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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN T. JENKINS,

APPELLANT

Appellate Case No. 2013-000633

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in permitting evidence of a witness's out-of-court and in-court identifications of Appellant where the prosecution failed to present testimony of the eyewitness during the in-camera hearing and relied solely upon the hearsay testimony of the police officer regarding the description of the alleged assailant and conditions attendant to the identification.

STATEMENT OF THE CASE

A Colleton County grand jury indicted Appellant for attempted murder (2012 – GS – 15 – 673), possession of a weapon during the commission of a violent crime (2012 – GS – 15 – 674), and malicious injury to personal property valued more than \$2000 and less than \$10,000 (2012 – GS – 15 – 675). R.300. The prosecution, represented by Ashley Hudson, called the case to trial before the Honorable Perry M. Buckner, III and a jury on March 18, 2013. Harris Beach represented Appellant. R. 1. The jury found Appellant not guilty of attempted murder and not guilty of possession of a weapon during the commission of a violent crime, but found him guilty of malicious injury to personal property valued between \$2000 and \$10,000. R. 292, lines 1 – 14. Judge Buckner sentenced Appellant to five years' imprisonment, suspended upon the service of four years' imprisonment and five years' probation. He further ordered Appellant to pay restitution in an amount of \$4436.41. R. 297, lines 10 – 17; R. 306; R. 300.

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

ARGUMENT

I. The trial judge erred in permitting evidence of a witness's out-of-court and in-court identifications of Appellant where the prosecution failed to present testimony of the eyewitness during the in-camera hearing and relied solely upon the hearsay testimony of the police officer regarding the description of the alleged assailant and conditions attendant to the identification.

Relevant facts.

Appellant moved to suppress the out-of-court and in-court identifications of him as the assailant by the alleged victim, Shannon Pye. The prosecution presented only one witness to support its claim that the identifications were admissible. Riddick David Thomas, an officer with the Colleton County Sheriff's Office, spoke to Shannon Pye after the alleged incident. Pye described the alleged assailants. Thomas then asked his fellow officers if they knew anyone matching the description provided by Pye. Thomas' captain provided him with Appellant's name. R. 36, line 12 – R. 37, line 3 Thomas obtained Appellant's photograph from the Department of Motor Vehicles (DMV). Thomas then submitted the DMV photograph to the South Carolina Law Enforcement Division (SLED) and requested a photograph line-up including that Appellant's DMV photograph. R. 37, lines 4 – 8. Upon receipt of the photographic line-up, Thomas met with Pye at the police station. R. 37, lines 16 – 19.

Thomas testified that he made no statements to Pye regarding the line-up, except "to be sure of his identification." R. 38, line 24 – R. 39, line 2. Pye identified the person in position number four, which was Appellant, as the suspect. R. 39, lines 6 – 7. Thomas was unable to recall how much time it took Pye to make the identification, but he thought it

occurred rather quickly. R. 39, lines 8 – 11. Also, Thomas could not recall exactly what Pye said when he made the identification. R. 40, lines 2 – 11.

On cross-examination, Thomas testified that Pye witnessed the shooting and that the person identified from the line-up was the person who actually shot him. However, Thomas was forced to admit that during the identification process, Pye was not clear that the person identified was the person who actually shot him or was merely someone at the scene. R. 43, line 21 – R. 44, line 9; R. 46, lines 5 – 13.

Upon questioning by the court, Thomas testified that Pye was approximately twenty feet away from the shooter and there were no obstructions between the two. R. 46, lines 16 – 23. Thomas also testified that there were streetlights or yard lights in the area enabling Pye to see the shooter. R. 46, lines 23 – 24. Prior to the identification, Pye described the individual as “a large, male.” R. 46, line 25 – R. 47, line 3.

Appellant argued that the testimony was unclear as to whether the person identified was simply a person present at the scene or was the person who was to have allegedly shot Pye. R. 48, lines 18 – 20; R. 48, line 23 – R. 49, lines 2. The trial judge found that the identification process was not unduly suggestive; therefore, the judge permitted the introduction of the in-court and out-of-court identification of Appellant. R. 49, line 22 – 23.

