STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEREMIAH JERMAINE BRANDON SMITH, JR.

APPELLANT

APPELLATE CASE NO. 2018-000100

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by admitting a witness's in court identification of Appellant as the shooter when the judge erroneously found the six pack photographic lineup was not unduly suggestive and the identification was reliable when, at the time of the shooting, the witness could not identify or name the shooter, but over three years later, after Appellant had been named as a suspect and arrested, the witness identified Appellant, and where, in finding the identification was reliable because the witness allegedly knew Appellant, erroneously concluded a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972) was not required since the witness had personal knowledge of Appellant?

STATEMENT OF THE CASE

A Clarendon County Grand Jury indicted Appellant on July 2, 2015 for the offense of attempted murder. R. 271-272. His case was called to trial on January 16, 2018 before the Honorable D. Craig Brown, and a jury. R. 1. Assistant Solicitors Chris Durant and Hugh McMillan represented the state, and Timothy Griffin represented Appellant. R. 1.

On January 18, 2018, the jury found Appellant guilty as indicted. R. 267, ll. 6-10. He was sentenced to twenty-five years' imprisonment. R. 268, ll. 11-14.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Liverman, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012) (citing 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." Id. at 137-138, 727 S.E.2d at 425 (citing State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000)). "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." Id. at 138, 727 S.E.2d at 425 (citing Moore, 343 S.C. at 288, 540 S.E.2d at 448). "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 discretion." Id. (citing Moore, 343 S.C. at 288, 540 S.E.2d at 448).

STATEMENT OF THE FACTS

During the early morning hours of December 20, 2014, Breshaun Pendergrass was shot in the back outside Browntown Social Club in Manning, South Carolina. Upon arriving at the scene, Lieutenant Scott Danback with the Manning Police Department interviewed two witnesses, including Cindy Calvin. R. 50, l. 6 – 53, l. 15. Despite providing information that helped further the investigation, including a description of the suspect vehicle, neither witness could identify the shooter. R. 53, l. 4 – 54, l. 3.

Pendergrass was dropped off by a friend at Browntown Social Club shortly after midnight. R. 60, l. 11 – 62, l. 13. He said he arrived alone and had no plans to meet anyone specific. While he was inside, Pendergrass saw Appellant enter the club with Shawn Avant, Trey Smith, and John Coard. Pendergrass claimed he and Appellant were "childhood friends" and that he had known Appellant "basically all my life." R. 62, l. 20 – 63, l. 3.

According to Pendergrass, he had no interaction with Appellant while inside the club. Pendergrass, who claimed he had nothing to drink, sat in the corner listening to music and watching others play pool. R. 65, ll. 1-9. Around two or three o'clock, when activity at the club began to "die down," Pendergrass walked outside to try to find a ride home. R. 65, l. 21 – 66, l. 9. He walked down the driveway of the club to the edge of the road. R. 69, ll. 13-17. When he "couldn't find a ride," Pendergrass began walking back to the club. As he was walking, he passed by Appellant, who was standing next to his car near the trunk. Appellant allegedly said something to Pendergrass. While Pendergrass could not remember what Appellant said, he knew "it wasn't nothing positive" and believed it was a "smart remark." R. 72, ll. 3-16. Pendergrass said he ignored Appellant's comment and walked away. R. 72, ll. 17-23. "Instantly" after Appellant's comment, and while he was still approximately three to five feet from Appellant,

Pendergrass heard a gunshot go off. R. 75, l. 22 – 76, l. 9. He tried to take another step, but could not and immediately fell to the ground. R. 76, ll. 18-22. After he fell, Pendergrass tried to stand up, but was unable to. R. 76, ll. 18-20. He remembered Cindy Calvin running towards him. Calvin thought Pendergrass was drunk. However, Pendergrass told her he "had just been shot." R. 76, l. 23 – 77, l. 6.

Patrons at the club drove Pendergrass to the local hospital in Clarendon. He was ultimately transported to the Medical University of South Carolina (MUSC) for treatment. R. 78, ll. 3-11. Pendergrass suffered multiple fractures to his spine and his spinal cord was completely severed by the bullet. R. 135, ll. 5-8. Consequently, Pendergrass cannot "feel anything below his nipples on down and he [cannot] move his lower extremities." R. 133, ll. 22-25. This injury is permanent. R. 135, l. 24 – 136, l. 5.

Pendergrass admitted he did not see who shot him that morning. He did not even see a firearm. R. 83, l. 25 – 84, l. 7. However, he claimed he knew Appellant was the shooter because Appellant "was close enough to [him]." R. 78, l. 20 – 79, l. 4. Despite his insistence that Appellant shot him, Pendergrass acknowledged the three individuals who were with Appellant were also standing near the car and were behind Pendergrass when he was shot. R. 90, ll. 5-14.

