STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DWAYNE EDDIE STARKS,

APPELLANT

APPELLATE CASE NO. 2013-000869

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court's admission of the witness's identification of Appellant deprive him of due process where the witness admitted she initially identified Appellant by voice, the show-up identification was done with Appellant in handcuffs seated in the back of a moving patrol car, at night, lasting only for a few seconds, where the witness admitted she could only see Appellant's face at the show-up, and without the opportunity for voice identification?

STATEMENT OF THE CASE

The Abbeville County grand jury indicted Appellant on one count of armed robbery and one count of possession of a firearm or knife during the commission of a crime. (Record on Appeal p. 6, lines 2-11). On April 1, 2013, Appellant proceeded to trial before a jury and the Honorable Thomas L. Hughston, Jr. Patricia Bolen and Janna Nelson represented Appellant and David Stumbo and Yates Brown represented the State. (R. p. 1).

At the conclusion of the trial on April 3, 2013, the jury found Appellant guilty of armed robbery and possession of a firearm in the commission of a crime. (R. p. 333, lines 20-25). For the armed robbery charge, Judge Hughston sentenced Appellant to twenty-five years imprisonment. For the weapons charge, the Judge sentenced Appellant to five years concurrent with credit for time served in jail prior to trial. (R. p. 345, lines 6-12).

This appeal follows.

ARGUMENT

THE TRIAL COURT'S ADMISSION OF A WITNESS IDENTIFICATION OF APPELLANT DEPRIVED HIM OF DUE PROCESS BECAUSE THE WITNESS INITIALLY IDENTIFIED THE APPELLANT IN A MANNER OTHER THAN VISUAL IDENTIFICATION, AND APPELLANT'S "STAND UP" IDENTIFICATION, DONE IN THE BACK OF A POLICE CAR, LASTING MERE SECONDS, AT NIGHT, WAS A SUGGESTIVE AND IMPROPER IDENTIFICATION.

STATEMENT OF FACTS

Late on the evening of February 27, 2012, sometime around 11:30 p.m., the Shell gas station on Highway 72, near Abbeville, S.C., was robbed by a hooded assailant in a ski mask. (R. p. 116, line 20-p. 120, line 18). The cashier on duty that night, Nakelia Williams, gave the robber the contents of her cash register. (R. p. 119, lines 20-22). The assailant then left the store. Ms. Williams stated she "believed" Appellant as the robber on the basis of "body build" and a voice identification. (R. p. 88, lines 13-22). Ms. Williams indicated she had prior interaction with Appellant at her store, and "he always comes in the store." (R. p. 87, lines 11-14). However, Ms. Williams was unable to see the face of the robber as it was obscured by a ski mask and hood. (R. p. 84, line 15- p. 85, line 19). Ms. Williams called Abbeville 911 and reported both the robbery and that she believed Appellant was the robber. On the call, she did not state to a certainty that Appellant was the assailant. (R. p. 153) (911 Call State Ex. 24); (R. p. 137, lines 17-21). Williams never saw the robber's face. (R. p. 138, lines 13-15).

Corporal Thomason of the Abbeville Police Department heard the 911 dispatch operator's report of the robbery and responded within a few minutes of hearing the initial report. Corporal Thomason took his patrol car to Sawmill Acres, a trailer park within a mile's distance of the Shell station. (R. p. 154, lines 2-4; p. 157, lines 19-24). Apparently,

this was on the basis that Corporal Thomason had previous familiarity with Appellant and knew him to be a resident of the area. (R. p. 158, lines 4-8). Upon entering the neighborhood in his car, Corporal Thomason came upon Appellant, wearing a red shirt, khaki slacks, and white shoes. (R. p. 158, line 24-p. 159, line 2). Corporal Thomason performed a *Terry* frisk on Appellant, found cash in his pocket, and placed him in the back of his patrol car. (R. p 159, line 22-p. 162, line 4). Appellant did not evade or run from law enforcement. (R. p. 172, line 24-p. 173, line 3). While Appellant was detained, Thomason and Officer McAllister, who had also responded to the 911 call, searched the vicinity where he was detained and found rolls of coins, a ski mask, and other items on the ground. (R. p. 176, lines 10-25). After this discovery, Officer McAllister returned to the patrol car containing Appellant and read him his Miranda rights. (R. p. 188, lines 18-24).

