ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HERBERT CAUSEY,

APPELLANT

Appellate Case No. 2011-199367

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to suppress testimonial and photographic evidence of the pre-trial identification of Appellant where the witness told law enforcement that all of the photos in the six-picture lineup looked the same, and where she identified two of the six photographs as the possible assailant?

STATEMENT OF THE CASE

Appellant Herbert Leonard Causey was indicted by the Horry County grand jury for kidnapping, armed robbery, first-degree burglary, and assault with intent to commit first-degree criminal sexual conduct. R. 7, ll. 1-8; R. 328 His case proceeded to trial from September 6 through 8, 2011, before the Honorable William H. Seals, Jr., and a jury. W. Thomas Floyd (Counsel) represented Appellant, while the State was represented by Candice A. Lively. R. 1.

The jury acquitted Appellant of assault with intent to commit first-degree criminal sexual conduct, but found him guilty of kidnapping, armed robbery, and first-degree burglary. R. 343, ln. 15–R 344, ln. 7. The trial court imposed concurrent sentences of life without possibility of parole for first-degree burglary, thirty years for armed robbery, and thirty years for kidnapping. R. 351, ln. 18–R. 352, ln. 1; R. 334.

ARGUMENT

The trial court reversibly erred by failing to suppress testimonial and photographic evidence of the pre-trial identification of Appellant where the witness told law enforcement that all of the photos in the six-picture lineup looked the same, and where she identified two of the six photographs as the possible assailant.

Eighty-one year old Eloise Martin (Martin) was in her house in Loris, South Carolina on January 26, 2011. R. 72, ln. 1—R. 73, ln. 17. At about 3:00 pm, an assailant entered Martin's house by asking to use the bathroom, robbed her of approximately $310, and then departed in a dark colored car with a South Carolina license plate. R. 74, ll. 1-20; R. 78, ll. 10-21; R. 82, ll. 17-19; R. 126, ll. 1-4. The robber possessed what Martin described as a little black water gun with a bright red light on it, "kind of like [what] the kids used to play with."[1] R. 108, ll. 4-9. Thereafter, Martin called the Loris Police Department, and law enforcement arrived within minutes. R. 82, ln. 23—R. 83, ln. 1; R. 120, ln. 7—R. 121, ln. 24.

At approximately 9:30 pm, Chief Joseph W. Vaught (Vaught) of the Loris Police Department returned to Martin's house. Vaught brought with him a six-picture photographic line-up that was prepared by the J. Rueben Long Detention Center, and included Appellant's photograph. R. 52, ll. 2-7; R. 56, ll. 7-13. At the pre-trial Biggers[2] hearing, Vaught testified that the following encounter occurred between himself and Martin:

> I explained to her that I was just going to show her a piece of paper which contained photographs and ask her if she could pick out the individual who had entered her house earlier in the day. She was, she was unable, she, she commented that it

[1] The robber purportedly dropped the item in the front yard as he left. Law enforcement later recovered a stun gun next to Martin's driveway. R. 111, ll. 1-20; R. 127, ln. 19—R. 128, ln. 24.

[2] 409 U.S. 188, 93 S.Ct. 375 (1972).

> was something to the effect that it was very confusing and traumatic and that she was just not able to focus on any one individual.
>
> . . . . .
>
> She took some time to look at the photographs and she, she commented it could be one of, possibly one of two individuals on the, on the paper.
>
> . . . . .
>
> It's the numbers five and six.

R. 53, ln. 24—R. 54, ll. 16. Vaught further explained to Martin that he was unable to help her or limit the pictures down to two people, and "that she must look at it and arrive at her own decision." R. 55, ll. 4-9.

The trial court held that the identification procedure was not unduly suggestive, and found it reliable. The court further held "that the fact that the [witness] picked out two individuals one of which is the defendant in a lineup simply goes to credibility." R. 57, ll. 1-7. Accordingly, over Counsel's objections, the State was permitted to elicit testimony from both Martin and Vaught regarding the pre-trial identification of Appellant, and enter the six-picture line-up into evidence. R. 38, ln. 9—R. 39, ln. 9; R. 100, ll. 12-23; R. 195, ll. 15-18; R. 324 (State's Exhibit #2, Photo ID Line-up).

"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." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). Thus, the general rule concerning identification "is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous

identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (citing State v. Cash, 257 S.C. 249 185 S.E.2d 525 (1971)).

The two-prong inquiry used to determine the admissibility of an out-of-court identification is as follows: (1) whether the identification process was unduly suggestive; and if so, (2) whether the out-of-court identification was so nevertheless so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447; see also Neil v. Biggers, 409 U.S. 188, 198-200, 93 S.Ct. 375, 382 (1972).

Several factors should be considered when evaluating the totality of the circumstances to determine the likelihood of misidentification, including the following: (1) the witness' opportunity to view the perpetrator at the time of the offense; (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 offense and confrontation. See Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977) (citing Biggers, 409 U.S. at 199-200, 93 S.Ct. at 382); Traylor, 360 S.C. at 82, 600 S.E.2d at 527. "Only after a determination as to the reliability of a witness' identification has been made by the trial court may the witness testify before the jury." Moore, 343 S.C. at 289, 540 S.E.2d at 449 (citing State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)). "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." Traylor, 360 S.C. at 81, 600 S.E.2d at 526.