On December 31, 2014, eleven days after the shooting, Lieutenant Sonia Daniels with the Manning Police Department, presented Pendergrass with a photographic lineup. Pendergrass identified Appellant as the shooter in the lineup, and again in court before the jury. R. 79, l. 8 – 83, l. 5.

Fritz Aguon, who was allegedly with Appellant on the morning of the shooting, gave a recorded statement to law enforcement on December 23, 2014. R. 103, l. 22 – 104, l. 6. In his recorded statement, Aguon claimed that earlier in the night before the shooting Appellant said

"he had a beef with somebody" and was told by a third party that the individual "he had a beef with" was at Browntown. Aguon ultimately went with Appellant and two others to Browntown. R. 105, l. 23 – 109, l. 23. Aguon claimed in his recorded statement that he saw Appellant and Pendergrass arguing at the door of the club and that the two continued to argue outside the club. R. 109, l. 12 – 110, l. 18. During the argument, Pendergrass punched Appellant in the face. According to Aguon, Appellant ultimately pulled out a gun and shot Pendergrass. R. 111, l. 5 – 112, l. 2. Aguon identified Appellant as the shooter in the court room. R. 116, ll. 10-17.

Despite being offered immunity from prosecution, throughout his testimony, Aguon either maintained he did not recall the content of his recorded statement or denied making specific claims in his statement. R. 103, ll. 6-21. He was repeatedly impeached with his recorded statement pursuant to Rule 613(b), SCRE. See 192, l. 21 – 193, l. 9.

Shardara Abraham claimed she was sitting outside in a car with Cindy Calvin at the time of the shooting. While they were in the car, the women heard a gunshot. After they heard the gunshot, Abraham and Calvin immediately got out of the car. R. 144, l. 14 – 145, l. 19. Calvin ran to Pendergrass who told Calvin he had been shot. R. 142, ll. 8-17. Abraham claimed that, at the time of the shooting, the only people outside were Appellant and Pendergrass. R. 150, l. 16 – 152, l. 11. However, she admitted she did not see the shooting and never even saw a gun that morning. R. 152, ll. 14-16; R. 156, ll. 13-25. Moreover, while Abraham claimed during her testimony that Appellant and Pendergrass were the only people outside at the time of the shooting, when Abraham was interviewed by Lieutenant Danback that morning, she could not name or identify the shooter. R. 53, l. 4 – 54, l. 3.

Cindy Calvin likewise testified she was sitting outside in a car with Abraham when the shooting occurred. She claimed that, as they were sitting in the car, she saw Pendergrass walk

out of the club followed by Appellant. She witnessed Appellant and Pendergrass talking. As they were talking, Calvin heard a gunshot, saw Pendergrass fall, and Appellant run to his car. After Appellant fled, Calvin ran to Pendergrass who told her he had been shot. R. 159, ll. 5-13; R. 161, ll. 1-6.

Calvin admitted she did not see the shooting. She merely heard a gunshot. She also never saw a gun that morning. R. 168, ll. 12-18. Calvin further admitted she did not name or identify Appellant as the shooter when she was interviewed by Lieutenant Danback on the morning of the shooting. R. 168, ll. 9-11. She claimed she "knew" Appellant, but "didn't know his name." R. 164, ll. 10-16. The week before trial, for the first time, Calvin identified Appellant in a photographic lineup as the shooter. R. 166, l. 2 – 167, l. 7. She also identified Appellant in the court room as the person who shot Pendergrass. R. 167, ll. 8-18.

ARGUMENT

The trial judge erred by admitting a witness's in court identification of Appellant as the shooter when the judge erroneously found the six pack photographic lineup was not unduly suggestive and the identification was reliable when, at the time of the shooting, the witness could not identify or name the shooter, but over three years later, after Appellant had been named as a suspect and arrested, the witness identified Appellant, and where, in finding the identification was reliable because the witness allegedly knew Appellant, erroneously concluded a hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972) was not required since the witness had personal knowledge of Appellant.

Pretrial Motion

Appellant moved pretrial to suppress Cindy Calvin's identification of Appellant as the shooter. In response to Appellant's motion, the trial judge held a Neil v. Biggers hearing. During the hearing, Calvin admitted she was sitting inside a car at the time of the shooting, which occurred after midnight when it was dark outside. R. 10, ll. 1-11. She further admitted she did not see the shooting and did not see who shot Pendergrass. Instead, Calvin merely heard a gunshot. R. 16, ll. 10-20.

Calvin testified that, while she and Appellant were not friends and have never socialized together, she knew Appellant "from the community." R. 10, l. 23 – 11, l. 11. She further claimed she knew Appellant by first name at the time of the shooting and would have been able to identify him if she saw him at Walmart.[1] R. 10, l. 23 – 11, l. 25.