The trial testimony revealed that on July 4, 2012, Pye learned that his wife was having an affair with Jose Rivas. R. 79, lines 16-21; R. 80, lines 12-18; R. 120, lines 17-19. During the early morning hours of July 5, 2012, Pye, his brother-in-law, and another friend went to a secluded area to confront Rivas about the affair. R. 82, lines 14-17; R. 82, line 25- R. 83, line 1; R. 83, lines 4-19; R. 84, line 1; R. 84, lines 10-18; R. 122, line 19 – R. 123, line 21. When they arrived, Rivas, Rivas’ brother, and Appellant were in the area. Pye did

not know Appellant at the time, but identified him in court. R. 85, line 2 – R. 87, line 5; R. 125, lines 1-20. Brother-in-law and Appellant, who had a knife, engaged in a physical altercation. R. 88, lines 1-14; R. 104, line 4 – R. 105, line 6. Pye and his comrades decided to leave the area. R. 88, lines 12-20, R. 88, line 23 – R. 89, line 15; R. 105, lines 9-10. Pye was in the bed of the truck when it suddenly stopped. Pye claimed that the three people surrounded the truck and then Appellant started beating on the truck with a knife and slashed a tire. R. 89, line 18 – R. 90, line 17; R. 107, lines 11-16. When the truck pulled off, Pye observed Appellant give the knife to Rivas and then Rivas gave a dark object to Appellant. Pye claimed he saw Appellant point the dark object and shoot. Pye was shot once in the leg. He claimed he heard two additional shots thereafter. R. 91, lines 3-15; R. 92, lines 3-9; R. 108, lines 1-19.

Pye called for help. R. 92, lines 19-24; R. 129, lines 18-23; State's Exhibit #2 - 911 call. Pye observed a red car at the incident location and later observed the red car following the truck. He believed the occupants of the red car following the truck were the three individuals from the incident location. However, when the police stopped the red car and made the occupants exit, Pye observed that one of the occupants was a female, and admitted he had identified the wrong people. R. 93, lines 2-21, R. 99, lines 17-21; R., line 111.

While receiving medical treatment, Pye described the alleged shooter to police as a large, black male weighing between 220 and 250 pounds and standing between six feet, three inches and six feet, five inches. R. 94, line 12 – R. 95, line 4. Subsequently, Pye identified Appellant during a line-up procedure on July 10, 2012 at the police station. R. 95, line 5 – R. 96, line 8.

Brother-in-law admitted that he took a swing at one of the individuals at the incident location. However, he was unsure if he had hit the person. He asserted that Appellant had a kitchen knife in his left hand, which prompted brother-in-law to act aggressively. R. 131, lines 8-25. Brother-in-law claimed the person ran to Rivas's car and entered the car's glove compartment, but he did not see what, if anything, the person got. R. 126, lines 1-7; R. 132, lines 20-25. Brother-in-law saw someone was beating on the side of the truck and heard the tire get slashed; however, brother-in-law was not sure who it was. R. 127, lines 10-25; R. 128, lines 1-2; R. 134, lines 3-12. Brother-in-law did not hear a gunshot, but heard Pye say he had been shot. R. 129, lines 4-10. Obviously, he did not see who had fired a weapon. R. 134, lines 13-16.

Investigator Thomas testified before the jury regarding his investigation, including the line-up procedures that he conducted. He met briefly with Pye in the emergency room where he learned of the alleged incident location. R. 177, lines 11-25. Pye described his assailant as "a larger black male," but could not provide a name. R. 178, lines 3-11. Thomas found no shell casings at the scene. Essentially, he found nothing of evidentiary value at the crime scene. R. 182, lines 18-25; R. 187, lines 2-8. Thomas asked his co-workers about the description he received and his captain suggested he investigate Appellant. R. 183, lines 1-10. Thereafter, Thomas obtained Appellant's photograph, which he submitted for a line-up from SLED. When he received the line-up, he engaged in a photographic line-up with Pye. R. 183, lines 11-25. Thomas indicated that Pye identified Appellant from the line-up. R. 184, lines 6-19.

Appellant presented testimony indicating that he, Rivas, and others were gathered at the incident location for street racing. R. 197, lines 2-18; R. 197, line 22 – R. 198, line 8; R.

209, lines 14-19. Appellant's witnesses testified that Brother-in-law punched Appellant in the face and then asked for a gun R. 199, line 10 – R. 200, line 1; R. 213, lines 9-12; R. 214, lines 3-5. Appellant's witnesses admitted that Appellant had a knife and that he hit the window of the truck. R. 200, lines 2-6; R. 214, lines 12-18. However, Appellant's witnesses denied that Appellant shot or even had a gun. Although the witnesses could not identify the shooter, the witnesses explained that the shot was fired from a crowd. R. 200, lines 7-8; R. 200, lines 23-25; R. 201, lines 2-14
R. 215, lines 1-14.