Officer McAllister and another officer, Lieutenant Wilkie, left the scene of Appellant's arrest and returned to the Shell station, where they met with Ms. Williams and asked her if she could identify the person who robbed the store. (R. p. 67, lines 9-14, 21-23, 24-p. 68, line 3). When Ms. Williams agreed to comply despite a stated reluctance to closely examine their detainee, Corporal Thomason brought the patrol car into the parking lot of the Shell station, turned on the interior lights of the car, and then drove on. According to testimony, the car stopped for a few seconds during the identification process. (R. p. 68, lines 13-20; p. 179, line 25-p. 180, line 3) By Investigator Wilkie's account, the alleged identification lasted a couple of seconds. (R. p. 68, lines 22-25). Appellant's attire did not match the initial description given by Ms. Williams to 911. (R. p. 174, lines 8-15). At no point was Ms. Williams given the opportunity to examine a voice identification of Appellant, the basis on which she had previously identified him. (R. p. 91, lines 2-11).

Moreover, Appellant was handcuffed, alone, in the back of a patrol car. (R. p. 69, lines 10-14; R. p. 70, lines 10-15). Appellant was then taken to the city police department. (R. p. 169, lines 10-13).

At the hearing in this case, Appellant's trial counsel properly moved for a *Neil v. Biggers*[1] hearing, seeking to exclude Ms. Williams' momentary visual identification. (R. p. 68, line 22-p. 70, line 17). During cross-examination by Appellant's counsel, Investigator Wilkie described the fleeting and cursory nature of the show-up from the back of the patrol car:

> Q. Just a couple of questions, Investigator Wilkie. You said it was less than a minute. It was really just a couple of seconds according to that video. Right?
>
> A. Yes, ma'am.
>
> Q. In fact, Sergeant Thomason didn't even really stop his car.
>
> A. Correct.
>
> Q. It was very close to midnight, so it's fair to say it was dark out?
>
> ...
>
> Q. Okay. And my client was in the back of the police car. Correct?
>
> A. Yes, ma'am.
>
> Q. And he was wearing handcuffs?
>
> A. They were on him at the time. Yes, ma'am.
>
> Q. And he was obviously brought to the victim by the police. Correct?
>
> A. Yes, ma'am.

[1] 409 U.S. 188 (1992).

Q. Okay. And he was not wearing what she reported the robber was wearing. Right?

A. No, ma'am.

Q. He was wearing a red shirt, I believe?

A. A red shirt. Yes, ma'am.
Q. His face was unobstructed?

A. Yes, ma'am.

Q. And he was wearing beige pants?

A. Yes, ma'am. He was.
...

Q. And prior to Sergeant Thomason coming up, did you tell her anything about who was coming up?

A. I asked her if she felt comfortable viewing him or seeing him so that she could identify him and she said that was fine.

Q. And there wasn't anyone else in the car, right? Other than the officer and my client?
A. That's correct.

Q. And you didn't bring anyone else up there at any other time to the victim to view. Correct?

A. No, ma'am.

Q. And you didn't do a lineup?

A. No, ma'am.

Id. Furthermore, at the *Biggers* hearing, Ms. Williams admitted during cross-examination by Appellant that she could not really see Appellant during the show-up, and her identification of his clothing that night does not match that of Investigator Wilkie and she herself was unsure of what he was wearing:

Q. The person in the store was wearing a mask? Okay. And when you saw him in the back of the police car, was he handcuffed?

A. Yes.

THE COURT: Could you see?

A. I couldn't really. I could see his head and him just sitting in the car and they shined the light and I seen his face.

