

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

Appeal from Horry County

JAN 14 2014

Larry B. Hyman, Jr., Circuit Court Judge **SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

JOHNNY LONGWORTH

APPELLANT

APPELLATE CASE NO. 2013-001648

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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STATEMENT OF THE CASE

A Horry County grand jury indicted Appellant for assault and battery in the first degree on September 27, 2012. R 179(Indictment). The prosecution, represented by Martin Spratlin, called the case for trial before the Honorable Larry B. Hyman and a jury on July 22, 2013. Melinda Knowles represented Appellant. R. 1. The prosecution moved to amend the indictment to assault and battery in the second degree. R. 5, line 24 – R. 6, line 1. Judge Hyman allowed the amendment over Appellant's objection. R. 6, line 3 – R. 12, line 13. The jury found Appellant guilty of assault and battery in the second degree. R. 166, lines 17 – 23. Judge Hyman sentenced Appellant to three years' imprisonment. R. 169, lines 16 – 23, R 181(Sentence sheet).

Appellant filed a timely notice of appeal. This brief follows

ARGUMENT

Appellant's federal and state constitutional rights to due process of law were violated when the trial judge allowed the prosecution's only eyewitness to the crime identify Appellant as the perpetrator where the in-court identification was tainted by law enforcement's use of a suggestive identification procedure - a show-up - in obtaining an out-of-court identification.

Relevant facts

Appellant objected to allowing the prosecution's only eyewitness to the alleged crime identify him in court because of suggestive procedures employed by law enforcement when the eyewitness made an out-of-court identification. R. 15, lines 2 – 11.¹ During the pretrial hearing on the matter, Kym Beckham, the only eyewitness and the alleged victim, testified that she was working in her shop on March 13, 2012 when Appellant entered. R. 17, line 12 – R. 18, line 2. The two engaged in conversation regarding historical buildings and gardening. R. 18, lines 3 – 10. Beckham described Appellant as wearing long pants, which were “neutral” in color, a polo-type shirt with a logo, and a ball cap on backwards with sunglasses on top. R. 18, lines 11 – 15.² She claimed nothing obscured her view of his face and her store was well lit. R. 18, line 16 – R. 19, line 5. Appellant was in her store for approximately fifteen minutes, during which time he looked in the various rooms at the merchandise. R. 19, lines 9 – 19. For

¹ Although Appellant objected to the identification, Appellant's argument to the jury was not one of mistaken identification. Instead, Appellant argued he had misread the signals from Beckham. In other words, he believed the touching was invited. R. 95, lines 13 – 23; R. 151, lines 17 – 23; R. 151, line 17 – R. 152, line 14.

² Beckham described her alleged assailant to law enforcement as not very tall, with a really dark tan, and black eyes. She admitted that she gave an age that was younger than Appellant's age. R. 26, lines 19 – R. 27, line 10; R. 31, lines 9 – 15.

approximately ten minutes, Appellant was approximately five feet from her when the two discussed gardening. According to Beckham, Appellant “looked her up and down” twice and then approached her. He allegedly pushed her against the door frame in her office, placing one hand on her face and one hand on her breast. Beckham believed he was trying to kiss her. R. 19, line 20 – R. 20, line 23; R. 28, line 19 – R. 29, line 22.

Beckham shoved Appellant and said “no.” She eventually shoved him out of the store. R. 21, lines 1 – 9. Beckham claimed Appellant got on a bicycle and rode off. The police were called by an employee of a neighboring store. R. 21, lines 12 – 23. Beckham was told that six minutes after the incident she was asked to identify someone by police. R. 22, lines 3 – 9. Thereafter, an officer transported her in a police car to a second location, which was within a few blocks of her store. R. 22, lines 14 – 20; R. 31, lines 18 – 21; R. 32, lines 14 – 21. Beckham saw Appellant on a bicycle surrounded by police officers. Although she claimed she knew it was him “from down the road,” the officer asked her to see his face and make a positive identification. Beckham did so. R. 22, line 24 – R. 23, line 5. Beckham claimed she was 100% certain of her identification. R. 23, lines 9 – 11; R. 32, lines 5 – 13. Additionally, Beckham identified Appellant in court as the person who allegedly assaulted her. R. 23, lines 17 – 21

Mark McIntyre, an officer with the Myrtle Beach Police Department, responded to the store. R. 33, lines 17-18; R. 34, lines 1 – 8. McIntyre spoke to Beckham, who provided a description of her alleged assailant, which was the same as Beckham gave during her testimony. R. 34, line 12 – R. 35, line 8; R. 40, lines 1 – 22. McIntyre broadcasted the description over the police radio. R. 35, lines 9 – 13. Within a few minutes, McIntyre received information that another officer had stopped a suspect. R.

35, lines 14 – 21 When Beckham stated she could identify her alleged assailant, McIntyre drove her to a separate location that was approximately four blocks away. R. 36, lines 1 – 15. McIntyre observed two officers standing with Appellant. R. 36, lines 19 – 25. As he and Beckham got close to Appellant, Beckham claimed he was the person who assaulted her. McIntyre instructed her to get closer and take a look at his face. The two rode by very slowly, and Beckham identified Appellant. R. 37, lines 14 – 23; R. 43, lines 11 – 25. McIntyre explained that if Beckham had not identified Appellant as her assailant, he and the other officers would have released Appellant and continued to search. R. 38, lines 6 – 15.

