STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAWN LEE WYATT,

APPELLANT

APPELLATE CASE NO. 2014-001556

FINAL BRIEF OF APPELLANT

JOHN H. STROM
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge err by denying the motion to suppress the suggestive single person show-up identification of Appellant made by Correctional Officer Joe Schnettler because it was unduly suggestive and unreliable and the resulting in-court identification was tainted by the prior suggestive procedure?

II.

Did the trial judge err by denying the motion to suppress the suggestive single person show-up identification of Appellant made by Correctional Officer Brenda Lippe because it was unduly suggestive and unreliable and the resulting in-court identification was tainted by the prior suggestive procedure?

STATEMENT OF THE CASE

On October 10, 2013, the Lancaster County Grand Jury indicted Appellant for possession with intent to distribute cocaine base; possession with intent to distribute cocaine; attempt to furnish contraband to a prisoner; and possession with intent to distribute marijuana. R. 221.

On July 14-16, 2014, Appellant proceeded to trial before the Honorable DeAndrea Benjamin and a jury. R. 1. Brandon Steen represented Appellant, and Solicitor Douglas Barfield represented the State.

The jury found Appellant guilty as charged. R. 214, ll. 13-25. The trial court sentenced Appellant to three terms of ten years imprisonment for possession with intent to distribute cocaine, possession with intent to distribute cocaine base, and attempt to furnish contraband. R. 219, ll. 23-25.

Appellant was sentenced to five years imprisonment for possession with intent to distribute marijuana; ten years imprisonment for attempt to furnish contraband; ten years imprisonment for possession with intent to distribute cocaine base; and ten years imprisonment for possession with intent to distribute cocaine. R. 220, ll. 1-4. All sentences were run concurrently. *Id.*

This appeal follows.

STATEMENT OF FACTS

At about five thirty in the morning on Friday, July 12, 2013, Correctional Officer Leslie Joe Schnettler, on duty at the east tower of Kershaw County Correctional Institution (KCI), observed what he believed to be white male running towards the perimeter fence. R. 19, ll. 2 – R. 21, ll. 25. Upon reaching the fence, the suspect sat down and tossed a series of objects over the fence into the adjacent exercise yard. R. 22, ll. 3-24.

Schnettler was at the end of a twelve hour night shift and had never seen someone throw items over the fence before. R. 115, ll. 16-23; R. 201, ll. 1-12. Schnettler admitted that he was excited and nervous. R. 115, ll. 16-19. Schnettler estimated that the east tower, where he was stationed, is approximately thirty-five feet tall and the suspect was seated about 80 to 90 yards away from him. R. 21, ll. 11-14.

The incident took place in the pre-dawn hours. The tower, as well as the prison's exterior lighting, is oriented towards the interior exercise yard and dormitories of the prison, so as to better observe inmates. R. 21, 1 – R. 22, ll. 21. Schnettler radioed that the individual was a **white male**, in long jean shorts, and a dark shirt. R. 22, ll. 18-21 (*emphasis added*). Schnettler also reported that the suspect had "shiny legs". R. 25, ll. 1-13; R. 30, ll. 18-23. Appellant's legs are heavily tattooed. Schnettler was unable to provide a description of the suspect's haircut, facial hair, footwear, or whether the suspect had gloves on. R. 29, ll. 1-12.

After throwing the packages over the prison fence, the individual disappeared into the adjoining woods. R. 25, ll. 6-10. Schnettler estimated the entire incident lasted approximately thirty seconds. *Id.* at ll. 21-24. Schnettler reported the incident to Corporal Christopher Hunt, the officer in charge of contraband at KCI. R. 25, ll. 2-10. Hunt then requested the assistance of the Lancaster County Sheriff's Department in searching for the suspect. R. 32, ll. 19 – R. 34, ll. 7.

Observation by Officer Brenda Lippe

At approximately six in the morning, Correctional Office Brenda Lippe was driving on US 601 to begin her shift at KCI when she notice an individual walking in the opposite direction on the far side of the road. R. 6, ll. 1-25. As it was still in the pre-dawn hours, only Lippe's day-time running lights briefly illuminated the man as she drove past. R. 6, ll. 5-21; R. 91, ll. 16-24. The speed limit on that portion of U.S. 601 is 55 mph. There are no street lights.

