ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Thomas L. Hughston, Circuit Court Judge

Appellate Case No. 2018-000703

THE STATE,

Respondent,

v.

KRAIG JERMAYNE ANDERSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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I.

Whether the trial judge properly admitted Victim's out-of-court identification of Appellant where the identification procedure used was not unnecessarily suggestive and even if this Court were to determine that it was, the identification was nonetheless reliable and no substantial likelihood of misidentification existed?

II.

Whether the trial judge abused his broad discretion in refusing to grant Appellant a mistrial when a photograph of Appellant wearing a grey and white shirt was shown to the jury but no reference was made to Appellant being in custody and therefore Appellant was not prejudiced by its admission, and where even if the photograph was admitted in error, whether any error was entirely harmless because of the overwhelming evidence presented against Appellant at trial?

STATEMENT OF THE CASE

In May 2016, the Charleston County Grand Jury indicted Appellant for one count of criminal sexual conduct in the first degree. On April 9-11, 2018, a jury trial was held in the Charleston County Court of General Sessions with the Honorable Thomas L. Hughston, presiding. Appellant was represented by Lorelle Proctor, Esquire, and Taylor Joy Seman, Esquire of the Charleston County Public Defender's Office. The Respondent (the State) was represented by Assistant Solicitors Jessica Baldwin and Jennifer Shealy of the Ninth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant as charged. Following the verdict, the trial judge sentenced Appellant to thirty years' imprisonment. Appellant then timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On June 18, 2014, Victim went to the Wild Buffalo Saloon in North Charleston to meet up with a friend who was tending the bar that night. (R. 130). Victim met a black male and asked him for a cigarette on the patio of the bar. (R. 134). Victim did not know this individual's name, but he was later identified as Appellant. (R. 153). As Victim prepared to leave, she was approached by a regular customer at the bar named Ed who insisted on walking her to her car. (R. 137-38). Victim declined to be walked to her car by Ed, but Ed continued to follow her. As Victim reached her car, Appellant interjected and told Ed that Victim had agreed to give him a ride home. (R. 138). Victim thought Appellant was being chivalrous and doing her a favor. (R. 138). However, after Ed left Victim and Appellant alone, Appellant entered Victim's car and insisted she give him a ride home. (R. 139). Victim reluctantly agreed and proceeded to drive Appellant down Greenridge road, where Appellant claimed to live.

As Appellant and Victim were driving to Appellant's residence, Appellant changed his story and said he didn't live on Greenridge road, but rather he was staying in a hotel nearby. (R. 140). After driving past several hotels, Appellant and Victim arrived at a Country Inn and Suites. (R. 141). Victim told Appellant that she needed to use a restroom and asked if she could use the one in Appellant's room or in the hotel lobby. (R. 142). Appellant refused, and told Victim she would have to urinate in the woods. Victim started walking into the woods near the hotel and Appellant followed her. After Victim finished urinating in the woods, Appellant pushed her against a tree and began to strangle her. (R. 143). Victim tried to keep her legs crossed and resist Appellant, but she eventually submitted to Appellant because she feared that Appellant might strangle her to death. After Victim uncrossed her legs, Appellant engaged in vaginal intercourse with Victim. (R. 144). After Appellant released Victim, he said "that's why you don't give rides

to strangers." (R. 144, lines 11-12). Victim returned to her car and drove to a nearby Denny's restaurant where she called 911. (R. 144).

After law enforcement arrived at Denny's, Victim was transported to MUSC where a sexual assault examination was performed. Test samples were taken from Victim's vaginal area and other areas of her body and sent to SLED to test for DNA. Victim met with law enforcement and viewed five different photo lineups on three different occasions. (R. 148, State's Exhibits 59-62). The first occasion was on July 14, 2014 where Victim viewed three six person photo lineups. (State's Exhibit 59, 62). Victim viewed an additional six person lineup on July 20, 2014, and the final lineup on October 6, 2015. (R. 149, 153, State's Exhibit 60-61). On July 14, 2014, Victim told law enforcement that she saw one individual in the three lineups who could have been her assailant, but she could not be one hundred percent sure. As a result Victim did not make a selection. (R. 149, 163).

