STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAPARIS SHMEL FLOWERS,

APPELLANT

APPELLATE CASE NO 2018-000099

ANDERS BRIEF OF APPELLANT

TAYLOR D GILLIAM
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting three out-of-court identifications of Appellant, where the witnesses' testimony was unreliable such that one individual could not recall any specifics about the identity of the shooter, type of car driven, or gun used, where one witness was unable to recall relevant details from the evening, and where law enforcement repeatedly prodded a witness in constant pain to identify Appellant?

STATEMENT OF THE CASE

On July 23, 2015, an Allendale County grand jury indicted Appellant for one count of murder, three counts of attempted murder, and one count of possession of a weapon during a violent crime. R. 644 – 653. On January 8, 2018, Appellant proceeded to trial before the Honorable Perry M. Buckner and a jury. R. 1. Tameaka Legette and Brian Hollen served as the assistant solicitors, and Joshua Koger, Jr. represented Appellant.

Following a four-day trial, the jury found Appellant guilty as indicted. R. 624, l. 9 – R. 625, l. 4. Judge Buckner sentenced Appellant to forty-five years' incarceration on the murder charge, thirty years on each of the attempted murder charges, and five years on the possession of a weapon charge. R. 641, ll. 3 – 23. The possession of a weapon sentence was crafted to run consecutive, and the attempted murder sentences were designed to run concurrently. Id.

This brief follows.

STANDARD OF REVIEW

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was "patently suggestive"). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Moore at 288, 540 S.E.2d at 448. "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

ARGUMENT

The trial court erred in admitting three out-of-court identifications of Appellant, where the witnesses' testimony was unreliable such that one individual could not recall any specifics about the identity of the shooter, type of car driven, or gun used, where one witness was unable to recall relevant details from the evening, and where law enforcement repeatedly prodded a witness in constant pain to identify Appellant.

Relevant facts

On or about December 6, 2014, law enforcement was contacted after a car being driven by Russell Smart was found to have veered off the road. R. 62, l. 19 – R. 65, l. 8. Supposedly following an altercation at the Lobster House in Allendale, the car, which also contained Jarrell Murray, Brandon Lewis, and Tyquan Charlton, was shot into and crashed into a tree. Id. Although Appellant denied involvement with the shooting, he was arrested after witnesses identified him out of a lineup. R. 72, l. 14 – R. 74, l. 20; R. 459, ll. 18 – 24.

The trial court held a Neil v. Biggers[1] hearing and heard testimony from Charles Matt Brown, an employee of South Carolina Law Enforcement Division who assisted with the investigation after the Allendale Police Department made a request for assistance. R. 62, l. 19 – R. 63, l. 6. Brown interviewed the three men who were in the car and showed each a photographic line-up containing Appellant. R. 83, ll. 18 – 23.

Law enforcement met with Brandon Lewis twice- once on December 6, 2014 with a detective and once with Brown on December 7, 2014 at Lewis' grandmother's house. R. 84, l. 3 – R. 92, l. 8; R. 102, l. 14 – R. 103, l. 25. During the earlier interview, he was unable to describe

[1] 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d (1972).

the shooter. R. 104, l. 1 – R. 105, l. 9. Furthermore, he was unable to describe the car being driven by the shooter or the gun used by the shooter. Id. Nonetheless, an investigator repeatedly prodded Lewis to identify Appellant even though Lewis was in constant pain after having been shot. R. 106, l. 3 – R. 108, l. 8.

At the interview with Brown, Lewis was instructed "to look at the set of photographs and see if [he] could identify the person that [he is] alleging committed the specific crime in this situation, that shot into Mr. Russell Smart's vehicle." R. 88, ll. 8 – 16. Lewis indicated that he had seen Appellant before, that the two both resided in Allendale and knew each other previously. R. 89, ll. 1 – 8. Lewis identified Appellant via the lineup. R. 89, l. 9 – R. 90, l. 2.