She described the individual as a light skinned African-American male of medium build with a black colored shirt and charcoaled colored shorts. R. 7, ll. 15-24. She recalled that he had a short "nice neat haircut". R. 9, ll. 3-4. Lippe believed that she was able to observe the man for approximately one minute. *Id.* at ll. 16-18.

Once Lippe reached KCI, she spoke with Hunt about the individual walking down the road. R. 10, ll. 16-21. Hunt then informed her that there had been a contraband incident that morning. R. 11, ll. 2-9. Lippe was ordered to relieve Schnettler from the east tower. R. 29, ll. 13-22. While with Schnettler she told him that she saw Appellant walking down U.S. 601 and that Appellant had just been picked up by law enforcement. R. 26, ll. 2-10. Schnettler then left to make the identification. R. 11, ll. 7-24.

Identification by Schnettler

Hunt took Schnettler by car to where Lancaster County Sheriff's Deputy Charles Kirkley had stopped Appellant on the side of U.S. 601 about a mile and half from KCI. R. 26, ll. 8-10. Appellant was seated in the back of Kirkley's patrol car. *Id.* at ll. 22-24. Interestingly, Deputy Kirkley would testify at trial that Hunt, not Schnettler, identified Appellant as the suspect. R. 38, ll. 9 – R. 39, ll. 6.

Appellant was taken out of the car and Schnettler, in the presence of his supervising officer and the Sheriff's deputy, allegedly identified Appellant as the individual at the fence. R. 27, ll. 5-19. Schnettler was only a few feet away from Appellant when he made the identification and Appellant was the only non-law enforcement individual at the location. R. 27, ll. 20 – R. 28, ll. 12.

Identification by Lippe

Appellant was taken into custody following Schnettler's identification and driven to KCI for Lippe to identify. R. 12, ll. 23 – R. 13, ll. 15. Once back at KCI, Appellant was taken out of the patrol car and flanked by Hunt and Deputy Kirkley. R. 13, ll. 1-23. Appellant was about fifty yards away from Lippe, who was in the guard tower, when she made the identification. R. 15, ll. 19-23. Her identification occurred about an hour or an hour and fifteen minutes after she passed him on the road. *Id.* Appellant was the only non-law enforcement individual at the identification. R. 17, ll. 20-23.

A search of the exercise yard found eight duct taped packages. R. 140, ll. 7 – R. 141, ll. 5.. The packages contained crack cocaine, cocaine, marijuana, tobacco, and cell phones. R. 144, ll. 2-19; R. 149, ll. 1-25. No fingerprints were recovered from the packages. R. 160, ll. 24 – R. 161, ll. 6.

Trial: *Biggers*[1] Hearing

Defense counsel motioned the court to conduct a *Biggers* hearing to determine if the identifications of Appellant by Lippe and Schnettler should be suppressed because they were conducted using an unduly suggestive identification procedure and presented a substantial risk of irreparable misidentification. R. 47, ll. 21-25. Defense counsel argued that both of the identifications were single person show-ups where Appellant was surrounded by law

enforcement under circumstances where the identifying officers were under pressure to identify Appellant as the suspect, but had either no opportunity or a very limited opportunity to view the suspect at the time of the incident. R. 48, ll. 1 – R. 49, ll. 17.

Counsel highlighted Schnettler's initial description of the suspect as a white male with "shiny legs" and his total inability to describe the suspect's haircut, appearance, footwear, or age. *Id.* The defense also emphasized that Schnettler only had, "a 30 second viewing from approximately a football field away in the pre-dawn hours, that's what we're identifying here where he gave no description, was taken to the officer and then picked him out." R. 48, ll. 16-20.

Moreover, Schnettler never relayed a physical description of the suspect when he was contemporaneously reporting the incident. R. 53, ll. 14 – R. 54, ll. 4. Instead Schnettler reported the number of packages that the suspect was throwing into the prison. He only provided his white-male description after the incident occurred. R. 54, ll. 1-4. The defense observed that Schnettler's failure to provide a description of the suspect during the incident did not reflect Schnettler's claimed training and expertise, which stressed the importance of providing the responding officers with a detailed description of the suspect. R. 53, ll. 14-25.

