

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

R. Knox McMahon, Circuit Court Judge

RECEIVED

AUG 23 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WHITNEY SPAN,

APPELLANT.

APPELLATE CASE NO. 2012-212578

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge's failure to hold a hearing to further examine the whereabouts and contents of police officer Pope's missing notes from interviews of eyewitnesses to the shooting impair Appellant's right to a fair trial where the eyewitnesses gave inconsistent descriptions of the shooting from the time of the events through the trial and where officer Pope took the notes "more or less" to pass on to be incorporated into another officer's incident report?

STATEMENT OF THE CASE

Appellant was indicted by a Greenwood County grand jury on one count of attempted murder and one count of possession of a firearm during the commission of a violent crime. R. *. On July 9, 2012, Appellant proceeded to trial before a jury and the Honorable R. Knox McMahon. Tr. 1. Lance Sheek represented Appellant and Matt Swilley represented the State. Tr. 1.

At the conclusion of the trial, the jury found Appellant not guilty of attempted murder but guilty of the lesser included offense of assault and battery of a high and aggravated nature. Tr. 339, ll. 19-22. It also found Appellant guilty of possession of a firearm during the commission of a violent crime. Tr. 339, ll. 22-25. Judge McMahon sentenced Appellant to twelve years imprisonment for assault and battery charge and five years concurrent for the weapon charge. Tr. 345, 13-20.

This appeal follows.

ARGUMENT

THE TRIAL JUDGE'S FAILURE TO HOLD A HEARING TO FURTHER EXAMINE THE WHEREABOUTS AND CONTENTS OF OFFICER POPE'S MISSING INTERVIEW NOTES IMPAIRED APPELLANT'S RIGHT TO A FAIR TRIAL.

STATEMENT OF FACTS

The State alleged that around 3:00 p.m. on October 22, 2011, Travis Boyd and a number of his friends were leaving a clothing store in Greenwood. Tr. 32, ll. 5-17. As they walked out, Appellant and his friends happened to be walking nearby, and they ran towards Boyd and his friends to fight. Tr. 32, ll. 15-20; Tr. 46, ll. 18-23. An initial fistfight ensued, and Appellant allegedly flashed a gun hidden on his person. Tr. 47, ll. 6-16. Boyd and his friends momentarily retreated into the clothing store before coming back out to fight again. *Id.* The store owner also came outside with a bat. *Id.* However, Appellant and his friends abandoned the fight and were walking away from the store. Tr. 47, ll. 22-23. Then Appellant allegedly threw a brick towards Boyd, who grabbed the bat from the store owner and slung it at Appellant. Tr. 47, l. 22 – Tr. 48, l. 3. Shots were fired and Boyd was hit three times as he dove into the car he rode to the store in. Tr. 48, ll. 6-9.

The State called as witnesses the investigating police officers as well as Boyd and his friends Kelvin Goode, Tavarious Lester, and Harry Parker. Boyd and his friends had given the police inconsistent statements describing the events surrounding the shooting, and each appeared to entertain a version of the incident with materially different details. Therefore, counsel for Appellant moved for and was granted sequestration of the witnesses for purposes of the trial. Tr. 23, ll. 7-22.

Kelvin Goode

Kelvin Goode told police in a recorded statement that two members of Appellant's group pulled guns and fired shots:

Q: So, Mr. Goode, when you gave your recorded statement you were positive that two other boys pulled guns and were shooting?

A: Well, I heard two other different shots, I can tell you that. I can tell a difference in it too.

Q: . . . [O]n the date of the incident you told that police officer you are positive that those other two boys pulled out guns and started shooting?

A: Yes, I am pretty sure they had.

Q: Were you being honest and truthful to the police?

A: Yes.

Q: So that statement is the truth, isn't it?

A: That statement is the truth, yes.

...

A: – I don't know what kind of guns it was but yes, they all had guns. I will put it that way, yes.

Q: So according to your statement . . . there were three people shooting?

A: Well, it might have been all four of them. Like I said, it was so many different shots and holes in the wall. But I know I saw two or three of them with a gun.

Tr. 94, l. 25 – Tr. 95, l. 21. When asked how many shots he heard, he responded, "Probably seven, eight, nine. There ain't no telling, there was a lot of them. I think it was more than seven." Tr. 96, ll. 6-8. He testified he was unable to identify Appellant, on the same day as the shooting, in a photo lineup as a shooter:

Q: But the police showed you a photo lineup on the 22nd of October while you were at the police department, didn't they?

A: Yes, sir.

Q: And in that photo lineup is a picture of [Appellant], isn't it?

A: Yes.

Q: But you couldn't identify him, could you?

A: No sir, I couldn't identify him on that picture, that is the truth.

Tr. 97, ll. 9-18.

Harry Parker

Harry Parker testified that after the initial fight, Appellant threw a rock at the group's car and Boyd threw the bat back. Tr. 180, ll. 18-20. He claimed he saw Appellant pull a gun and start shooting. Tr. 171, 2-5. When asked who the gun was pointed at, he said, "Everybody." Tr. 171, ll. 6-7. Parker got down when the shooting started and heard six or seven shots. Tr. 171, ll. 8-19. However, he admitted that in recorded statement on day of shooting, he told police that a second person in Appellant's group named Zay was also shooting. Tr. 187, l. 20 – Tr. 188, ll. 3.

