STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

COREY ANDREW BROWN,

APPELLANT

APPELLATE CASE NO 2016-001536

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing identification testimony into evidence that emanated from a suggestive pre-trial out-of-court identification based on a media representation where a store worker identified appellant as the perpetrator in the case because of the likely link between police and state action connected to the media coverage, which in turn meant that the identifications were unreliable and inadmissible at trial.

STATEMENT OF THE CASE

Appellant Corey Andrew Brown was convicted of first degree assault and battery, kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime during the July 2006 term of the Spartanburg County General Sessions Court before Judge R. Keith Kelly. Appellant was sentenced to imprisonment for an aggregate period of thirty-five years. Paul K. Neely and J. Roger Poole represented appellant at trial and Assistant Solicitor Joe Barnette appeared on behalf of the state.

Appellant appealed his convictions and sentences. This brief follows.

ARGUMENT

The trial judge erred in allowing identification testimony into evidence that emanated from a suggestive pre-trial out-of-court media identification based on a media representation where a store worker identified appellant as the perpetrator in the case because of the likely link between police and state action connected to the media coverage, which in turn meant that the identifications were unreliable and inadmissible at trial.

At trial, Mindy Slotin testified that she was working at her husband's Imagination Store located in downtown Spartanburg on the afternoon on August 7, 2015, when a male and female entered to pay for an item previously selected. Slotin testified that after she answered the male's question about another toy, "the next thing she realize[d] [was that] she was laying on the floor [and] he had a gun pointed at [her] face and he had hit [her] in the head with the gun." Slotin added further that the man duck taped her hands, took her ring, led her to the cash register at gunpoint, made her open the cash register, and then led her into the back storage room where he taped her ankles and then fled. R. 55, l. 9 – R. 60, l. 6. Slotin stated she saw the man who was "duct taping" her and made an in court identification at trial pointing to appellant as the perpetrator in the case. R. 60, l. 18-24; R. 76, l. 10-25.

State's witness Sandra Elaine Pearson testified that she was with appellant inside the store on the date in question and saw appellant put a gun to Slotin's head, and that she witnessed him taping her and leading her to the cash register and then to the storage room before fleeing. R. 85, l. 10 – R. 99, l. 4.

Prior to trial, defense counsel objected to the use of the identifications made by Slotin in the case in effect because it was tainted by "the out of court [media] identification" thereby making it "so unreliable...it would create a substantial likelihood of misidentification." R. 4, l.

16 – R. 4, l. 2. Here, the store owner's wife, who was the subject of the attack, called the police station after the incident and advised Investigator Kirky that she saw a mug shot of appellant on the local evening news in connection with a report about the case and recognized that the mugshot was a picture of the perpetrator. The picture in question was a photograph of appellant. R. 19, l. 6 – 12; R. 25, l. 13 – R. 26, l. 15. This was problematic because after the crime, Slotin stated that she could only describe the perpetrator's clothing and height (much taller - not exact height), but not his "eyes" or "nose". R. 24, l. 11 – R. 25, l. 12. Defense counsel argued that the source of that news report would be from some police action, and that the "Bigger" standard applied in the case. R. 4, l. 3-20; R. 3, l. 16 – 23. Counsel argued that the "crux of [his] argument" was that Slotin's "[in-court] identification [was] based off the identification that she made when she saw his mugshot on the news" and in effect that the resulting in-court identification was "tainted" and ultimately unreliable. The solicitor argued that there was no governmental involvement connected to the news media report in question and that the media acted alone. R. 5, l. 4 – R. 7, l. 4.

Defense counsel's response was that this was an ongoing investigation because the incidents occurred on August 7, 2015 and three days later on August 10, 2015, the news received the information from local police (the mugshot) and the story was then aired on television. Counsel argued that the media received the information in the case from law enforcement.

Defense Counsel outlined his objection as follows:

> Your Honor, to allow her to sit on that witness stand and point at [appellant] and say that that's the man that did it, she's absolutely gonna (sic) be able to just point at the man whose mugshot she saw on tv. At this point, because a law enforcement's involvement in the identification of [appellant] through that news source, [i.e.] her in-court identification is gonna be so tainted that she's only gonna [sic] see the man whose mug shot was on that news so to allow her to make an in-court identification based on an unreliable out-of-

> court identification would violate [appellant's] due process rights. R. 9, lines 3 – 13.