With respect to Lippe's identification, defense counsel noted that despite testimony from Schnettler, Hunt and Kirkley, only Lippe recalled the officers taking Appellant back to the prison to be identified. R. 48, ll. 22 – R. 61, ll. 2. As with Schnettler, the defense argued that Lippe had only a short observation window as she was driving past Appellant in the pre-dawn hours. R. 49, ll. 2-13. Moreover, the risk of a misidentification leading the jury to convict Appellant was even greater as Lippe did not see the actual incident, but could provide a more detailed identification of Appellant.

---

[1] *Neil v. Biggers*, 409 U.S. 188 (1972).

The State conceded that the one person show-up procedure was suggestive, but countered that both Schnettler and Lippe were trained law enforcement officers. R. 49, ll.19 – R. 50, ll. 4. The State alleged that the officers are trained to "observe and record information mentally and then report the information." *Id.*

The State argued that the guard tower was designed to provide officers with a comprehensive view of the interior and exterior of KCI. R. 50, ll. 7-19. The prison also had extensive lighting and Schnettler's description of the suspect's clothes was consistent with Appellant's attire. R. 50, ll. 19-25. The State downplayed Schnettler's description of the suspect as a white male, arguing that under the conditions at the time of the incident, Appellant could have been confused for a white male. R. 50, ll. 24 – R. 51, ll. 21.

In arguing for the admissibility of Lippe's identification, the State emphasized Lippe had the opportunity to observe the suspect while driving past him. R. 52, ll. 1-16. The State also posited that Lippe's identification was somehow more reliable because she did not witness the incident. R. 52, ll. 17 – R. 53, ll. 10. The State concluded by reminding the Court that both officers were absolutely certain that Appellant was the suspect. R. 51, ll. 14-18; R. 53, ll. 5-10.

The trial court ruled that the identifications were sufficiently reliable to overcome the suggestiveness of the single person show-up. R. 54, ll. 5-13. When assessing each officer's opportunity to view the crime, the court determined that Lippe "although she did not view the crime, [Lippe] testified that she passed by the [Appellant]," in close proximity and "got a new view of the [Appellant]." *Id.* at 13-19.

The court concluded that Schnettler, while not close to the incident or able to provide an accurate description of the suspect, stated that he was completely certain that the Appellant was the suspect once his supervisor presented Appellant for identification. *Id.* at ll. 19-25. The court

then took judicial notice of the fact that Appellant is an African-American male of "lighter complexion." R. 55, ll. 1-6.

As to the witnesses' degree of attention, the court determined that Schnettler observed the incident as a part of his job and that Lippe had paid close attention to the Appellant because she found it odd that a person was walking down the road. *Id.* at ll. 6-12. Then, with respect to the certainty of the witnesses, the court reiterated that the officers were adamant and stated they were "100 percent certain" that Appellant was the suspect. *Id.* at ll.22-25. Accordingly, the court held that the identifications were admissible despite the suggestiveness of the identification procedure. R. 57, ll. 1-4.

Trial

At trial, defense counsel renewed his motion to suppress Lippe and Schnettler's identifications prior to each testifying. R. 96, ll.5-9; R. 117, ll. 15-18. Both motions were denied. *Id.*

During their deliberations, the jurors sent the court two questions. First, the jurors asked for clarification regarding direct versus circumstantial evidence; which the trial court answered by repeating its instructions from the jury charge. R. 207, ll. 10- R. 208, ll. 18. Second, the jurors asked, "how far in distance was the [Appellant] from the contraband area, Oak dorm, when Lippe noticed him on the side of the road?" R. 212, ll.

The trial court then brought the jury in and asked the foreman to write down what testimony they would like to hear again. R. 212, ll. 10-15. The juror's indicated they wished to rehear Kirkley's and Lippe's testimony. *Id.* at ll. 17-23. The juror's deliberations continued into the next morning, where they reached a verdict of guilty on all counts. R. 214, ll. 4-24.

ARGUMENT

I.

The trial judge erred by denying the motion to suppress the suggestive single person show-up identification of Appellant made by Correctional Officer Joe Schnettler because it was unduly suggestive and unreliable and the resulting in-court identification was tainted by the prior suggestive procedure.