Q. Okay. So, he was sitting in the car.

A. Yes, ma'am.

Q. They didn't take him out? They didn't take him out of the car?

A. No, they didn't take him out.

Q. Okay. And what was ---

A. Because I asked them not to, because they asked me first could they bring him back up there and I could fully identify him. I told them that I didn't want to, as far as him coming in the store. But they said, well, I'll leave him in the car and have him seated and they will shine the light and ---

Q. And he was wearing a red shirt in the car. Right?

A. No, ma'am.

Q. What was he wearing?

A. He had that, a green jacket on, if I'm not mistaken.

Q. In the car?

A. Yes, ma'am, I think so. I really just couldn't tell. I seen his face.

Q. In the car?

A. Yes, ma'am.

Q. So, you didn't really notice what he was wearing in the car?

A. No.

(R. p. 90, line 12-p. 91, line 23). Tr. April 1, pp. 90, ll. 12-91,23. Despite some contradictory testimony of the witnesses, the witness' own admission that she could not see, and the brief and cursory nature of the show-up outside the police station, the trial court ruled that the identification was admissible over Appellant's objection, and without reviewing all of the *Neil v. Biggers* factors. (R. p. 100, line 10-p. 101, line 4). During the course of the trial, Ms. Williams bolstered her own statements beyond those made in the pretrial hearing; contrary to prior testimony, she claimed a greater degree of certitude about the identification during cross-examination by Appellant's counsel. (R. p. 130, lines 5-8).

DISCUSSION

I. Law enforcement's suggestive identification procedure was conducive to mistaken identification and violated Appellant's right to due process.

An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification violates an individual's right to due process of law. *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967); *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). In *Neil v. Biggers*, the Supreme Court crafted a two-prong inquiry to determine the admissibility of out-of-court identifications. 409 U.S. 188 (1992). First, the trial court must ascertain whether the identification process was unduly suggestive. Second, 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. This

determination must be fact-specific: "there is no bright line rule concerning show-ups, as the ultimate decision is controlled by the particular facts and circumstances." *Gibbs v. State*, 403 S.C. 484, 744 S.E.2d 170 (2013). *See also State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (citing *Biggers*, 409 U.S. at 198). Corporal Thomason and Officer McAllister's attempt to elicit an identification from Ms. Williams, at night, without the patrol car even stopping, as it moved past the Appellant made the procedure unnecessarily suggestive and conducive to irreparable mistaken identification. Since Ms. Williams' identification was not reliable, any evidence of it and fruits thereof should have been excluded at trial.

A. Law enforcement violated Appellant's due process rights by using an identification method that was patently suggestive.

Pursuant to *Biggers* and its progeny,[2] both the United States Supreme Court and the Courts of South Carolina require trial courts to scrutinize identification processes that are unduly suggestive. Some identifications are considered suggestive as a matter of law, including show-ups. *Moore*, 343 S.C. at 287, 540 S.E.2d at 448. *See also State v. Frazier*, 394 S.C. 213, 715 S.E.2d 650 (Ct. App. 2011). Such suggestive identifications are disfavored as a law enforcement practice, and one-on-one show-ups have been widely condemned as "inherently suggestive." *Stovall*, 388 U.S. at 302; *Moore*, 343 S.C. at 287, 540 S.E.2d at 448 (citing *Jefferson v. State*, 425 S.E.2d 915, 918 (Ga. Ct. App. 1992)).

South Carolina Courts consistently recognize that having the witness in the presence of the suspect, where no other individuals are detained, is suggestive. *Gibbs*, 403 S.C. at 494, 744 S.E.2d at 175; *Liverman*, 398 S.C. at 141, 727 S.E.2d at 427; *Moore*, 343 S.C. at 288, 540 S.E.2d at 448; *Frazier*, 394 S.C. at 221, 715 S.E.2d at 654; *State v.*

[2] *E.g.*, *Perry v. New Hampshire*, 132 S. Ct. 716 (2012); *Manson v. Brathwaite*, 432 U.S. 98 (1976).

Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000); *State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999). Moreover, the South Carolina Supreme Court has categorized stand up identification procedures as "patently suggestive." *Moore* at 448. If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, a subsequent in-court identification is not admissible, as it is fruit of the poisonous tree. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Moore*, 343 S.C. at 286, 540 S.E.2d at 447. Examples of non-suggestive identifications include photographic lineups, even where the photos contain varying background colors, or a witness' spontaneous identification of a defendant without law enforcement prompting. *E.g.*, *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013), *petition for cert. filed,* No. 5148 (S.C. Oct. 23, 2013); *State v. Turner*, 373 S.C. 121, 644 S.E.2d 693 (2007). *Accord Coleman v. Alabama*, 339 U.S. 1 (1970) (noting the absence of the crucial element of police overreaching where witness' identification was virtually spontaneous).

In the present case, the actions of Investigator Wilkie, Sergeant McAllister, and Corporal Thomason made Ms. Williams' identification of Appellant unnecessarily suggestive and conducive to an irreparable mistaken identification. First, the officers' protocol for the show-up was patently and inherently suggestive in our jurisprudence. There is no dispute in the record by law enforcement or Ms. Williams that the identification lasted mere seconds, and in no case, more than a minute. Ms. Williams' testimony indicates that Thomasons' patrol car may not have even come to a stop. Appellant was alone and handcuffed in the rear of the patrol car. A light was momentarily shown in his face for the benefit of Ms. Williams, yet Ms. Williams conceded she "couldn't really" see. (R. p. 90, line 12-p.91, line 23). No opportunity was given for a photo line up or a "stand up" at the

police station. Appellant was not shown in attire matching the witness's initial description, and the witness even admitted she couldn't really see. In fact, on the whole, the identification of Appellant was cursory, as if it were a foregone conclusion that Appellant was guilty. Appellant satisfies the first prong of the Biggers test by virtue of the method of his abbreviated and flawed show-up identification. Under all circumstances, it falls squarely in the category of identifications treated as suggestive by the U.S. Supreme Court and the South Carolina appellate courts.

B. The witness' identification of Appellant was not reliable enough to mitigate the suggestive nature of law enforcement's identification method.

Once the Court has determined that an identification is suggestive, it must proceed to evaluate its reliability. *Dukes*, 404 S.C. at 560–61, 745 S.E.2d at 141. If the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed, the identification may be admitted. *Liverman*, 398 S.C. at 138, 727 S.E.2d at 425–26 (citing *Biggers,* 409 U.S. at 198). Five factors should be considered when evaluating, in the totality of the circumstances, the reliability of an identification pursuant to *Biggers*: (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 138; 727 S.E.2d at 426. *See also State v. Stewart*, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

In South Carolina, courts have only found out-of-court identifications to be sufficiently reliable when at least two of the *Biggers* factors are satisfied. A witness' identification during a single person show-up was found to be sufficiently reliable

(overcoming the taint of suggestiveness and minimizing the possibility of mistaken identification) because he had a "protracted opportunity" to observe and remember the defendant's face and noted particularly his heightened attention to the defendant's features during the commission of a burglary. *Mansfield*, 343 S.C. at 79, 538 S.E.2d at 263. Similarly, a "patently suggestive" method of identification was upheld because three witnesses saw their assailant for several minutes in good light, and were able to provide a detailed description of the defendant prior to viewing his photograph. *State v. Traylor*, 360 S.C. 74, 83, 600 S.E.2d 523, 527. Finally, a single-person show-up identification was upheld where the witness was identified the defendant with a high degree of certainty only twenty minutes after the commission of the crime, even though the witness made his identification while being driven by the defendant while the defendant was being detained by law enforcement. *Frazier*, 394 S.C. at 222, 715 S.E.2d at 654.

Conversely, in *State v. Moore* the only factor supporting a finding of reliability was the short amount of time between the crime's occurrence and the witness' identification, and consequently the identification was excluded. 343 S.C. at 289, 540 S.E.2d at 449. The South Carolina Supreme Court noted that the witness originally did not get a good look at the criminal, and that the suggestiveness of a single person show-up, where the defendant was being detained and was surrounded by law enforcement, was not overcome or sufficiently mitigated. *Id.*

The case at hand aligns itself most closely with *Moore*. As in that case, there are not sufficient indicators of reliability, under *Biggers*, as to mitigate the suggestiveness of law enforcement's identification procedure. There is no dispute that Ms. Williams initially identified Appellant in at the time of the robbery by voice identification and "body build."