In the present case, the identification procedure was unduly suggestive due to the comments made by Vaught to Martin when he showed her the line-up. Specifically,

Vaught's testimony at the Biggers hearing suggested that the assailant would be in the photographic line-up:

> I explained to her that I was just going to show her a piece of paper which contained photographs *and ask her if she could pick out the individual who had entered her house earlier in the day.*

R. 53, ln. 25—R. 54, ll. 3 (emphasis added).[3] Thus, contrary to the trial court's holding,[4] the procedure was unduly suggestive because Vaught's statement to Martin implied an expectation that the assailant's photograph was present in the six-picture line-up.

Moreover, the totality of the circumstances indicate that the suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Although Martin had opportunity to observe the assailant during the robbery, observations of Martin by law enforcement immediately after the incident indicate

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[3] While perhaps not dispositive of the issue, Martin's own trial testimony is instructive as to what she believed the police wanted her to do:

Q. Okay, alright, and when [Vaught] showed you that document did he tell you what the purpose was that he showed that to you?

A. *Yeah, they was wanting me to identify the person that broke, that come in.*

. . . .

Q. Okay, and whenever you were looking at that document, what was the thing that you were trying to do in looking at those six photos?

A. *I was trying to be sure I had the right one.*

R. 99, ll. 10-23 (emphasis added).

[4] Vaught's trial testimony regarding the matter differed from what he stated at the pre-trial Biggers hearing. However, the trial court's ruling regarding the suggestiveness of the identification procedure was based upon Vaught's testimony at the Biggers hearing.

that the elderly woman was shaken and flustered. For example, according to Officer Alicia Miller (Miller), the first responding officer to arrive within one minute after being dispatched, Martin "was very distraught." R. 120, ln. 7—R. 122, ln. 4; R. 124, ln. 12-13. Despite refusing Miller's repeated offers to take her to the hospital, Martin "was just unable to pull herself together to be able to write her statement . . . ." R. 124, ll. 13-16. As such, her degree of attention was likely low. Additionally, the accuracy of Martin's description of the assailant focused on his clothing. The only physical details indicated by Martin were the eye color of her assailant, and that he had tattoos on his arms and neck. R. 126, ll. 8-23. Although Appellant is tattooed in similar locations, Martin failed to initially identify what the tattoos looked like when describing the robber, and the photographic line-up did not show the clothes of the pictured subjects. R. 102, ln. 5—R. 103, ln. 16.

Perhaps most telling of the likelihood of irreparable misidentification was the level of uncertainty demonstrated by Martin when shown the photographs by Vaught. As Vaught admitted during the hearing, "[Martin] was, she was unable, she, she commented that it was something to the effect that it was very confusing and traumatic and that she was just not able to focus on any one individual." R. 54, ll. 4-7. Vaught continued to explain that Martin could not even identify a specific individual in the six-picture line-up: "She took some time to look at the photographs and she, she commented it could be one of, possibly one of two individuals on the, on the paper." R. 54, ll. 11-13.[5] Thus, according to the testimony of the only witness called by the State to the Biggers hearing, the witness could neither focus on

[5] Martin's in-court testimony confirmed her uncertainty of whether her assailant was in the photographic line-up when she admitted the following on cross-examination: "They all looked alike to me at the time." R. 113, ll. 12-14.

the photographs nor identify the assailant from the photographic line-up. Accordingly, Appellant was deprived of due process of law by the identification procedure which was unnecessarily suggestive due to Vaught's comments to Martin, and conducive to irreparable mistaken identification.

Further, Appellant was prejudiced by admission of testimony from Martin and Vaught regarding pre-trial identification, as well as admission of the photographic line-up. A constitutional error may be harmless only where the reviewing court is able to declare a belief "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986).[6] "No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990).

In the case at bar, the State relied upon Martin's pre-trial identification of Appellant as the assailant in order to gain the conviction. For example, the State not only elicited testimony from both Martin and Vaught regarding the pre-trial identification, but also entered the photographic line-up with Appellant's picture into evidence. R. 98, ln. 15—R. 102, ln. 13; R. 194, ln. 6—R. 196, ln. 18. Further, the State expounded upon both the

[6] Additionally, it is the burden of the party benefitting from the trial error to prove it was harmless beyond a reasonable doubt. See, e.g., Chapman, 386 U.S. at 24, 87 S.Ct. at 828. In the present case, the State benefitted from the trial court's erroneous admission of testimonial and photographic evidence regarding Martin's pre-trial identification of Appellant. Therefore, it is the State's burden to prove the error was harmless beyond a reasonable doubt.

testimony regarding the pre-trial identification as well as line-up itself in its closing argument to the jury:

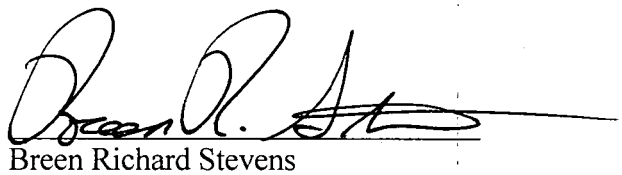
> [Martin] couldn't pick out one individual, okay, and you can look at it yourself, but she picked out five and six. It's one of those two, she's distraught. It was the same day where she had been burglarized, terrorized, she couldn't write her own statement, but you know what, guess who's in one of those two, [Appellant], okay so we have that.

R. 314, ll. 17-22. Accordingly, the error was not harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Appellant Herbert Causey respectfully requests reversal of his convictions, and a remand of his case for new trial.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of November, 2012.

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 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."

November 29th, 2012

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Christina J. Catoe, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 29th day of November, 2012.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of November, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.