Discussion

The show-up identification procedure used to secure Schnettler's identification of Appellant was impermissibly suggestive and carried the risk of irreparable misidentification. Accordingly it should have been suppressed. Generally, the decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error. *State v. Moore*, 343 S.C. 282, 540 S.E.2d 445 (2000). However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. *Caver v. Alabama,* 537 F.2d 1333, 1335 (5th Cir.1976), *cert. denied,* 430 U.S. 910, (1977), *citing Foster v. California,* 394 U.S. 440, 442-43, n. 2 (1969).

Reliability is the linchpin in determining the admissibility of identification testimony. *Id.* at 504, 589 S.E.2d at 785, *citing Manson v. Brathwaite,* 432 U.S. 98, 114, (1977); *State v. Blassingame,* 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App.1999). A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. *State v. Mansfield,* 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App.2000); *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 very substantial likelihood of irreparable misidentification. *Manson v. Brathwaite,* 432

U.S. 98 (1977); *Simmons v. United States*, 390 U.S. 377, (1968); *State v. Stewart*, 275 S.C. 447, 272 S.E.2d 628 (1980).

The burden is on the state to show by clear and convincing evidence that an in-court identification of a defendant was not tainted by suggestive action on the part of police, or, presumably, other state officials. *State v. LaRue*, 271 S.C. 256, 246 S.E.2d 890 (1978). "The central question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 527 (2004).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. *Biggers*, 409 U.S. 188. First, "[a] court must first determine whether the identification process was unduly suggestive." *Id.*, 409 U.S. at 198; *Moore* 343 S.C. at 286-287, 540 S.E.2d at 447. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed ... only if [the procedure] was suggestive need the court consider the second question-whether there was a substantial likelihood of irreparable misidentification. *Id.*; *State v. Brown*, 356 S.C. 496, 589 S.E.2d 781, 784 (Ct. App. 2003); *See Biggers, supra.*

Single person show-ups are particularly disfavored in the law. *Stovall v. Denno*, 388 U.S. 293 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also *State v. Johnson*, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law); *In the Interest of Jamal Rashee A.*, 308 S.C. 392, 418 S.E.2d 326 (Ct.App.1992) (taking witness to location where suspects, but no other individuals, are being detained is suggestive).

The identification procedure in the present case was an unduly suggestive single-person show-up. Schnettler had been informed by Lippe that she had seen Appellant, who she described as a light-skinned African American with a short haircut, walking down the road on her way to work. R. 26, ll. 3-5; R. 16, ll. 24-25. Appellant was the only suspect presented to Schnettler by his superior officer, Corporal Hunt. R. 27, ll. 5-19. Appellant was handcuffed at the time of the show-up with only law enforcement officers around him. R. 26, ll. 8-24.

Moreover, the fact that Schnettler had failed to provide a detailed description of the suspect at the time of the incident and that this was the first time he had experienced such an incident, added to the pressure Schnettler must have been feeling to insure that someone was apprehended for the breach of prison security. Therefore, the trial court was correct in holding that the line-up was suggestive; however the court committed a reversible error in applying the second prong of the *Biggers* analysis because the procedure used created a substantial likelihood of irreparable misidentification.

In considering whether an identification is reliable, based on the totality of the circumstances and despite the use of an unduly suggestive process, the court should consider the following factors: (1) the opportunity of the witness to view the offender 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. *Moore*, 343 S.C. at 289, 540 S.E.2d at 448-449.

Applying these factors, Schnettler's out-of-court identification was not reliable and a substantial risk of misidentification existed. As noted, Schnettler had approximately thirty seconds to view the suspect and was about one hundred yards away from where the incident

occurred. R. 23, ll. 1-10. The watch tower and lighting for the prison are oriented towards the interior of the prison and the incident occurred in the pre-dawn hours. R. 21, 1 – R. 22, ll. 21.

Schnettler's view of the incident was also partially obstructed by the razor wire and the outer fence. *Id.*; (State's Exhibits No.: 2 and 3, photos). The incident happened at the end of his twelve hour shift and was the first time that Schnettler had witnessed someone attempting to throw contraband into the prison. R. 115, ll. 16-23. In sum, the officer Schnettler had a very small window of time in which to observe the suspect from an obstructed vantage point at a considerable distance from the incident.

