ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

QUOTEAS SYLVESTER NESBITT,

APPELLANT

APPELLATE CASE NO. 2014-001851

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing a police officer to identify Appellant as the perpetrator where the officer was not a witness to the crime but was asked by fellow officers to identify Appellant in a grainy video of the shooting in violation of Appellant's right to due process of law?

STATEMENT OF THE CASE

On March 28, 2013, the Colleton County grand jury indicted Appellant for murder (2012-GS-15-663) and possession for a weapon during the commission of a violent crime (2012-GS-15-664). R. 608 – 609; R. 611 – R. 612. The state, represented by Tameaka Legette, called the case for trial on August 25, 2014 before the Honorable Perry M. Buckner, III, and a jury. Matthew Walker represented Appellant. R. 1. The jury found Appellant guilty on both counts. R. 594, lines 17-25. Judge Buckner sentenced Appellant to forty-five years' imprisonment for murder and to five years' imprisonment for the weapon. He ordered the sentences to run consecutively, resulting in a total of fifty years' imprisonment. R. 604, lines 9-23; R. 610; R. 613.

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

ARGUMENT

In violation of Appellant's right to a fair trial and due process of law, the trial judge erred in allowing a police officer to identify Appellant as the perpetrator where the officer was not a witness to the crime but was asked by fellow officers to identify Appellant in a grainy video of the shooting.

Relevant facts

On the evening of September 6, 2012, many people, including Appellant, gathered at Chase Lounge, a local pool hall. Moray "Bobo" Holmes, the deceased, arrived, still dressed in his work clothes from logging all day. He grabbed a drink and left, promising to return. R. 417, line 2 – R. 418, line 25; R. 476, lines 3-23; R. 487, line 11 – R. 488, line 5. Later, the deceased and his wife, Renatta Holmes, return to Chase. R. 174, lines 19-20; R. 436, lines 4-24; R. 465, lines 4-6; R. 477, lines 5-11; R. 477, lines 18-20; R. 488, line 22 – R. 489, line 5. Renatta sat in the car talking to her cousin, Kenya Kelly, while the deceased walked around greeting his many friends and family members who were present. R. 179, lines 5-21; R. 190, line 22 – R. 193, line 15; R. 405, lines 11-18; R. 437, lines 5-12. The deceased stopped in the parking lot to speak with an unknown individual.[1] After the two spoke briefly, the deceased started walking away. The unknown individual shot the deceased twice in the back. State's Exhibit # 45.[2] The entire trial centered on the identity of the shooter. The prosecution had no physical evidence connecting Appellant to the

[1] Renatta Holmes, Brian Manigo, Kelvin Mitchell, Nicholas Williams, and Donald Odom claimed this unknown individual was Appellant. R. 179, line 21 – R. 180, line 4; R. 185, line 15 – R. 186, line 12; R. 186, lines 21-23; R. 437, lines 17-18; R. 438, lines 9-18; R. 443, lines 3-8; R. 465, lines 7-20; R. 477, line 20 – R. 478, line 1; R. 489, line 7 – R. 490, line 1; R. 492, line 25 – R. 493, line 8.

crime. In fact, the entire case rested upon the identification testimony of witnesses, about whom the prosecutor repeatedly apologized to the jury. Some of the witnesses had prior criminal records and some of the witnesses had pending charges. Many of the witnesses delayed talking to the police for years and others gave inconsistent statements. All of the witnesses were biased due to their familial relationship with the deceased. R. 116, lines 8-20; R. 546, line 14 – R. 547, line 9.

During pretrial proceedings, Appellant objected to testimony by Jason Chapman[3] identifying Appellant as the shooter. Chapman was not present during the actual shooting; rather, Chapman's identification was based on his watching the surveillance video from Chase. Although no faces were identifiable in the video, Chapman claimed that he could identify Appellant based on his mannerisms.

Chapman claimed he had known Appellant for eight or ten years based on his interactions with Appellant "in the street, in calls for service, where he resides, or the neighborhood he resides in is relatively close to the office." Chapman claimed that after patrolling the same streets for sixteen years, he knew most people. R. 51, lines 10-19. He estimated that he interacted with Appellant between fifty and one hundred times. R. 51, line 25 – R. 52, line 2. Based on these interactions, Chapman claimed he was familiar with Appellant's mannerisms:

> He never gave me an issue, as far as verbally. He was always cordial with me when we spoke. He liked to talk with his hands, often had his hands on his waist; not in a threatening gesture, just everybody has a quirk about them

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[2] The video from the Chase Lounge was admitted as an exhibit during the pre-trial hearing and during the trial. The video has been transported to this Court for review as part of the Record on Appeal.