The solicitor's response follows:

> Your honor...the newspaper always gets their news from law enforcement reports and everything of from mug shots or whatever, they put this information in news. All these cases the police they have to make a case and then it comes out at that point. To argue that the police intentionally did this, this is not intentional from that stand point. R. 9, lines 15-21.

At the in-camera hearing that followed, Mindy Slotin testified as follows:

> Q: And you identified, your identification's based on what you see in the courtroom today, is that right ma'am?
>
> A: Absolutely, it's the same guy, there's not a doubt in my mind.
>
> Q: But ya (sic), also saw it's obviously saw his mug shot at some point a couple of days afterwards, is that right, ma'am?
>
> A: I did but the police never, the police...when I saw them said, I told them that I had seen the mug shot, they said well we can't, we're not even gonna (sic) bother askin' you for identification because you just saw a mug shot. R. 19, l. 2 – 12.

Thus, even police officers realized that the error and stated the following:

> We can't, we're not even gonna (sic) bother asking you for identification because you just told us you saw a mug shot. R. 19, l. 9 – 12.

Slotin stated that she was extremely upset when this happened on August 7, 2015, and could only identify the perpetrator's height (5'10") and that she left town on August 8, 2015, which meant she did not see any photographic line up, but that she saw the media shot on August 10, 2015, and then saw a name in the paper as to who had been arrested in the case. R. 24, l. 13 – R. 26, l. 15; R. 27, l. 3 – R. 28, l. 2.

At the close of Slotin's testimony, the court found no governmental involvement in the case because of the short period of time in which these events in question occurred and thus

ruled her in-court identification would be admissible at trial. R. 29, l. 25 – R. 31, l. 19; R. 35, l. 3 – R. 36, l. 11.

At trial, Slotin recounted her version of the incident and testified that she "got a very good look at [the perpetrator]" and made an in-court identification pointing to appellant as the perpetrator in the case. R. 60, l. 19 – R. 61, l. 24; R. 76, l. 18 – 25. On cross examination, Slotin admitted in effect that her description of the perpetrator was limited in that it included ethnicity and clothing only. Slotin stated that the perpetrator was 5'10" and 160 lbs and wore blue jeans and a dark shirt. R. 78, l. 19 – R. 79, l. 12. However, initially she gave no height and only described the perpetrator as "taller". R. 25, l. 1 – 12.

Reliability is the linchpin in determining the admissibility of identification testimony, and further, the purpose of the strict rule regarding the inadmissibility of evidence of unnecessarily suggestive confrontations is to deter the police from using a less reliable procedure where a more reliable one night be available. See. State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (2000), citing to Manson v. Braithwaite, 432 U.S. 98 (1977). For example, single show up identifications or single photograph displays are widely condemned. See Stovall v. Denno, 388 U.S. 293 (1967). Even in Tisdale, the Court held that "it is uncontested that the media identifications were suggestive." In Tisdale, a man robbed a bank on October 24, 1996, and on that same evening, one teller saw a report of the robber's arrest on television and another teller identified the robber from a photograph she saw in a newspaper article shortly thereafter. However, although the Tisdale Court found that there was no police (or governmental) sources connected to the pre-trial media identifications, the fact that the tellers were 1.) thoroughly examined about their descriptions and 2.) apparently examined about the media reports as they related to their identification, then no due process violation was found to have occurred in the case.

In the case at bar, the solicitor stated that the police did not intentionally give information about this case to the media, and in effect that police have to make their case by giving information to the media. R. 9, l. 15 – 21. The police failed to obtain an identification from Slotin because she called them (the police) about her identification from the media. Also, Slotin was not thoroughly examined by the state or by the defense at trial (as done in Tisdale) about that the out-of-court media representation she viewed and whether or how that influenced her in-court identification. In addition, Slotin's woefully inadequate description of the perpetrator made it a mystery as to how she was able to connect the dots and identity the perpetrator without help from the media identification. For example, Slotin's memory led to a nondescript identification of the perpetrator, which is proved by relevant portions of her testimony below:

> Q. Okay. And what was the nature of your contact with law enforcement? Do they ask you for a description? What was your conversation like?
>
> A. The conversation was, if it, uh, if I can remember was basically that store has been robbed and that I had been tied up and hit at gunpoint and at the time I didn't know if the people were still in the store, if they were in the store, I had ran, I'd left the store so, I mean, that was basically what I told 'em initially.
>
> Q. Right, okay.
>
> A. But I describe 'em I think and as the conversation went on they, I could describe what they were wearing, uh, I could describe their ethnicity, I could describe, uh, what the girl's hair looked like 'cause it, uh, she had kind of a unique hairstyle, uh, other than that I really, I think that's about all I could use to describe to them, to the ---
>
> Q. When --- the – when we get information from the State on a case it's always mostly in the form of writing and I'm asking you as I'm reading a part of the incident report, uh, the male is described as a black male with dark skin approximately 5"10" and 160 pounds, wearing blue jeans and a dark t-shirt, do you remember giving that information to law enforcement?

A. No.

Q. Okay.

A. No. Now I I could maybe ins – in my description he cou – law enforcement could have surmised that that's what because height-wise the best, I don't, I can't judge height, I mean, it's usually like they're this (indicating) much taller than me would be the way I would describe. I don't, I don't know how to judge height, you know, as far as a big person or a medium-size. R. 78, l. 9 – R. 79, l. 21.

In addition, Slotin's pretrial identification testimony proved also that she was unable to give an adequate description in order to assist officers in their investigation. For instance, Slotin's pre-trial testimony regarding this matter follows:

A. Well they wanted to know who who they should look for so, yes, I mean, I I I was able to tell them what the people were wearing at the time, -- ---but, I mean, it's, I was extremely upset and like I said, I remember tellin' 'em what the people were wearing. Uh, the lady had a really funky hair style which at the time so I was aha, it was very memorable but, I mean, I can't describe, I co – I didn't describe eyes or nose or mouth or ---

Q. But you described height.

A. Roughly, roughly. I mean, I'm only 5'2 so I can say he's 'bout this (indicating) much bigger than me I think. I mean, It wasn – I can't look at so – I'm not, it's like I'm not good at that and I certainly am not good at weight. You know, I can say he wasn't a huge person but I don't know what that means.

Q. You told law enforcement that he was 5 foot 10 the man that did this.

A. I just said he was like this (indicating) much taller than me, that's as high as I can reach.

Q. So you didn't tell 'em that he was 5 foot 10?

A. I did not remember giving them an exact figure.
R. 24, l. 13 – R. 25, l. 12.

Not only were Slotin's identifications tainted and reliable and thus inadmissible in that they stemmed from media coverage, but also the identifications could begin to pass the Biggers[1] admissibility test.

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. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (2009). In determining whether an out-of-court identification can be admitted, a court must as certain whether the identification process was unduly suggestive and whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, 409 U.S. 188 (1972). Moreover when determining the likelihood of misidentification, The Biggers Court listed factors to be used to evaluate reliability under the totality of the circumstances:

1.) The witness' opportunity to view the perpetrator at the time of the crime;

2.) The witness' degree of attention;

3.) The accuracy of the witness' prior description of the perpetrator;

4.) The level of certainty demonstrated by the witness at the confrontation; and

5.) The length of time between the crime and the confrontation.

Although Slotin had an opportunity to view the perpetrator, she apparently was unable to focus her attention (she stated that incidents were stressful) because she could not give a detailed or accurate description of the perpetrator at all. Slotin's identification shaped up only after her media representation identification of appellant as the perpetrator occurred.

The trial judge lower erred in allowing Slotin's identification testimony into evidence at trial in violation of the Due Process Clause of the Fourteenth Amendment.

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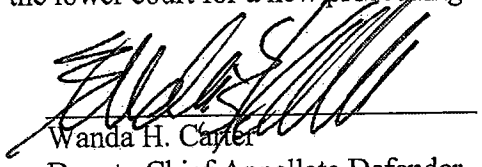
[1] Neil v. Biggers, 409 U.S. 188 (1972).

CONCLUSION

Based on the foregoing argument, appellant requests that this his convictions and sentences be reversed and his case remanded to the lower court for a new proceeding.



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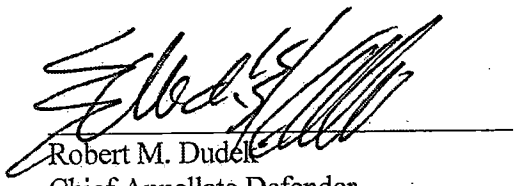
This 20th day of September, 2017.

CERTIFICATE OF COUNSEL

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 20, 2017



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of September, 2017.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.