As to his degree of attention, while Schnettler was trained to observe the suspect and report a description; he failed to provide a detailed description of the suspect. Schnettler could not describe the suspect's, haircut, facial features, or any other identifying characteristic of the suspect. Furthermore, Schnettler reported the suspect was a white male. R. 22, ll. 18-21. As his testimony makes clear, most of Schnettler's reporting the time of the incident was focused on the number of packages being thrown into the prison yard, not the identifying characteristics of the individual throwing them. R. 24, ll. 4-9.

Like his degree of attention, Schnettler's accuracy is likewise questionable. Schnettler reported that he observed a white male running towards the prison's outer fence. It was only after speaking with Lippe, that Schnettler discovered that Appellant had been seized by law enforcement and was a black male. R. 26, ll. 3-10. Schnettler also described the suspect as having shiny legs, but Appellant has heavily tattooed legs. R. 30, ll. 18-23. The vagueness of Schnettler's initial description mitigates against the court's finding that his initial description was accurate.

Schnettler made his positive identification of Appellant within an hour or an hour and a half of the suspect fleeing into the woods and expressed great confidence in his identification. R. 16, ll. 19-23. Nevertheless, its reliability is highly suspect as this identification was made at the behest of his superior officer. *Id.* In fact, Hunt was so assertive that Deputy Kirkley believed Hunt had actually made the identification. R. 38, ll. 13-14. Appellant was also handcuffed and was the only suspect presented. R. 39, ll. 1-10. As Schnettler's description is too vague to create a workable suspect description, his early identification of Appellant was crucial to the State's efforts. Moreover, Schnettler had already been told by Lippe that a suspect had been caught immediately before meeting with his superior officer to make the identification. R. 26, ll. 2-15.

The show-up identification used to have Schnettler identify Appellant created a very substantial likelihood of irreparable misidentification. Accordingly, both Schnettler's show-up identification and his in court identification should have been suppressed. Schnettler's identification was the only evidence linking the contraband to the Appellant and, as such, a new trial is necessary.

II.

The trial judge erred by denying the motion to suppress the suggestive single person show-up identification of Appellant made by Correctional Officer Brenda Lippe because it was unduly suggestive and unreliable and the resulting in-court identification was tainted by the prior suggestive procedure.

Discussion

The single person show-up identification of Appellant by Lippe was unduly suggestive and the trial court committed a reversible error as there was a very substantial likelihood of irreparable misidentification. *Johnson*, 311 S.C. at 134, 427 S.E.2d at 719; Therefore, Lippe's show-up identification and her in-court identification should have been suppressed. *Stewart*, 275 S.C. at 447, 272 S.E.2d at 628.

The show-up identification was done with Appellant handcuffed and exiting the back of a police car. R. 13, ll. 1-23. Hunt, from whom Lippe had initially learned about the contraband incident, was stationed next to Appellant. Lippe had spoken with Schnettler before he left to make his identification and presumably knew that Schnettler had already identified Appellant as the suspect by the time she was asked to make her identification. R. 16, ll. 17 – R. 17, ll. 24. As with Schnettler's identification, the trial court correctly determined the procedure used when Lippe made her identification was suggestive. R. 54, ll. 5-13.

When applying the previously-detailed factors regarding reliability of an identification arising out of a suggestive police procedure; Lippe's out-of-court identification was not so reliable that no substantial likelihood of misidentification existed. *Moore*, 343 S.C. at 289, 540 S.E.2d at 448-449. First, unlike, Schnettler's identification, Lippe's identification was not made a result of her having witnessed the suspect at the time of the crime. R. 54, ll. 13-19. Her identification stems from passing Appellant while on her way to work. *Id.* As she did not observe the offense happening, the probative value of her identification is questionable while

being highly prejudicial to Appellant as the central issue in the case is who threw contraband into the prison, not who was walking down U.S. 601.

