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SC COURT OF APPEALS

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JEROME SHIPPY,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial court erred in admitting a witness' in-court identification of Appellant because the witness' ability to identify Appellant was tainted by her exposure to an illegally seized shirt on the day of the incident by police officers and a photograph of Appellant in the prosecutor's file immediately prior to trial.

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant during its June 2010 term. The indictments charged him with malicious injury to personal property, third or greater offense and grand larceny, third or greater offense. R. 8 lines 3-11; R. 317 Indictment. The state represented by Zach Ellis called the case to trial before the Honorable Roger L. Couch on August 9, 2011. Matthew Shealy represented Appellant. R. 1.

The jury returned its verdict finding Appellant not guilty of grand larceny. R. 304 lines 20-25. However, the jury found Appellant guilty of malicious injury to personal property. R. 305 lines 1-4. Judge Couch then sentenced Appellant to ten years imprisonment, which he suspended to six years imprisonment with probation for four years. R. 314 lines 12-20.

Appellant filed a timely notice of appeal. This brief follows.

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ARGUMENT

The trial court erred in admitting a witness' in-court identification of Appellant because the witness' ability to identify Appellant was tainted by her exposure to an illegally seized shirt on the day of the incident by police officers and a photograph of Appellant in the prosecutor's file immediately prior to trial.

Relevant facts.

Prior to the start of trial, Appellant moved to suppress a prosecution witness' in-court identification of him. R. 33 line 23 – R. 34 line 3. In response to Appellant's motion, the prosecutor advised the court that he had shown the witness pictures and that witness informed him that "she may be able to recognize" the individual, but she was not sure. R. 38 lines 2-5. The witness informed the prosecutor that after seeing Appellant in the courtroom, she was prepared to identify him as the man she saw damaging the air conditioner. R. 38 lines 7-11. Additionally, the prosecutor informed the trial judge that police officers seized a shirt from Appellant's residence matching the description of the shirt provided by the witness. On the day of the incident, this shirt was shown to the witness by officers and the witness identified it as the shirt worn by the perpetrator. R. 37 lines 22-24; R. 39 lines 17-25. The trial judge ruled the shirt was seized illegally and excluded it from the case. R. 37 lines 19-20. Appellant argued that the witness' identification was tainted by her viewing of the shirt on the day of the incident and the photographs on the day of trial. R. 37 lines 21-25; R. 38 lines 12-25; R. 41 lines 2-5; R. 41 lines 23-25.

The judge required a hearing on the matter. R. 42 lines 1-5. The state called Rita Chapman to the stand. R. 42 line 7. Chapman testified that she returned to her job at an

apartment complex after her lunch break on April 21, 2010. She observed an individual at an air conditioning unit of a yellow house across from her parking space. She watched him for several minutes. The individual then stood up and looked at her. Chapman proceeded into the office and contacted the authorities. R. 43 lines 14-22. She estimated that she was fifty yards from the individual at the time she observed him, R. 43 lines 23-25, and she testified she had an unobstructed view, R. 44 lines 1-3. She described the individual she saw as a black male in an orange shirt. R. 44 lines 4-6. Chapman testified she looked at the individual for only a few seconds when he turned to face her. R. 44 lines 23-25. She then identified Appellant as the individual she saw beside the air conditioning unit. R. 45 line 25 – R. 46 line 2. When asked by the prosecutor if she were sure, she responded that she was one hundred percent certain. R. 46 lines 3-4; R. 56 lines 2-4.

On cross-examination, Chapman revealed that the prosecutor had shown her at least one photograph of Appellant while the two were preparing for trial. R. 47 lines 15-17. On re-direct, the prosecutor asked Chapman if the only reason she knew that Appellant was the man she saw damaging an air conditioning unit was based upon knowing that the shirt she identified on the day of the incident had been connected to Appellant. R. 52 lines 12-23. Chapman responded it was. R. 52 line 23. When asked if she recognized the Appellant, she responded she did. R. 52 line 24 – R. 53 line 1. The prosecutor then asked if the shirt was the reason she was identifying Appellant or if she “recognize[d] him on his own.” R. 54 lines 4-7. Chapman responded she recognized him on his own and the shirt was not the basis for her identification. R. 54 lines 8-11.