[3] At the time of the trial, Chapman worked for the Colleton County Sheriff's Office. R. 50, lines 22-23. At the time of the shooting, Chapman worked for the Walterboro Police Department. R. 50, lines 24-25.

> when they stand or walk, and he often stood a lot of times holding his pants with his hands. He had a slight gait when he walked, for lack of a better term; I'm not sure exactly how to explain it. But I don't know if he ever had an injury or not, but he's got a slight gait when he walks with a - - I guess it would be his right leg. I wouldn't really call it a limp, more of a gait. Like I said, he's actually very social when you interact with him. I don't think I ever had an issue where he was threatening towards me in any way.

R. 52, lines 3-20. Although Chapman worked for the Walterboro Police Department at the time of the shooting, which was being investigated by the Colleton County Sheriff's Office, Chapman was notified of the shooting and assisted in the investigation. R. 52, line 21 – R. 54, line 2. Part of Chapman's participation was assisting in locating Appellant, who was identified as a suspect. Ultimately, Appellant turned himself in to Chapman. R. 54, line 3 – R. 55, line 9.

About a week before Appellant's trial, all of the police officers involved in the case against Appellant met to prepare for trial. Chapman was the "only one present that had never seen the video." He "was asked if [he] thought [he] could identify [Appellant] from the video without any interaction or involvement from anybody else involved in the case." The video was played "to a certain point, as to not give away anybody's identity." Chapman "picked out who [he] believed was [Appellant], and was later informed that that was him based on the information they had on hand." R. 55, line 10 – R. 56, line 10; R. 62, line 11 – R. 63, line 6. Chapman claimed Appellant "was always pulling on his pants, he had a habit of standing with his hands on his waist. He had a gate [*sic*] that made it look somewhat like a slight limp to the right side." When the video was played, Chapman "watched everyone interact and mov[e] around in the video." "[T]he only person [he] saw that had the same height, weight, physical characteristics and mannerisms of Appellant was the person [he] identified." R. 56, lines 11-24.

Chapman readily admitted that identifying the shooter from the video based on facial features was impossible. However, Chapman claimed he could make an identification of Appellant "based on the fact that" he knew that "Appellant was present at the crime scene and the people walking around and interacting in that video, of the people that were there, the one [he] picked out was the only one, in [his] opinion, that had the mannerisms and the physical characteristics of Appellant." R. 57, lines 9-18; R. 62, lines 4-7; R. 63, lines 7-9. Specifically, Chapman was "asked out of the people that you had viewed in that video, do you see anyone that you would identify as [Appellant]." The only one that Chapman saw that had the same mannerisms as Appellant was the person he identified, who was the shooter. R. 60, line 6 – R. 61, line 14.

Appellant objected to the introduction of the identification testimony by Chapman. After noting that Chapman was not present at the scene, trial counsel argued "that the identification procedure outlined in the testimony today is equivalent to a single person show-up identification, which are [*sic*] disfavored in the law as being inherently suggestive." Trial counsel noted that Chapman was aware that Appellant had been charged with the crime and was the subject of the meeting he attended. Further, Chapman "was shown a video where he was expected to see [Appellant], and in his opinion, the person on the video was [Appellant]." Additionally, Appellant objected that Chapman's testimony "would be more prejudicial than probative" because the identification by law enforcement was being used to shore up the "shaky identification" testimony from the eyewitnesses. Further, Appellant argued the testimony was prejudicial because it suggested to the jury that

Appellant had engaged in prior criminal acts because of Chapman's claim that he had interacted with Appellant so frequently. R. 94, line 21 – R. 95, line 24.[4]

The state argued in favor of admissibility. According to the prosecutor, Chapman arrived at the meeting "have been told basically nothing about the case, except that it was a video in which he was being asked to watch to see if he could pick out anyone in the video, to include [Appellant]." Further, the prosecutor argued that Chapman had an opportunity to observe the video and an opportunity to witness Appellant. Due to Chapman's training, he had paid "particular attention" to Appellant "and how his gait is and how he walks and how he kind of waddles, along with the stance he typically takes." R. 96, line 7 – R. 97, line 2. Judge Buckner held Chapman's identification of Appellant as the individual in the video who shot the deceased was admissible finding it reliable based on the totality of the circumstances. R. 97, line 3 – R. 98, line 9.[5]

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

[4] The suggestion that Appellant had a prior criminal record was reinforced by the lead investigator's testimony that she had known Appellant "for some years, working at the jail." R. 160, lines 19-21.