Even if the identification has marginal, circumstantial probative value, the risk of misidentification is substantial. Lippe had less than one minute to observe the individual walking down the road. R. 9, ll. 616-18. Moreover, she observed him during pre-dawn hours and with only the illumination of her day-time running lights. R. 91, ll. 16-24. The portion of U.S. 601 that she was traveling on has a speed limit of 55 mph and no street lighting. Her degree of attention is dubious given that she was presumably focused on driving safely and had no reason to believe Appellant had committed a crime at the time she passed him. Finally, Lippe's identification was made from the guard tower at a distance of approximately fifty yards while Appellant was standing next to Hunt and with the knowledge that Schnettler had likely already identified Appellant as the suspect. R. 17, ll. 8-24.

As with Schnettler, the trial court committed a reversible error in holding that, while the police-procedure was suggestive, the officers' identifications were reliable. Under the totality of the circumstances, Lippe's show-up identification used in the present case created a very substantial likelihood of irreparable misidentification and was of little relevance to the State's case, but highly prejudicial to the defense because it implied that Appellant was guilty for simply walking down U.S. 601. Further, the trial court's error was not harmless because Lippe's identification of Appellant was more detailed than Schnettler's description of the suspect at the time of the incident however, Lippe never witnessed the incident happened.

In short neither Schnettler's identification nor Lippe's had sufficient indicia of reliability to overcome the irreparable risk of misidentification stemming from the patently suggestive single person show-ups conducted by law enforcement. *Moore*, 343 S.C. at 289, 540 S.E.2d at

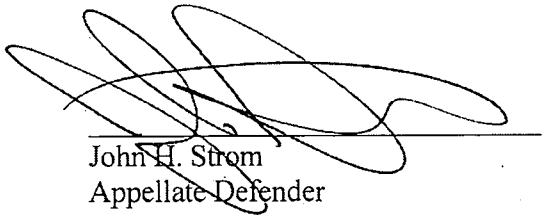
448-449. To wit, Schnettler initially reported that the suspect was a white male and could provide no description of his haircut or facial features beyond the suspect having shiny legs. R. 19, ll. 2 – R. 21, ll. 25; R. 25, ll. 1-13; R. 30, ll. 18-23. Appellant is an African American with heavily tattooed legs. R. 30, ll. 18-23. Moreover, his identification was done at the behest of his superior officer and after being told by Lippe that the suspect had been caught. R. 26, ll. 2-10. Lippe did not observe the incident occur. R. 54, ll. 13-19. She passed the individual on the road in the pre-dawn hours with only her daytime running lights on. R. 91, ll. 16-24. Her identification of Appellant came after she knew that Schnettler had already made his identification. R. 17, ll. 8-24.

Accordingly, both show-up identifications and the in court identifications by Schnettler and Lippe should have been suppressed and a new trial is necessary.

CONCLUSION

For the foregoing reasons, Appellant Shawn Wyatt respectfully requests that this Court reverse his convictions and remand this case to the Lancaster County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

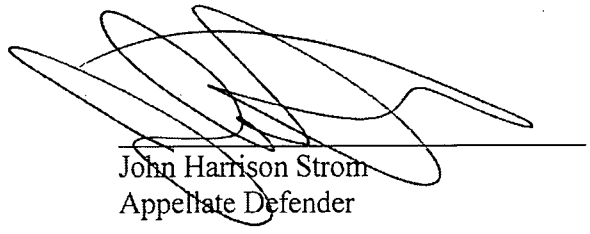
ATTORNEY FOR APPELLANT

This 1st day of July, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

July 1st, 2015



John Harrison Strom
Appellate Defender

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAWN LEE WYATT,

APPELLANT

APPELLATE CASE NO. 2014-001556

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 William M. Blitch, Esquire, Senior Assistant Deputy Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of July, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2014-001556

The State, Respondent,

vs.

Shawn Lee Wyatt, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly found based on the totality of the circumstances the identification made by both Officers Schnettler and Lippe were reliable and did not err in denying Appellant's motion to suppress their identifications.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court correctly found based on the totality of the circumstances the identification made by both Officers Schnettler and Lippe were reliable and did not err in denying Appellant's motion to suppress their identifications.

