

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

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SC COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CLARENCE J. FISHBURNE,

APPELLANT

APPELLATE CASE NO. 2011-20366

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) 9

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) passim

State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct.App.1993)..... 9

State v. Liverman, 727 S.E.2d 422 (2012)..... 8

State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)..... 8

State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) 8

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967)..... 9

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress identification testimony when the show-up identification procedure used was inherently unreliable and conducive to irreparable mistaken identification?

STATEMENT OF THE CASE

In October of 2010, the Berkeley County Grand Jury indicted Fishburne for two counts of armed robbery, two counts of kidnapping and one count of burglary first degree, indictments #2010-GS-08-1653, 1654, 1655, 1656 and 1657. In November of 2011, the indictments were amended and the Berkeley County Grand Jury again indicted Fishburne for two counts of armed robbery, two counts of kidnapping and one count of burglary first degree, indictments 32011-GS-08- 1567, 1568, 1569, 1660 and 1661. On November 7, 2011, Fishburne and his co-defendant, Douglas M. Thompson proceeded to jury trial before the Honorable Kristi L. Harrington. Attorneys Chad Shelton and David Schwacke represented Fishburne at trial. Attorneys David Aylor and Peter McCoy represented the co-defendant Thompson. Attorneys Ashley Cornwell and Bryan Alfaro prosecuted the case. The jury found both defendants guilty as charged. Judge Harrington sentenced Fishburne to 20 years concurrent for each charge. A timely notice of intent to appeal was filed on November 17, 2011. This appeal follows.

ARGUMENT

The trial judge erred in refusing to suppress identification testimony when the show-up identification procedure used was inherently unreliable and conducive to irreparable mistaken identification.

On August 6, 2010, at about 11:30 at night Paulo Silva and Adao Olivera were outside on the porch of their townhouse when they were approached and robbed at gunpoint by three black men. Silva is married to Olivera's niece, Paulino Silva, and they all lived together in the townhouse with the Silva's three year old daughter. (R. p. 255, lines 20 – p. 256, lines 1-12). The three men forced Silva and Olivera inside the house. (R. p. 258, lines 1-12). Once inside the house, Silva saw his wife and told her, in Portuguese, to go get help because they were being robbed. The wife left the house. (R. p. 258, lines 10-12). Two of the three men forced Silva and Olivera upstairs. (R. p. 259, lines 1-13).

When Ms. Silva fled the townhouse, she ran next door to get help from her neighbor, Lucineia Rodriguez. (R. p. 503, lines 13 – p. 504, line 1). Ms. Rodriguez became concerned that the Silva's child was still in the house asleep. Ms. Rodriguez went next door, entered the house, saw a man with a gun downstairs, went upstairs, saw Silva and a man holding Olivera in one bedroom, and then went into the other bedroom where the child was sleeping. (R. p. 502, lines 18 – p. 544, lines 1-2). The robbers fled when Ms. Rodriguez entered the child's bedroom. (R. p. 514, lines 15-22).

The police were called. The 911 operator testified that the caller described a robbery by two black males wearing red and white striped shirts. (R. p. 173, lines 17-19). Deputy Jason Charlton with the Berkeley County Sheriff's Department arrived at the townhouse and learned that the suspects could possibly be walking up Harbor Lake Road. (R. pp. 303-307). The deputy also learned that a laptop computer had been taken from the townhouse. (R. p. 305, lines 19-25). The

only description given to the deputy of the suspects was that they were black males. (R. p. 88, lines 12 – p. 89, 90, lines 1-10). The deputy drove down Harbor Lake Road and saw three black males walking and one of them was carrying a laptop. (R. p. 308, lines 18-25). The deputy stopped to speak with the three individuals and one of them fled. (R. p. 309, lines 3-14). The deputy identified the two remaining individuals as appellant Fishburne and co-defendant Thompson. (R. p. 309, lines 22 – p. 310, lines 1-5). The deputy testified that Thompson was carrying the laptop. (R. p. 310, lines 6-9).

Appellant and the co-defendant were detained on the road by another officer while Deputy Charlton returned to the townhouse. The deputy brought Silva, Olivera and a neighbor, Rubio Hilario, who served as a translator, to the road where appellant and the co-defendant were detained. (R. p. 313, lines 2 – p. 314, 315, lines 1-21). According to the deputy, Silva and Olivera identified appellant and co-defendant as the robbers. (R. p. 315, lines 22 – p. 316, lines 1-25).

Prior to trial appellant moved to suppress the identifications made by Silva and Olivera. (R. p. 28, lines 12-15). The trial judge conducted a hearing pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). (R. pp. 34 – 215). After the hearing, counsel for co-defendant Thompson argued that the identification testimony should be suppressed as unduly suggestive. (R. pp. 195 – 204). Counsel for appellant Fishburne joined in the motion to suppress and made additional argument about the unreliability of the identification. (R. p. 204, lines 9 – 25). After the State argued, counsel for co-defendant responded again arguing that the identification testimony should be suppressed. (R. p. 211, lines 24 – p. 212, 213, lines 1-15). The trial judge denied the motion to suppress the identification testimony. (R. p. 213, lines 16 – p. 214, 215, lines 1-5). The trial judge erred.

