

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

V.

JULIUS ROOKS-MCBEAN,

APPELLANT

APPELLATE CASE NO 2016-001152

FINAL BRIEF OF APPELLANT

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SC Court of Appeals
RESPONDENT,

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT

The trial court erred in allowing Lieutenant Baird and Vic Patel to testify about appellant’s identity because neither were at the scene of the crime when the crime happened and their testimony was spurious, confusing, and it bolstered the State’s case on the issue of identity.3

CONCLUSION.....7

TABLE OF AUTHORITIES

Cases

State v. McKenley, 397 S.C. 461, 725 S.E.2d 139 (2012) 5

United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967) 5

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing Lieutenant Baird and Vic Patel to testify about appellant's identity when neither were at the scene of the crime when the crime happened and their testimony was spurious, confusing, and it bolstered the state's case?

STATEMENT OF THE CASE

Appellant was convicted of attempted armed robbery, assault and battery with intent to kill, and possession of a weapon after a jury trial held before the Honorable Roger L. Couch on May 23-25, 2016, in Beaufort County. Respective sentences of fifteen (15) years, fifteen (15) years, and five (5) years were imposed. Jared S. Newman, Esquire was defense counsel. Hunter P. Swanson, Esquire and Ann Fitts, Esquire were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred in allowing Lieutenant Baird and Vic Patel to testify about appellant's identity because neither were at the scene of the crime when the crime happened and their testimony was spurious, confusing, and it bolstered the State's case on the issue of identity.

On December 23, 2009, a man entered the Island Plaza Convenience Store at 862 Sea Island Parkway in St Helena in Beaufort County during the nighttime and attempted to rob the store owner, Jay Patel. Mr. Patel was shot during the attempted armed robbery but survived to testify.

The key issue in this case was the identity of the suspect. Deputy Capps said he responded to the store on the night of the shooting. Antonio Brown an employee at the store was standing by the door which was locked. He let Deputy Capps in and he found Jay Patel on the floor with a gunshot wound to the chest. (R. 126, line 21 – p. 128, line 3) The deputy testified that he viewed a video from the store surveillance system. (R. 131, line 19 – p. 132, line 8). A still shot from the video showed the suspect. (R. 134, lines 8-13) They were able to get fingerprints off the door store. (R. 135, lines 15-19) One usable print came back that belonged to Dominick Lesesne who lives on St. Helena and the deputy had frequent dealings with him. Lesesne was around 6'4" to 6'5" tall. He was a black male that was darkly complexed and wore dread locks. (R. 137, line 21 – p. 138, line 22)

On cross examination, Deputy Capps admitted that he could not identify who the suspect was on the video. He did see dark pants, an orange or red pullover and a black knit cap. He admitted that he had seen people with dreads pull them tightly and put them in a rubber band, put a beanie over the top and tuck it into a large fitting shirt. (R. 141, line 15 – p. 143, line 5) He

said a booking report listed Dominick Lesesne at 6'5" tall and appellant at 6'6" tall. (R. 143, lines 8-14) There was no forensic evidence found at the scene that linked appellant to the crime. (R. 146, lines 4-7)

Jay Patel, the victim, testified next. He said the suspect who shot him regularly came into the store 4-5 times a day in about 3 months. (R. 154, lines 4-15) After he got out of the hospital, he picked appellant out of a photo lineup as the person who shot him. (R. 156, line 16 – p. 158, line 16)

Torry Brown, a store employee, testified next that he also picked appellant out of a photo lineup and he identified appellant in the courtroom. (R. 169, line 23 – p. 172, line 15)

The solicitor next proffered testimony of Lieutenant Baird and Vic Patel. Lieutenant Baird said he showed a photo lineup to Vic Patel because Patel had told him that he could identify an individual who was a suspect in the shooting. He told Lieutenant Baird he could tell him if it was the person that everybody said was the guy from New York. Patel said he had frequent contact with him at the store. (R. 188, line 18 – p. 189, line 13) Vic Patel picked appellant out of a lineup. (R. 190, lines 12-20).

Vic Patel testified his dad owned the store where the attempted armed robbery occurred¹. He also said he picked appellant out of the photo lineup. (R. 195, lines 10 – p. 196, line 23)

Defense counsel objected because the evidence was legally spurious and confusing to the jury. It would just bolster the in-court identification of appellant. (R. 197, lines 13-21) He said, "It sounds like one more witness identifying the dude that did this when he can't identify the dude that did this at all. (R. 198, lines 4-6) The solicitor said Vic Patel recognized the guy so it goes towards identity and this is an identity case. (R. 197, lines 14-16)

¹ Vic Patel was not at the store when it was robbed.

The trial court said, "I think this goes toward the identity of that person that was identified by the two eyewitnesses, and so I'm going to allow the testimony." (R. 199, lines 5-7)

After the jury came back, Investigator Malphrus testified that on November 13, 2009, he made a traffic stop on a silver Lexus with a New York license plate. Appellant was sitting in the rear passenger seat. Investigator Malphrus said he did not recall if the license tag number was EUY1436. He was also not aware that Vic Patel had written down the number 3178. (R. 202, lines 8 – p. 204, line 19)

Vic Patel testified that Jay Patel was his father. The younger Patel said he worked at the store 7 days a week but he was in Florida on the day of the attempted robbery. (R. 205, line 19 – p. 206, line 13) He again said he picked appellant out of a photo lineup even though he was not at the scene. (R. 218, line 20 – p. 219, line 21)

Lieutenant Baird testified, this time in front of the jury, that Vic Patel was not at the store during the shooting but he did pick appellant out of the phot lineup. (R. 228, lines 1-17)

The decision to allow Vic Patel's testimony and Lieutenant Baird's testimony should not have been allowed. "witnesses may not improperly bolster the testimony of other witnesses." State v. McKenley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (2012). The testimony of Vic Patel and Lieutenant Baird that Vic Patel picked appellant out of a photo lineup was not relevant to the issue of eyewitnesses identification in this case other than in a spurious way. In United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933 (1967) the Supreme Court of the United States wrote: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." The technique used in this case only compounded the problem of eyewitness identification. It should be noted that appellant's first trial resulted in a mistrial because the jury could not reach a verdict. At that trial Vic Patel and Lieutenant Baird

did not testify concerning Vic Patel picking appellant out of a photo lineup. It was not until the second trial that this bolstering testimony was used so that the State could get a conviction. Now solicitors will know they can be rewarded by using bolstering spurious testimony of non-eyewitnesses to pick a defendant out of a photo lineup. This should not happen.

CONCLUSION

Appellant's convictions should be reversed.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

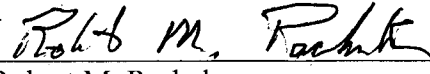
ATTORNEY FOR APPELLANT

This 5th day of September, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

September 5th, 2017



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