Appellant contends the trial court erred in denying his motion to suppress the identifications made by two Correctional Officers who observed Appellant and then identified him during a single person show-up identification procedure. The officers each had ample time to view Appellant during the crime or during his departure from the scene, provided a reasonably accurate description of Appellant and his clothing, made the identification a short time after initially viewing Appellant, and were one hundred percent confident in their identification.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of identification evidence falls within the trial judge's discretion and will not be disturbed on appeal without an abuse of discretion or an error of law. State v. Govan, 372 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007). A trial judge should only exclude the identification evidence if there is "'a **very substantial** likelihood of irreparable misidentification.'" Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted); see also, State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Suggestiveness alone does not mandate the exclusion of evidence."). Significantly, the exclusion of evidence is a "drastic sanction" and should be "limited to

identification testimony which is **manifestly suspect.**" Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983)(emphasis added).

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). 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 South Carolina Supreme Court explained:

> 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); Manson v. Brathwaite, supra. First, "[a] court must first determine whether the identification process was unduly suggestive.... [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Curtis v. Commonwealth, 11 Va.App. 28, 396 S.E.2d 386, 388 (1990) (citing Neil v. Biggers, 409 U.S. at 198, 93 S.Ct. 375).

State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). The Court further stated:

> Although one-on-one show-ups have been sharply criticized, and are inherently suggestive, the identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure. [The] inquiry, therefore, must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.

Id. at 287, 540 S.E.2d at 448 (quoting Jefferson v. State, 206 Ga.App. 544, 425 S.E.2d 915, 918 (1992)).

If a show-up is conducted, the show-up may be proper where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness' memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching. Brown, 356 S.C. at 503-504, 589 S.E.2d at 785. The use of a show-up is less objectionable the closer the show-up is in time and proximity to the scene of the crime. Brown, 356 S.C. at 504, 589 S.E.2d at 785. Furthermore, a show-up may even be proper when the police refer to the individual as a suspect and he is handcuffed and in the presence of law enforcement officers. Id.

Assuming the single-person show-up identification procedure was unduly suggestive,[1] the Court must determine "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." Biggers, 409 U.S. at 199. The United States Supreme Court enounced:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' 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.

Id. at 200. "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." Perry, 132 S. Ct. at 720.

[1] The State conceded at the hearing the show-up procedure was inherently suggestive. (T.61; 66; R. 49; 54). The State did not concede it was unduly suggestive but did argue exclusively regarding the indicia of reliability regarding the officers' identifications.

In State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000), this Court considered whether identification evidence obtained from a show-up identification procedure conducted at a police station was properly admitted during trial. In that case, a neighbor of the victim witnessed a man later identified as Mansfield attempting to break into the victim's home in the middle of the afternoon. Id. at 69-70, 538 S.E.2d at 259. During the attempted break-in, the neighbor looked right at Mansfield's face and attempted to speak with him before Mansfield quickly exited the area. Id. at 70, 538 S.E.2d at 259. Thereafter, the neighbor contacted the authorities and correctly described Mansfield's height, race, skin tone, and shirt but incorrectly indicated that Mansfield was wearing white shorts and tennis shoes and had his hair in plaits. Id. A short time later, Mansfield was apprehended while wearing grey sweat pants pulled up to his knees and boots and with his hair in an afro. Id. at 70-71, 538 S.E.2d at 259. Following his apprehension, Mansfield was transported to a police station, and the neighbor identified him as the attempted burglar. Id. at 71, 538 S.E.2d at 259.

On appeal, this Court affirmed Mansfield's conviction after finding the neighbor's identification of Mansfield to be reliable under totality of the circumstances. Id. at 79-80, 538 S.E.2d at 263-264. In reaching its conclusion, this Court relied upon the following circumstances supporting the reliability of the identification: (1) the neighbor's attention was heightened; (2) the neighbor had a good opportunity to view the attempted burglar in good lighting; (3) the neighbor expressed certainty in his identification of Mansfield; (4) the neighbor's description "description on the whole was accurate" even though there were slight discrepancies in the description of Mansfield's hair and clothing; and (5) the show-up was conducted less than an hour after the crime. Id.