Discussion

When law enforcement use an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification, an individual's right to due process of law is violated. Stovall v. Denno, 388 U.S. 293 (1967); State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, the in-court identification is not admissible. Manson v. Brathwaite, 432 U.S. 98 (1977); Moore, 343 S.C. at 286, 540 S.E.2d at 447. In Neil v. Biggers, 409 U.S. 188 (1992), the United States Supreme Court created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, the trial court must ascertain whether the identification process was unduly suggestive. Next, the trial court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. at 198. The central issue is whether the identification was reliable even though the confrontation procedure was suggestive under the totality of the circumstances. Id. The following factors should be considered when evaluating the totality of the circumstances:

(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; and (5) the length of time between the crime and the confrontation. Id. at 199; see also State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

Our courts have found some identification procedures patently suggestive. For example, in State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), our Supreme Court held a line-up procedure wherein three victims were in the same room, sitting within feet of each other, while observing photographic line-ups was blatantly unacceptable. Id. at 81-82, 600 S.E.2d at 527. Nevertheless, the Court found the identification was admissible based upon the totality of the circumstances. Those circumstances included the victims not conversing during the line-up and not being aware of whom the other victims selected, if anyone. The victims testified they observed the assailant from one minute to ten minutes and their prior descriptions generally matched that of the person identified. All testified they were certain of their identifications, which were made two days after the incident. Id. at 83, 600 S.E.2d at 527.

Our Supreme Court held a show-up identification was unduly suggestive in Moore, supra. A witness observed two people exiting her neighbor's home when she knew the neighbor was away. She called the police and provided a general description of the men, primarily focused on the clothing. Id. at 285, 540 S.E.2d at 447. Ninety minutes later, officers took the witness to an area where two men were being detained. The witness positively identified the two men as the perpetrators. Her identification was based upon the clothing she observed. She admitted she had not really seen their faces earlier. Id. at 285-

286, 540 S.E.2d at 447. As explained by the Court, “[s]ingle person show-ups are particularly disfavored in the law.” *Id.* at 287, 540 S.E.2d at 448 (citing *Stovall*, 388 U.S. at 302 and *State v. Johnson*, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993)). The procedure in *Moore* was unduly suggestive. *Id.* Further, the Court found the identification unreliable as a matter of law. In the case presented, the Court found the only factor with any reliability was the amount of time between the crime and the confrontation, which was ninety minutes. The other factors clearly outweighed that one where the witness observed the two perpetrators for a brief time at a significant distance, the degree of attention was not great, and the accuracy of her description was tenuous. *Id.* at 449, 540 S.E.2d at 290.

The trial court erred in allowing the prosecution to present evidence of the witness’s out-of-court and in-court identification of Appellant as the alleged assailant. The prosecutor failed to present evidence from the actual witness to indicate the type of procedures used during the identification process. The prosecutor presented only the officer who conducted the line-up and copies of the photographic line-ups. The court then allowed the officer to testify to hearsay statements allegedly made by the witness concerning the description of the assailant and the conditions surrounding the incident at which the witness saw the assailant. The prosecution failed in its burden of production and burden of proof. This failure inhibited the judge from making a determination regarding the suggestiveness of the line-up procedures and the reliability of the identification.

CONCLUSION

Appellant respectfully requests this Court 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 August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

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BRIAN T. JENKINS,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brian T. Jenkins 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 Perry M. Buckner, which was held on March 20, 2013, 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 Brian T. Jenkins.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of August, 2013.

STATE OF SOUTH CAROLINA

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Appeal from Colleton County

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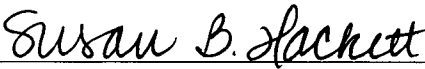
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments;
- (2) Entire trial transcript dated March 18 – 20, 2013;
- (3) State's Exhibit #1 (photo line-up);
- (4) State's Exhibit #2 (911 call);
- (5) Sentence Sheet
- (6) Restitution Order Form

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

August 21st, 2013



Susan B. Hackett
Appellate Defender

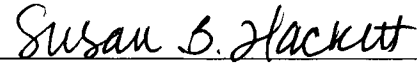
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Attorney for Appellant

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 21, 2013



Susan B. Hackett
Appellate Defender

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STATE OF SOUTH CAROLINA

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THE STATE,

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BRIAN T. JENKINS,

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Appellate Case No. 2013-000633

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 Brian T. Jenkins, #354770 at Coastal Work Center, 2462 Leeds Avenue, Charleston, SC 29405, this 21st day of August, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of August, 2013.

Emily M. [Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.