At the conclusion of the in camera testimony, Appellant moved to suppress the identification based upon the time frame in which the identification was made, the vagueness of the description given, and Beckham's inattention to the alleged assailant. R. 54, lines 6 – 19. The prosecution argued that although the show-up identification was suggestive in nature and the law generally disfavored show-up identifications, he argued the court should admit the identification in the instant matter. He argued the show-up identification was necessary and reliable. He explained that it occurred shortly after the crime and near the scene of the crime. The prosecutor explained that a show-up may expedite the release of an innocent suspect R. 54, line 21 – R. 56, line 14.

The judge agreed that although show-up identification procedures are disfavored, they are admissible if the totality of the circumstances show that the identification is reliable that no substantial likelihood of misidentification existed. The judge found that Beckham testified her attention was on the assailant for approximately fifteen minutes and that she engaged in a face-to-face conversation with him for approximately nine

minutes, her description to police was consistent with the appearance of Appellant when she made the out-of-court identification, and she was 100% certain of her identification at the confrontation. The judge found only a short period of time – approximately six minutes – passed from the time of the alleged offense and the time of the confrontation, and the confrontation occurred only four blocks away. He found “these kinds of show-ups are proper where it occurred shortly after the offense and near the offense.” As a result, the judge found the identification admissible. R. 56, line 15 – R. 58, line 5.

During the trial, Beckham testified very similarly to her pre-trial testimony regarding the incident, her interaction with law enforcement, and her identification of Appellant. R. 98, lines 22-25; R. 100, line 9 – R. 103, line 5; R. 108, lines 10 – R. 109, line 12.³ Beckham admitted that when she yelled “no” and shoved Appellant away, he acted surprised. R. 105, lines 13-16. She was unsure if Appellant stated he made the wrong assumption when she pushed him away. R. 113, lines 13 – 25. Although McIntyre testified substantially the same as during his pretrial testimony, he testified regarding key facts that further illuminated the circumstances surrounding the alleged assault. According to McIntyre, Beckham told McIntyre that when she pushed Appellant away, Appellant asked if she were sure and stated he had made the wrong assumption. R. 120, lines 12 – 21; R. 125, lines 1 – 2. Additionally McIntyre indicated that Beckham stated that “while she was attempting to push the offender away, he reached out and grabbed her breast.” R. 124, lines 20 – 24

³ When Beckham identified Appellant as the person who allegedly assaulted her, trial counsel did not renew the objection. R. 109, lines 10-12.

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 demonstration 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, 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. 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.

Without question, the identification procedure employed by the Myrtle Beach Police Department was unnecessarily and patently suggestive. Appellant was standing with two police officers and Beckham was asked if she could identify him as her assailant. Turning to the second step, requires a consideration of the circumstances surrounding the incident as well as the confrontation to determine if Beckham’s out-of-court identification was nevertheless so reliable based on the totality of the circumstances that no substantial likelihood of misidentification existed. According to Beckham, she observed the assailant in her shop for a total of fifteen minutes. While the assailant was shopping, he was in various rooms and at various distances from her. Although she

engaged in conversation with the assailant, she remained standing four to five feet from him. She was unsure of the length of the conversation, but estimated it was nine or ten minutes. Despite Beckham's claim that she was looking at the assailant, she admitted that she was looking at a seed catalog as well during the conversation concerning gardening. Clearly, her opportunity to view the assailant at the time of the crime was hindered by the assailant's movements throughout the store. Additionally, the facts demonstrated that Beckham's attention was distracted by the seed catalog. Although Beckham's description of the assailant resembled Appellant, the description was vague and mostly involved clothing. No one would be surprised to see a man with a dark tan wearing a Polo-type shirt in Myrtle Beach. Beckham could describe nothing distinctive about the perpetrator to distinguish him for any other gentleman in the shopping district of downtown Myrtle Beach. The totality of the circumstances surrounding the identification could not overcome the unduly suggestive nature of the identification procedure conducted by law enforcement.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of January, 2014.

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APPELLATE CASE NO. 2013-001648

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny Longworth states.

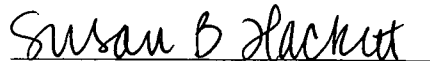
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge Larry B. Hyman, Jr., which was held on July 23, 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 Johnny Longworth.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of January, 2014.

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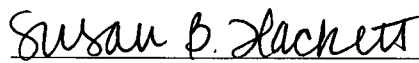
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire trial transcript;
- (2) Court's exhibit #1;
- (3) True-billed indictment; and
- (4) Sentence sheet.

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

January 14th, 2014



Susan B. Hackett
Appellate Defender

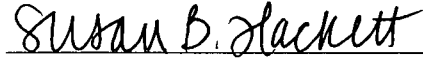
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Attorney for Appellant

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."

January 14, 2014



Susan B. Hackett
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APPELLANT

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 have been served on Johnny Longworth, at 1636 Poplar Hill Road, Cross, SC 29436, this 14th day of January, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of January, 2014.

[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022 .