The trial court conducted a hearing in which both officers testified. Officer Lippe testified she was headed into work at the Kershaw Correctional Institution (KCI) in the early morning on July 12, 2013. (T.17; R. 5). As she headed down Highway 601, she passed an individual walking on the opposite side of the road toward her. She observed the individual and described him as a "medium build, light skinned black gentleman in a black colored shirt with looked to be charcoaled colored shorts." (T.18-19; R. 6-7). She also indicated he had a "nice neat haircut." (T.20; R.8). Officer Lippe indicated she saw him roughly a half a mile from the driveway to KCI.

A sheriff's deputy brought Appellant back to KCI to be identified by Officer Lippe. The gentleman stepped out of the sheriff's department vehicle and was identified by Officer Lippe. (T.24-25; R. 12-13). She identified him about an hour after seeing him on Highway 601 and was "100 percent sure" of her identification. (T.27; R.15).

Officer Schnettler also testified at the pre-trial hearing. He indicated he was working in an observation tower at KCI in the morning hours of July 12, 2013. (T.31; R. 19). He testified he saw a man run from the treeline up to the fence of the prison and throw several packages over the fence and then run back to the trees. (T.34; R. 22). He indicated the area is well lit from the prison's perimeter lighting as well as cluster lights above the prison. He testified he saw a "light complected [sic] man run from the treeline in a pair of jean shorts, long jean shorts and dark shirt." (T.34; R. 22). He indicated at the time of the incident he believed the individual to be a white male. (T.35; R. 23). He viewed him from about 80 yards away for approximately 30 seconds. (T.35-37; R. 23-25).

Officer Schnettler exited the tower and met a sheriff's deputy on the side of the road to make an identification of Appellant. He then viewed the man in the back of the sheriff's department vehicle and he looked like the man. Officer Schnettler asked that the man get out of the car to see him standing and indicated it was the man he saw throwing contraband into the prison. (T.39; R. 27). Officer Schnettler noted how light the skin on Appellant's legs was as well as the clothing Appellant wore. (T.39; R. 27). He indicated he was "100 percent" certain the man in the sheriff's car was the man he saw throw packages over the fence. The viewing took place less than a half hour after he originally witnessed Appellant throw packages over the fence. (T.40; R. 28).

The show-up procedure in this case was not unduly suggestive. The show-up occurred a short time after the incident and shortly after Appellant was viewed by both officers. The identification took place at or very near the site of the incident, and precluded any opportunity for Appellant to have altered his appearance. The close proximity and time to the incident allowed the officers' memories to remain fresh and allowed the sheriff's department to quickly determine whether Appellant was the individual throwing contraband into KCI or whether they needed to continue a search for another individual. See Brown, 356 S.C. at 503-504, 589 S.E.2d at 785.

Even assuming the show-up procedure was unduly suggestive, the trial court properly admitted the out-of-court and in-court identifications of Appellant by Officers Lippe and Schnettler. The trial court conducted a thorough analysis of whether the identifications were reliable not withstanding the show-up procedure used. (T.66-68; R. 54-56).[2] Specifically, the court found 1) both officers had opportunity to view Appellant

[2] It should also be noted the trial court thoroughly charged the jury regarding its role in assessing and using the identifications. (T.236-238; R. 204-206).

at or near the scene of the crime; 2) while Officer Schnettler mistakenly believed the individual to be a white male, the court took judicial notice Appellant was an African-American males "of a lighter skin complexion," and the remaining descriptions offered by both officers were accurate; 3) both officers were paying close attention at the time they viewed Appellant; 4) both officers were "100 percent certain" Appellant was the individual seen previously; and 5) the show-up occurred a short time after the crime and the viewing by the officers. (T.66-68; R. 54-56).

The trial court explicitly considered all factors provided by Biggers and found, based on a totality of the circumstances, "the show-up identification procedures used in this arrest did not create a substantial likelihood of irreparable misrepresentation" and the identification by the officers was "reliable." (T.68; R. 56). The trial court's decision is amply supported by the testimony of the officers and the evidence presented during the pre-trial hearing, and, therefore, the court properly admitted the identification.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 17, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2014-001556

The State, Respondent,

vs.

Shawn Lee Wyatt, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 17, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2014-001556

The State, Respondent,

vs.

Shawn Lee Wyatt, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 17th day of July, 2015.

Sally Ellison

SALLY ELLISON
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727