Some of the test samples that were sent to SLED were found to contain semen. (R. 276). The samples containing semen were run through the CODIS database and matched positively with Appellant's DNA. (R. 176, 279). Based on this finding, Detective Angela Elmer of the North Charleston Police Department placed Appellant's photo in a fifth six person lineup and showed it to Victim on October 6, 2015. (R. 176, 208). Victim identified Appellant in the lineup and at trial. (R. 150, State's Exhibit #61). Appellant was subsequently located and arrested in Michigan. (R. 209). At the conclusion of trial, Appellant was convicted as charged.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Liverman, 398 S.C. 130, 137-138, 727 S.E.2d 422, 425 (2012). "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Id.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. Thompson, 352 S.C. at 560, 575 S.E.2d at 82, (*citing* State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977).

ARGUMENT

I.

The trial judge properly admitted Victim's out-of-court identification of Appellant where the identification procedure used was not unnecessarily suggestive and even if this Court were to determine that it was, the identification was nonetheless reliable and no substantial likelihood of misidentification existed.

Appellant contends the trial judge erred in admitting Victim's out-of-court identification of Appellant because the lineup was unduly suggestive. Additionally, Appellant argues the identification was unreliable because Appellant was the only individual in the lineup that was wearing a prison jumpsuit. Appellant's arguments are without merit. The trial judge did not abuse his discretion in admitting Victim's identification of Appellant, because Victim's identification was reliable and the procedure used by law enforcement was not unnecessarily suggestive. Victim's identification was reliable because she identified him immediately and testified that she had "no doubt whatsoever" that she identified the correct person. (R. 22, 150, 168, line 8). Furthermore, Victim testified that she "had no idea" Appellant was wearing a prison jumpsuit and therefore her identification of Appellant was not unduly influenced by his clothing. (R. 25, line 11). Therefore, the trial judge did not abuse his discretion in admitting Victim's identification of Appellant. Appellant's conviction and sentence should be affirmed.

"When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-prong inquiry to determine whether due process requires suppression." State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017). "First, the court must determine whether the identification resulted from 'unnecessarily suggestive' police identification procedures." Id. (quoting Neil v. Biggers, 409 U.S. 188, 198-199 (1972)). "An in court identification of an accused is inadmissible if a suggestive and out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600

S.E.2d 523, 526 (2004). "If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong." State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) "If, however, the court determines the procedures were both suggestive and unnecessary, the court must then determine 'whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.'" State v. Wyatt, 421 S.C. at 311, 806 S.E.2d at 710 (citing State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 426 (2012)).

The United States Supreme Court has prescribed a number of factors to be considered by appellate courts when determining whether a risk of misidentification existed. The factors to be considered include: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. " Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

Applying the two pronged test of Neil v. Biggers to the current case, the out-of-court identification of Appellant was neither unnecessarily suggestive nor was there a substantial likelihood of misidentification. Appellant initially argues that the lineup was unduly suggestive because Appellant appeared to be wearing a prison jumpsuit in the lineup. This argument is belied by the testimony presented during the *in camera* hearing and at trial. Victim testified that she recognized Appellant immediately and was "very certain" that she made the correct decision. (R. 22, line 16, 150). Furthermore, Victim was not told by law enforcement that Appellant was in the October 6 lineup, nor was she told that she had picked the correct person. (R. 21-23, 30, 150, 153). Victim also identified Appellant at trial in front of the jury as being the person who

assaulted her. (R. 153). Contrary to Appellant's assertion, Victim testified that she did not know Appellant was wearing a prison jumpsuit. (R. 25). Likewise, the trial judge remarked that he didn't think Appellant looked like he was wearing prison attire, but rather looked similar to the rest of the men in the October 6 lineup. (R. 169). Additionally, the fact that Victim had looked at four previous lineups without making a selection before she finally settled on selecting Appellant demonstrates that the lineup procedure used by law enforcement was not unnecessarily suggestive. Therefore, the trial judge did not abuse his discretion in admitting Victim's out-of-court identification of Appellant.

Appellant next argues that in light of the unnecessarily suggestive nature of the October 6 lineup, there was a substantial likelihood of misidentification. Even if we assume for the sake of argument that the October 6 lineup was unnecessarily suggestive, Victim's identification was nevertheless reliable. Victim had the opportunity to view Appellant on multiple occasions throughout the night of June 18, 2014 and into the morning of June 19, 2014. Victim viewed Appellant outside the bar on the patio, both outside and inside her car, and in the woods when he sexually assaulted her. (R. 134, 138, 143-44). Victim was also able to identify Appellant in security camera footage from the Wild Buffalo Saloon. (R. 157). Additionally, Victim testified that she was very certain about her identification and that she picked Appellant immediately. (R. 22, 150, State's Exhibit #61). That Victim had viewed four previous lineups before she finally selected Appellant weighs in favor of the reliability of her identification, because Victim demonstrated she was not going to select an individual unless she was absolutely certain that it was the person who assaulted her. Indeed, Victim saw a person in a previous lineup that she thought could be her assailant, but she did not make a selection because she was not one hundred percent certain. Victim's selection of Appellant almost a year and a half after the assault reflects

a high level of confidence and certainty that she had correctly identified her assailant. Therefore, the trial judge did not abuse his discretion in admitting Victim's out-of-court identification of Appellant. Appellant's conviction and sentence should be affirmed.

