is not admissible. Manson v. Brathwaite, 432 U.S. 98 (1977); Moore, 343 S.C. at 286, 540 S.E.2d at 447.

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 trial judge erred in admitted the identifications made by Jesse where law enforcement used an unnecessarily suggestive identification procedure. Although "[t]he photo array is the most common police-arranged identification procedure in the United States," it is not without its problems. Identifying the Culprit: Assessing Eyewitness Identification, National Research Council of the National Academies, 23 (2014). Maschak used a simultaneous procedure – he presented all six photographs to Jesse simultaneously as opposed to sequentially. See id. at 24. The simultaneous procedure is fraught with problems of suggestibility. See id. Further, Maschak was aware of which of the photos was of the suspect in the case, leading to conscious and unconscious cues being given to Jesse. Although Maschak could have used a double-blind procedure, he chose not to do so. See id. at 24-25.

In light of the unnecessarily suggestive identification procedure used by law enforcement, the trial court was required to analyze the Biggers factors to determine if Jesse's identification of Appellant was, nonetheless, reliable. Although Jesse claimed he had the opportunity to view Appellant for about one hour, Jesse's testimony was vague

regarding the exact length of time and how much of his time was occupied with other observations. It is unlikely that Jesse spent an hour memorizing the contours of Appellant's face during their social visit. The record contains no evidence of Jesse's degree of attention to Appellant's appearance. However, an examination of the circumstantial evidence reveals the significant likelihood that Jesse was pre-occupied. Jesse testified that he was showing books, photos, and magazines of tattoos. Presumably, these books showed numerous photos of people and other faces for which Jesse could easily confuse Appellant's facial characteristics. Minor testified that Jesse "touched up" her tattoo. Thus, it is clear that Jesse was distracted. Jesse gave no description to law enforcement; thus, his subsequent identification of Appellant could not be compared to a description to determine accuracy. Although Jesse testified that he was certain, his high degree of certainty alone cannot outweigh the other factors. Finally, Jesse made the identification almost a month after the encounter. This lengthy delay weighs against the reliability of Jesse's identification of Appellant.

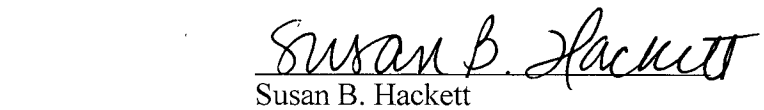
In light of the unnecessarily suggestive identification procedure employed by police and the Biggers factors weighing heavily against reliability of the identification, the trial judge erred in permitting testimony concerning the out-of-court and in-court identifications by Jesse of Appellant. Jesse's identification of Appellant concerning the grand larceny and contributing to the delinquency of a minor charges tainted the evidence in the lewd act and criminal sexual conduct cases as well. When the prosecutor chose to try the cases together, the prosecutor assumed the risk that errors affecting the grand larceny case would infect the unrelated case. The jury could not compartmentalize the evidence in one case from the evidence in the other case. Thus, this Court should reverse

the four convictions against Appellant due to the erroneous admission of the in-court and out-of-court identifications, which were not reliable and were the product of unnecessarily suggestive identification procedures used by law enforcement.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terry L. McCarrell states:

1. She is an 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 Robin B. Stilwell, which was held on July 7-8, 2014, and July 10, 2014. In her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Terry L. McCarrell.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of May, 2015.

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IN THE COURT OF APPEALS

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial Transcript dated July 7, 8, 10, 2014;
(2) State's Exhibit #6 (line-up and affidavit);
(3) True-billed indictments;
(4) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 21st, 2015

Susan B. Hackett

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Attorney for Appellant

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 21, 2015

Susan B. Hackett

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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 and Record on Appeal 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 a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Terry L. McCarrell, #171323 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of May, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of May, 2015.

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