Deputy Charlton testified during the Biggers hearing that he drove Silva, Olivera and Rubio, the translator, to the side of the road where appellant and the co-defendant had been detained. (R. p. 43, lines 3-18) When asked what he told the three men the deputy testified, "I told them we found two guys walking up the street that may of [sic] may not been the persons who committed the act. So we would need them to tell whether they were or not." (R. p. 43, lines 19-22). The officer admitted that appellant and the co-defendant were the only African American males at the scene. (R. p. 61, lines 17-25). The deputy admitted that he did not separate Silva and Olivera for purposes of making the identification. (R. p. 63, lines 19 – p. 64, lines 1-4). The deputy testified that at the time of the identification appellant and the co-defendant were standing in front of a police vehicle handcuffed with their hands behind their backs, although the handcuffs were not visible. (R. p. 44, lines 7-20). The deputy testified that the lighting at the scene was "not great" and he used the spotlight on his car to illuminate the area. (R. p. 44, lines 21 – p. 45, lines 1-11).

Silva testified at the Biggers hearing that when he saw the two individuals detained by the police he recognized the individual who choked Olivera but was unsure if the second individual was the man with the gun or the man who stayed downstairs by the door. (R. p. 155, lines 3-20). Silva admitted that the two individuals detained by the police were not wearing the same clothes as the individuals who entered the house and robbed them. (R. p. 159, lines 3-5; p. 169, lines 21-25). Silva admitted giving a statement that one of the individuals was wearing a blue shirt but neither of the individuals detained was wearing a blue shirt. (R. p. 157, lines 15-21). Both Silva and Olivera testified that in their opinion all African American males have similar facial features. (R. p. 149, lines 20-23; p. 170, lines 1-3).

The deputy testified that Silva and Olivera told him that the robbers took money in denominations of one hundred dollar bills and two dollar bills, a Brazilian tradition. (R. p. 67, lines

9-13). There were no one hundred dollar bills or two dollar bills found on either appellant or the co-defendant. (R. p. 67, lines 14 – p. 68, lines 1-2). The deputy testified that he found two cell phones in appellant’s pocket but the deputy did not independently verify ownership of the cell phones and both phones were returned to Olivera. (R. p. 64, line 25 – p. 65, lines 1-25). Silva’s Blackberry phone, stolen in the robbery, was never recovered. (R. p. 68, lines 3-6). There was no clothing recovered matching the descriptions provided. (R. p. 424, lines 19 – p. 425, lines 1-11). The gun was never recovered. (R. p. 425, lines 12-13). The third suspect was never apprehended. (R. p. 400, lines 5-18).

“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). The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

In State v. Liverman, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

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).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

The single person show up identification used in the present case was suggestive. The judge, however, found that the identification was not unduly suggestive stating, “Although the showup was suggestive, it was not unduly suggestive. And as such the Court must determine if the ID given by the victims was so reliable that no substantial likelihood of misidentification existed.” (R. p. 214, lines 11-15). The judge noted that the victims had an opportunity to view the suspects and provided similar descriptions; one victim indicated certainty with regard to the identification of one of the suspects and that a short amount of time elapsed between the robbery and the show-up identification. (R. p. 214, lines 16 – p. 215, lines 1-2). The judge then stated, “Based upon all of those factors, I am denying your motion to suppress the identification as to Mr. Fishburne and to Mr. Thompson. I’ll note your exception for the record.” (R. p. 214, lines 2-5). Appellant renewed the objection to the identification testimony when Silva testified. (R. p. 263, lines 7-8).

The judge erred in failing to review the Biggers factors under the totality of the circumstances. The judge failed to address the lack of a prior description other than black males wearing either a blue shirt or a red and white striped shirt. Based on the totality of the circumstances surrounding the suggestive show up identification procedure, including the fact that the only prior description provided was that the suspects were black males wearing either a blue shirt or a red and white striped shirt and neither appellant nor the co-defendant's clothing matched the description and both witnesses admitted to difficulty with cross racial identification, there is a substantial likelihood that appellant was irreparably misidentified and the identification is unreliable as a matter of law.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



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This 16th day of September, 2013.

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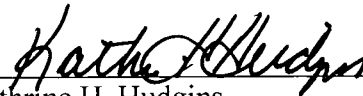
CLARENCE J. FISHBURNE,

APPELLANT

APPELLATE CASE NO. 2011-20366

CERTIFICATE OF SERVICE

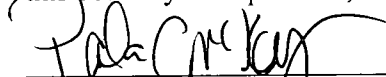
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of September, 2013.



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SUBSCRIBED AND SWORN TO before me
this 16th day of September, 2013.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022