Jarrell Murray also met with Brown on December 7, 2014. R. 92, l. 9 – R. 97, l. 22. The two met in the parking lot of the Allendale County Magistrate's Office. R. 92, ll. 14 – 18. Instructions similar to those given to Lewis were offered to Murray. R. 93, ll. 15 – 23. Murray identified Appellant. R. 93, ll. 24 – 25; R. 97, ll. 8 – 12.

Brown met with Tyquan Charlton on December 10, 2014 at the Augusta University Medical Center. R. 97, l. 23 – R. 102, l. 4. Similar to the others, Charlton was provided comparable instructions, knew Appellant, and identified him. Id. Charlton did, however, have difficulty remembering other matters, particularly how he got into Smart's car. R. 100, ll. 2 – 23.

At the conclusion of the *in camera* hearing, counsel for Appellant challenged the identification by all three men and noted that the State had not met its burden to show that the identifications should be admissible. R. 116, l. 18 – R. 119, l. 16. The trial court ruled that the "there [was] sufficient evidence to admit the identification into evidence in the trial of this case by the preponderance of the evidence." R. 121, l. 25 – R. 124, l. 14.

Discussion

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "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." Id.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's 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. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

South Carolina courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who

committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); see also Rule 104(c), SCRE (providing that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

With regards to the identification by Brandon Lewis, the second identification was unduly suggestive following a first encounter during which Lewis was unable to identify the shooter or car and where he did not see a weapon. R. 104, l. 1 – R. 105, l. 9. He told law enforcement *he did not know who shot him.* Id. He "did not recall seeing anything or hearing anything." Id. This interview took place closer in time to the incident than the second interview where he identified Appellant. Id. At the second interview, Lewis was in constant pain and was prodded by an investigator to identify Appellant. R. 106, l. 3 – R. 107, l. 4. Lewis was hesitant to identify Appellant. R. 107, ll. 16 – 22.

Charlton's identification was equally suspect considering his inability to remember basic details from the night of the shooting. Charlton was unable to remember how he ended up at the club or even in Smart's car. R. 108, ll. 9 – 25. Notably, Charlton testified at trial that the line-up admitted as State's Exhibit 74 was incongruent to the one shown to him at the hospital. R. 260, l. 21 – R. 262, l. 25. He testified that the picture of Appellant "was up top" and not on the bottom row when he saw it in the hospital. Id. Charlton also testified that he was "doped up with the medicine" that the hospital staff had given him. R. 258, ll. 7 – 22. He also admitted to having a conviction in Barnwell County for giving false information in 2014. R. 260, ll. 5 – 9.

At trial, Lewis testified that he was unable to make an identification in the photographic line-up. R. 306, l. 23 – R. 308, l. 2. Quite notably, he did not remember making a selection in the line-up on December 7, 2014. Id. He did not recall telling law enforcement who shot him. Id. Although this was trial testimony which took place after the *in camera* hearing, it evidenced a repeated pattern of dubious claims made by witnesses to the shooting. The shooting took place around 3:20 in the morning on December 6, 2014. R. 102, ll. 21 – 23. It was dark outside, and visibility would have been less than ideal.

Charlton and Murray both identified Appellant in the courtroom at trial. R. 265, l. 20 – R. 266, l. 3; R. 286, l. 23 – R. 287, l. 13. These in-court identifications should have been inadmissible following the suggestive out-of-court identification procedures used by law enforcement which created a very substantial likelihood of irreparable misidentification.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions based upon the trial court's error in failing to exclude the prejudicial photographic lineups, out-of-court identifications and resulting in-court identifications.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Laparis Shmel Flowers states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Perry M. Buckner, which was held on January 8 - 11, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Laparis Shmel Flowers.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

This 1st day of February, 2019.

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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) True-billed indictment(s);
(2) Entire trial transcript from January 8 – 11, 2018;
(3) Court's Exhibits 1 – 5;
(4) State's Exhibits 1 – 33, 35 – 48, and 85.

I certify that this designation contains no matter which is irrelevant to this appeal.
February 1, 2019

Taylor D Gilliam
Appellate Defender

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(803) 734-1330

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."

February 1, 2019.

Taylor D Gilliam
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, 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 have been served on Laparis Shmel Flowers, 375098, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 1st day of February, 2019.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.