Tavarius Lester

Tavarius Lester described the incident and said he saw a bat, but he never saw it or a brick being thrown. Tr. 105, ll. 21-25. This testimony contradicted a statement he gave police on the day of the shooting, in which he said Boyd threw a stick at Appellant. Tr. 114, ll. 4-14; Tr. 119, ll. 1-4. He claimed he saw shots fired from the gun Appellant was holding, but he testified that there were only three or four shots. Tr. 106, ll. 22-25; Tr. 108, ll. 1-8.

This testimony again contradicted what he told police in his prior statement, in which he said that he heard seven or eight shots. Tr. 116, ll. 8-10. In the prior statement he also said the gun was black with a brown handle. Tr. 119, ll. 1-4. However, at trial he testified that it was a shiny, silver or chrome revolver. Tr. 112, l. 2. He stated that after the initial scuffle, “we got back and stuff [and] we got a little dizzy. . . . [T]hey started arguing again and he just started letting off shots. [A member of Boyd’s group] was dizzy from the beer.” Tr. 105, ll. 1-9.

Travis Boyd

Travis Boyd said he saw the gun he alleged Appellant was carrying, but on cross-examination he could not testify to a caliber, shape, or color or otherwise describe it at all. Tr. 56, ll. 11-15. He said Appellant threw a brick, which hit the door of the store, prompting Boyd to take a bat from Mr. Andrews and sling it at Appellant. Tr. 58, l. 14 – Tr. 59, l. 15. He said Appellant then pulled a gun and started firing, and Boyd ran and jumped into the car. Tr. 61, ll. 5-16. He heard five or six shots; however, Boyd said he never actually saw the shots because his back was turned. *Id.*; Tr. 62, ll. 2-4.

Demetrius Andrews

Demetrius Andrews was the owner of the clothing store. Tr. 46, ll. 5-9. He said he never saw a brick being thrown:

Q: If you were standing right there behind [Boyd] at the time he got shot, from that point you would have seen a brick [get] thrown at him and hit the front door of your business, wouldn’t you?

A: Yes, I would have seen the brick. Yeah, I would have seen it.

Q: Do you recall that ever happening?

A: No, no. I have got a glass door, it would have hit the glass door if he [threw] a brick.

Tr. 75, ll. 14-22. He testified that he saw Appellant fire shots, but admitted when police had previously shown him a photo lineup including a picture of Appellant, he could not identify him. Tr. 76, l. 9 – Tr. 77, l. 8.

Officer Pope

Patrolman Ray Pope with the Greenwood City Police Department was one of the first officers on the scene along with Lieutenant Terry Greenfield. Tr. 158, ll. 12-23. Though he interviewed a number of people at the scene and took notes, he testified for the State using an incident report created by Lieutenant Greenfield to help recall his observations. Tr. 158, ll. 6-11.

Q: So if I get this straight, you are the first officer to interview the eyewitnesses for the shooting, correct?

A: Yes, sir.

Q: And you made no notes?

A: Yes, sir. I made notes on a notepad but it was more or less notes to pass along to Lieutenant Greenfield to do his initial incident report.

Q: Where are those notes?

A: I am not sure at this point, sir.

Q: Well, you would agree with me though that based on the information you got from dispatch and from the eyewitnesses you were looking for more than one shooter, weren't you?

A: Yes, sir.

Q: Because the information you had been given was there were at least two shooters?

A: Yes, sir.

Tr. 159, l. 19 – Tr. 160, l. 10. He said he made notes on a notepad “more or less to pass along to Lieutenant Greenfield to do his initial incident report.” Tr. 159, ll. 22-25. Officer Pope also testified that there were no shell casings present at the scene. Tr. 161, ll. 9-11.

After officer Pope’s testimony, Appellant moved for a dismissal of the charges based on a violation of Rule 5, SCRCrimP, arguing that the State’s failure to provide the notes prejudiced his ability to prepare a defense by showing discrepancies in the eyewitness statements and testimony. Tr. 165, l. 17 – Tr. 166, l. 14. The judge denied the motion. Tr. 250, l. 5 – Tr. 252, l. 4. He found that based officer Pope’s testimony, he took interview notes at the scene but was unsure of their location. *Id.* The notes stated in part that two shooters were at the scene. *Id.* The judge found that Lieutenant Greenfield incorporated all of the information from the notes into the incident report. *Id.* Therefore, no violation of Rule 5, SCRCrimP occurred, and no prejudice to Appellant occurred. *Id.*

DISCUSSION

The trial judge’s failure to hold a hearing to further examine the whereabouts and contents of officer Pope’s missing interview notes impaired Appellant’s right to a fair trial. “Upon request of the defendant the prosecution shall permit the defendant to inspect and copy . . . papers, documents, [and] tangible objects . . . within the possession, custody or control of the prosecution, and which are material to the preparation of his defense” Rule 5, SCRCrimP. Under this rule, evidence, including impeachment evidence, is material if there is a reasonable probability that had it been disclosed, the result of the proceeding would have been different. *State v. Proctor*, 358 S.C. 417, 421, 595 S.E.2d 476, 478 (2004). When a defendant establishes a basis for a claim that undisclosed materials contain material evidence, he is entitled to a hearing to examine

whether the materials actually contain information that probably would change the outcome of the trial. *State v. Bryant*, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)).