II.

The trial judge did not abuse his broad discretion in refusing to grant Appellant a mistrial when a photograph of Appellant wearing a grey and white shirt was shown to the jury but no reference was made to Appellant being in custody, and therefore Appellant was not prejudiced by its admission. However, even if the photograph was admitted in error, any error was entirely harmless because of the overwhelming evidence presented against Appellant at trial.

Lack of Prejudice to Appellant

Appellant contends the trial judge erred by not granting him a mistrial when a photograph of him in a prison jumpsuit was shown to the jury. Appellant argues that this photograph prejudiced him and caused the jury to judge him based on the photograph rather than on whether he was guilty or innocent of the crime for which he was charged. Appellant's argument is without merit. Appellant assumes that he was adversely affected by the jury seeing a photograph of him in a grey and white shirt. Appellant was never identified as wearing a prison jumpsuit in front of the jury by any witness, nor was it apparent that he was in fact wearing one. Therefore, there is no evidence in the record to indicate that Appellant was identified as being an inmate in front of the jury. However, even if the photograph of Appellant was admitted in error, admission of the photo was harmless because of the overwhelming evidence presented against Appellant at trial.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "The power of a court to declare a mistrial ought to be used with the greatest caution under

urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. Thompson, 352 S.C. at 560, 575 S.E.2d at 82, (*citing* State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977)). "A mistrial should not be granted unless absolutely necessary." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. In order to receive a mistrial, the defendant must show error and resulting prejudice. Id.

Appellant is unable to show that he was prejudiced by the admission of his photograph into evidence. Here, there was no plain and obvious basis on which to grant a mistrial. Indeed the trial court found Appellant was not wearing prison attire and stated that Appellant had on similar clothes as the other men in the lineup. Appellant asserted that his photo depicted him in prison attire, but Appellant was never identified as being in custody in front of the jury. The only reference made to what Appellant was wearing at trial occurred during Appellant's *in camera* cross examination of Victim. Victim denied that she picked Appellant based on his clothing, and maintained she "had no idea" Appellant was in a prison uniform. (R. 25, line 11). Appellant did not ask the same question when cross examining Victim before the jury, and thus no witness or attorney revealed he was wearing prison attire. Without any evidence that Appellant was prejudiced by the admission of his photograph, the trial judge did not abuse his discretion by refusing to grant Appellant's motion for a mistrial.

Harmless Error

Even if we assume for the sake of argument that Appellant's photograph was admitted in error, any error was entirely harmless because of the overwhelming evidence presented against Appellant at trial.

"Whether an error is harmless depends on the circumstances of the particular case." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "Error is harmless when it could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E. 2d 888 (1971)).

The evidence presented against Appellant at trial was overwhelming. Appellant was identified in court by Victim as being her assailant. (R. 153). Victim also identified Appellant in security camera footage from Wild Buffalo Saloon. (R. 157). Victim's identification of Appellant was corroborated by Appellant's semen and DNA being found in her vaginal area. (R. 279). The probability of selecting another individual with the same DNA profile as Appellant is 1 in 160 trillion. (R. 279). Law enforcement identified Appellant based on the match of Appellant's DNA found in the CODIS database before Victim selected him from the October 6 lineup. (R. 176, 279). Appellant attempted to account for the presence of his DNA by arguing in closing that he had consensual sex with Victim. However, Appellant's defense was contradicted by the testimony of Dr. Kathy Gill-Hopple who confirmed that Victim had been strangled. (R. 310-13, State's Exhibits 23, 24, 25, 32, 33). The jury was convinced of Appellant's guilt by the DNA evidence and evidence of strangulation and not by a single photograph of Appellant wearing a grey and white shirt that neither the Victim nor the trial judge thought was a prison uniform. Any error in the admission of Appellant's photograph was harmless. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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February 28, 2019

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
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I further certify that all parties required by Rule to be served have been served.
This twenty-eighth day of February, 2019.

Sally Ellison

SALLY ELLISON
Legal Assistant

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