At the conclusion of the hearing, Appellant argued Chapman's identification was tainted by the police officers showing her the shirt seized from Appellant's residence on the day of the incident. R. 74 line 23 – R. 75 line 1; R. 75 lines 14-19. Ultimately, the trial judge ruled the identification was admissible. R. 78 lines 14-25.

In front of the jury, the prosecution called Chapman as its first witness. R. 100 line 1. Chapman described the events as she had in the pre-trial hearing. R. 102 line 21 – R. 103 line 8. Over Appellant's objection, Chapman then identified Appellant as the individual she observed beside the air conditioning unit. R. 106 line 12 – R. 107 line 9.

Law and analysis.

A defendant may be deprived of his due process rights through an identification procedure that is unnecessarily suggestive and encourages irreparable mistaken identification. State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 1967)(citing 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 significantly substantial likelihood of irreparable misidentification." Id. at 502-03, 589 S.E.2d at 784. In Neil v. Biggers, 409 U.S. 188, 198 (1972), the United States Supreme Court articulated a set of factors by which a trial court judge should evaluate both out-of-court identifications and their subsequent use by a witness in court. Those factors include: (1) the opportunity of the witness to view the criminal 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. Id. at 199. The Court stated that the trial court judge should look at the totality of the circumstances when

evaluating the likelihood of misidentification. Id. at 196. “Reliability is the linchpin in determining admissibility of identification testimony” and the Biggers factors must be weighed against the “corrupting effect of the suggestive identification itself.” Manson v. Braithwaite, 432 U.S. 98, 114 (1977).

The United States Supreme Court recognized that single photographic lineups are inherently suggestion. Simmons v. United States, 390 U.S. 377, 383 (1968). The Court explained that after a suggestive lineup, such as using a single photograph, “the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.” Id. at 383-384.


Here, the prosecutor showing Chapman the single photograph of Appellant immediately prior to trial was unduly suggestive as it is a single photograph line-up conducted by a governmental agent. Therefore, an analysis of the Biggers factors is required. The first factor to consider is Chapman’s opportunity to observe the perpetrator at the time of the crime. Chapman testified that she observed the individual for several minutes, but that she saw his face for only a few seconds. Although her view was not obstructed, she was approximately half of a football field away. As a result, her opportunity to view the individual at the time of the crime was not significant. The witness did not testify concerning her degree of attention to the perpetrator rendering an analysis of the second factor nearly impossible. Chapman’s description of the individual at the time of the crime was extremely vague. She described the person as a black male in an orange shirt with black stripes. She provided no additional details and saw nothing distinguishing about the individual. Thus, the third factor – the accuracy of the witness’

description – weighs in favor of excluding the identification. Regarding the fourth factor, Chapman testified that she was one hundred percent certain that Appellant was the perpetrator. However, prior to trial she had been unable to identify the perpetrator with any degree of certainty. Finally, the temporal factor weighs in favor of excluding the identification as well. The crime occurred on April 21, 2010, and Appellant’s trial began over a year later on August 9, 2011. For well over a year, Chapman had been unable to identify the individual and unable to provide a more specific description. Yet, on the day of trial, she suddenly identifies Appellant as the perpetrator. An analysis of the Biggers factors does not overcome the inherently suggestive one photograph identification employed by the prosecutor in this matter. Therefore, the trial court erred in failing to exclude Chapman’s identification of Appellant.

CONCLUSION

Appellant respectfully asks this Court to reverse his conviction and sentence and remand the matter for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of February, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JEROME SHIPPY,

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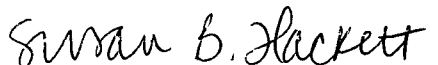
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Jerome Shippy states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Roger L. Couch, which was held on August 9-10, 2011, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Christopher Jerome Shippy.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

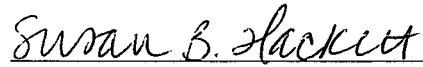
ATTORNEY FOR APPELLANT

This 21st day of February, 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."

February 21st, 2012



Susan B. Hackett
Appellate Defender

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THE STATE,

RESPONDENT,

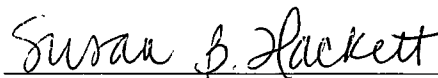
V.

CHRISTOPHER JEROME SHIPPY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a true copy of the Final Anders Brief of Appellant and Record on Appeal have been served on Christopher Jerome Shippy, #222423 at Kershaw Correctional Institution, this 21st day of February, 2012.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of February, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013 .