[I]n determining the materiality of nondisclosed evidence, an appellate court must consider the evidence in the context of the entire record. *United States v. Agurs*, 427 U.S. 97 (1976). However, the court should not consider the sufficiency of the evidence. The court's function is to determine whether the appellant's right to a fair trial has been impaired. *State v. Osborne*, 291 S.C. 265, 353 S.E.2d 276 (1987); *State v. Goodson*, 276 S.C. 243, 277 S.E.2d 602 (1981).

State v. Taylor, 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998).

In this case, Appellant established a basis for a claim that officer Pope's missing notes contained material evidence as to the circumstances surrounding the shooting as well as to the credibility of the State's witnesses. The notes contained information gathered from multiple eyewitnesses at the scene. Officer Pope admitted that the notes contained information leading him to believe there were two shooters. Thus, Appellant's defense strategy focused on the presence of two shooters. It also focused on showing the discrepancies in the eyewitness statements and testimony. Many material and specific details were plainly inconsistent between the various witnesses' stories. From the day of the incident through trial, their statements varied regarding the color and appearance of the gun Appellant allegedly carried; whether the number of shots that were fired exceeded the capacity of a standard revolver; whether a brick, rock, or bat was thrown and in what direction; whether the witnesses could confidently identify Appellant as the shooter; and whether they actually saw Appellant discharge the bullets that ultimately struck Boyd. One witness even suggested that the behavior and observations of the

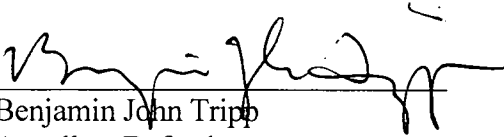
members of Boyd's group were affected by drinking beer, a fact which officer Pope would have been reasonably likely to notice and record.

Other than admitting that he believed there were two shooters, officer Pope never provided any detailed info about the statements taken from the witnesses, such as which witnesses claimed to have seen the shots fired, which witnesses saw more than one shooter, or how the witnesses described the shooter's appearance. After establishing the basis for the claim that the contents of the notes were material, Appellant was entitled to a hearing to examine whether the notes actually contained additional direct evidence that multiple shooters were at the scene or that the eyewitnesses were giving inconsistent accounts. The judge summarily inferred that Lieutenant Greenfield incorporated all of the information from the notes into the incident report based solely on officer Pope's testimony that he "more or less" passed the notes on to Lieutenant Greenfield. Thus, the judge erred in finding that no prejudice to Appellant occurred without holding a hearing specifically to determine to the furthest extent possible what the contents of the notes were and whether the information in its entirety was included in Lieutenant Greenfield's report.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse the decision of the trial court and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Benjamin John Tripp', written over a horizontal line.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2013.

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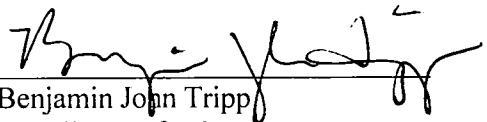
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Whitney Span 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 R. Knox McMahon, which was held on , 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 Whitney Span.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2013.

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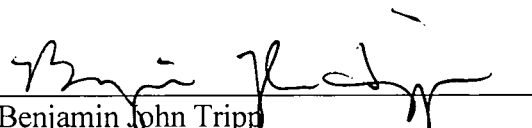
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Transcript Dated July 9, 2012:

I certify that this designation contains no matter which is irrelevant to this appeal.

August 23rd, 2013


Benjamin John Tripp
Appellate Defender

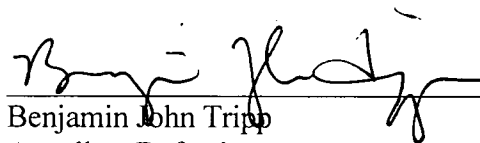
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Attorney for Appellant

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 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."

August 23, 2013



Benjamin John Tripp
Appellate Defender

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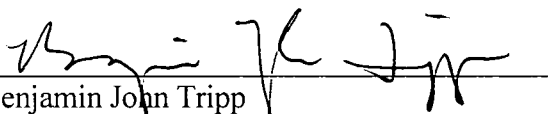
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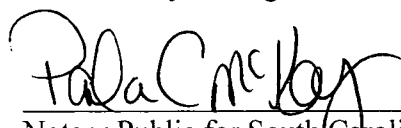
CERTIFICATE OF SERVICE

The undersigned attorney 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 Salley W. Elliott, 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 and Record on Appeal have been served on Whitney Span, #351494 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 23rd day of August, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of August, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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AUG 23 2013

SC Court of Appeals