She said that she "believed" that the robber was Appellant, but her identification relied significantly on the voice identification. In addition to this agitated mental state, it is undisputed Ms. Williams never viewed the face of the robber while the crime was being committed. She stated that his face was covered by a ski mask and hood. Her opportunity to view her assailant at the time was therefore limited as to the second, visual identification.

Though her assailant was facially obscured, one must concede she observed her assailant for a short time. During this brief observation, Ms. Williams recalled that the assailant was masked and was wearing a green jacket. However, when the show-up identification was performed, Appellant was not masked, nor did his attire match her initial description. Ms. Williams admitted she only noticed Appellant's face during the show-up, and believed him to be wearing a green jacket. Investigator Wilkie testified that the Appellant was not wearing a green jacket at that point but rather a red shirt.

Additionally, Ms. Williams' opportunity to identify the Appellant as the masked assailant was fleeting at best. She was driven by the Appellant while he was in custody, without ever fully stopping. It around midnight and it is unclear exactly how much light was in the area where the Appellant was being detained. There is no evidence that the Appellant was ever made to get out of the police cruiser while Ms. Williams was attempting to identify him.

Related to the issue of the timing and completeness of the initial identification, Ms. Williams was never given the opportunity to make a voice identification; her recollection of Appellant's voice as a former patron in the store may have caused mistake or confusion in her identification. Because Appellant did not speak at the show-up, there was no opportunity to conduct a voice identification that would have substantiated the other

evidence provided by Ms. Williams. While Ms. Williams seemed to be certain of her assailant in her actual trial testimony, her initial identification in the 911 call came with the caveat that she "believed" Williams was the assailant, but the show-up itself was so truncated that there was the possibility of mistaken identification. Though the length of the time between the underlying offense and the identification admittedly was relatively brief (approximately an hour and a half), this fact must be balanced against the problematic nature of the suggestive identification protocol.

The evidence of Ms. Williams' identification of the Appellant was thus unreliable as a matter of law, and should not have been admitted at trial. The circumstances surrounding the identification demonstrate that there was a substantial likelihood of irreparable misidentification, and this likelihood was not mitigated by any reliability exhibited by Ms. Williams. Thus, having first shown that the show-up identification was inherently suggestive, Appellant also successfully demonstrates that the identification procedure was conducive to irreparable mistaken identification in the totality of the circumstances. As in *Moore*, these demonstrations give rise to a basis for remand.

Balancing the suggestiveness of the identification meetings with the factors bearing on the reliability of the identification, nothing in this case suggests that the generation of the out-of-court identification and the presentation of this evidence to the jury rose above the level of depriving Appellant of due process of the law. Appellant's identification should have been excluded as a matter of law, and should be the basis for a remand of this matter ot the trial court.

CONCLUSION

Appellant respectfully requests that this Court find the show-up identification procedure unduly suggestive and the identification inherently unreliable as a matter of law, and remand this case for a new trial.

Respectfully submitted,

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This 14th day of March, 2013.

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THE STATE,

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DWAYNE EDDIE STARKS,

APPELLANT

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the attached Final Brief of Appellant complies with Rule 211 (b) SCAR, this 14th day of March, 2014.

By: RMD

Robert M. Dudek
Chief Appellate Defender

John Edward Robinson
Co-Counsel

ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 14th day of March, 2014.

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

STATE OF SOUTH CAROLINA
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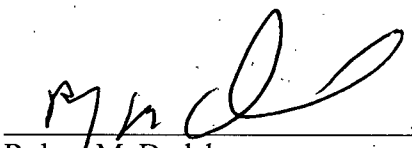
APPELLANT

CERTIFICATE OF SERVICE

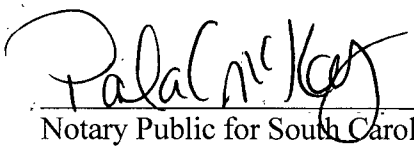
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of March, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 14th day of March, 2014.



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