[5] Appellant renewed his objection to Chapman's identification testimony during the trial, preserving the objection for review on appeal. R. 352, lines 12-17.

irreparable misidentification, the in-court identification is not admissible. Manson v. Brathwaite, 432 U.S. 98 (1977); State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000).

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 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).

Our courts have found some identification procedures patently suggestive. For example, in State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), our Supreme Court held a line-up procedure wherein three victims were in the same room, sitting within feet of each other, while observing photographic line-ups was blatantly unacceptable. Id. at 81-82, 600 S.E.2d at 527. Nevertheless, the Court found the identification was admissible based upon the totality of the circumstances. Those circumstances included the victims not conversing during the line-up and not being aware of whom the other victims selected, if anyone. The victims testified the observed the assailant from one minute to ten minutes and their prior

descriptions generally matched that of the person identified. All testified they were certain of their identifications, which were made two days after the incident. Id. at 83, 600 S.E.2d at 527.

Our Supreme Court held a show-up identification was unduly suggestive in Moore, supra. A witness observed two people exiting her neighbor's home when she knew the neighbor was away. She called the police and provided a general description of the men, primarily focused on the clothing. Id. at 285, 540 S.E.2d at 447. Ninety minutes later, officers took the witness to an area where to men were being detained. The witness positively identified the two men as the perpetrators. Her identification was based upon the clothing she observed. She admitted she had not really seen their faces earlier. Id. at 285-286, 540 S.E.2d at 447. As explained by the Court, "[s]ingle person show-ups are particularly disfavored in the law." Id. at 287, 540 S.E.2d at 448 (citing Stovall, 388 U.S. at 302 and State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993)). The procedure in Moore was unduly suggestive. Id. Further, the Court found the identification unreliable as a matter of law. In the case presented, the Court found the only factor with any reliability was the amount of time between the crime and the confrontation, which was ninety minutes. The other factors clearly outweighed that one where the witness observed the two perpetrators for a brief time at a significant distance, the degree of attention was not great, and the accuracy of her description was tenuous. Id. at 449, 540 S.E.2d at 290.

The identification procedure used by law enforcement to obtain Chapman's identification of Appellant reeks of suggestiveness. This type of identification procedure is at least as suggestive as a show-up identification procedure or single photograph identification procedure. Fellow officers told Chapman that Appellant was on the video

and asked Chapman to pick out Appellant from among the several people on the grainy video. Chapman knew the person he was supposed to select and approached the entire process with this in mind. This type of identification procedure is the epitome of suggestiveness.

Applying the Biggers, supra, factors to Chapman's identification of Appellant is nearly impossible because Chapman was not an eyewitness to the crime. However, applying the factors where possible reveals the unreliability of Chapman's identification of Appellant. Chapman had no opportunity to view the shooter at the time of the crime because he was not present. Although he had an opportunity to view the video of the shooting, the video is of very poor quality in terms of seeing individuals. The crime occurred in a parking lot at night. There are many cars and people and very little lighting. Although Chapman may have watched the video with a high degree of attention, no amount of attention could overcome the low quality of the video in terms of ability to make an identification of an individual. Chapman's professed high level of certainty of his identification is belied by his testimony that he could not see any facial features of the individuals on the video, his identification was based on purely mannerisms ubiquitous among many members of society – walking with weight shifted on one side and placing one's hands on his hips, and that he knew he was trying to find the person in the video who most resembled Appellant.[6] Based on a review of the suggestiveness of the procedure and the reliability factors, the trial judge erred in

[6] Because he was not an eyewitness, Chapman gave no prior description of the assailant and there was no time between the crime and the confrontation; therefore, these factors are not relevant for the analysis.

admitting Chapman's testimony, which served only to shore up the identification of testimony of the state's admittedly interested witnesses.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

QUOTEAS SYLVESTER NESBITT,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Quoteas Sylvester Nesbitt 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 Perry M. Buckner, which was held on August 25-28, 2014, and, 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 Quoteas Sylvester Nesbitt.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

QUOTEAS SYLVESTER NESBITT,

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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) Entire trial transcript dated August 25-28, 2014;
(2) State's #45 (DVD video surveillance at Chase);
(3) Court's Exhibit #3 (jury note);
(4) True–billed indictments (2012-GS-15-663 & -664); and
(5) Sentence sheets.

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

June 9th, 2015

Susan B. Hackett

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PO Box 11589
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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."

June 9, 2015

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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QUOTEAS SYLVESTER NESBITT,

APPELLANT

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 Quoteas Sylvester Nesbitt, #361169, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 9th day of June, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of June, 2015.

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