[1] Calvin's *in camera* testimony directly contradicts her testimony before the jury where she admitted she did not identify Appellant as the shooter when she was interviewed by Lieutenant Danback on the morning of the shooting because "I didn't know his name." R. 164, ll. 10-16.

Lieutenant Sonia Daniels testified that she presented a photographic lineup to Calvin the week before trial on January 9, 2018, which was over three years after the shooting and after Appellant had been named as a suspect and arrested. R. 23, ll. 2-12. She stated Calvin selected Appellant from the lineup as the shooter. Daniels further maintained that she did not suggest to Calvin in any way who she should identify. R. 24, l. 21 – 25, l. 18.

At the conclusion of the *in camera* testimony, defense counsel argued Calvin's identification of Appellant should be excluded as a result of the suggestive photographic lineup, which was only shown to Calvin the week before trial, over three years after the shooting. He asserted, "Three years have gone by, and so much time has gone by that she may or may not have come to hear about the case." R. 28, ll. 14-18. Counsel further argued that Calvin's identification was unreliable because she admitted she did not see who shot Pendergrass, but had heard about the identity of the shooter from outside sources. R. 28, ll. 19-21.

The trial judge found the photographic lineup presented to Cindy Calvin was not an unduly suggestive identification procedure nor was the procedure so suggestive as to give rise to irreparable misidentification. R. 31, ll. 10-20. Consequently, the judge ruled Calvin's out of court and in court identification of Appellant was admissible. R. 31, ll. 4-5.

Moreover, citing State v. Singleton, 395 S.C. 6, 716 S.E.2d 332 (Ct. App. 2011), the trial judge asserted a Neil v. Biggers hearing is not even necessary when the witness had personal knowledge of the defendant, which Calvin maintained she did. R. 31, ll. 4-24.

Discussion

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-

court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id.

"In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (citing Neil v. Biggers, 409 U.S. 188, 198 (1972)).

"Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (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 at the confrontation, and (5) the length of time between the crime and the confrontation." Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977)); See Biggers, 409 U.S. at 199-200.

"Our courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury." Liverman, 398 S.C. at 139, 727 S.E.2d at 426; See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the state offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); Rule 104(c), SCRE (providing that

"[h]earings on the admissibility of . . . pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury").

"The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Liverman, 398 S.C. at 139, 727 S.E.2d at 426 (quoting Ramsey, 345 S.C. at 613, 550 S.E.2d at 297) (internal quotation marks omitted).

The trial judge erred by admitting Calvin's identification of Appellant as the shooter since the photographic lineup was an unduly suggestive identification procedure arranged by law enforcement and Calvin's out of court identification of Appellant was so unreliable that a substantial likelihood of misidentification existed.

Considering the factors set forth in Liverman, no other conclusion can be reached but that Calvin's identification was wholly unreliable. See Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, Calvin admitted she did not see the shooting and did not see who shot Pendergrass. Specifically, she testified, "I didn't see who shot him." R. 16, ll. 10-20. Calvin also did not have a strong degree of attention at the time of the shooting given that she was yards away in her car and not involved in the altercation, which occurred outside in the dark after midnight. She never gave a prior description of the shooter. Therefore, the accuracy of her prior description cannot be judged. Moreover, more than three years had passed since the shooting and when Calvin was shown the photographic lineup. During those three years, Appellant was named as a suspect and arrested for the shooting. This fact undoubtedly would have tainted Calvin's identification. Consequently, the trial judge erred by admitting Calvin's identification of Appellant as the shooter.

Moreover, the trial judge erred by concluding a Neil v. Biggers hearing was not even required since Calvin allegedly had personal knowledge of Appellant. In Perry v. New Hampshire, 565 U.S. 228 (2012), the United States Supreme Court made clear that due process requires a trial court to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances arranged by law enforcement. Given this holding, our Supreme Court in Liverman concluded "Perry mandates that preliminary judicial inquiry is required once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, *regardless of the witness's prior knowledge of the accused.*" Liverman, 398 S.C. at 140, 727 S.E.2d at 427 (emphasis added). This holding overruled State v. McLeod, 260 S.C 445, 196 S.E.2d 645 (1973), which held a pretrial hearing is not necessary where an eyewitness knows the accused. Id. at 140-141, 727 S.E.2d at 427.

Based on our Supreme Court's holding in Liverman, a Neil v. Biggers hearing was required despite Calvin's alleged prior knowledge of Appellant. Therefore, the trial judge erred by finding otherwise.

Because the trial judge erred by admitting Calvin's unreliable identification of Appellant as the shooter, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of August, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 28, 2018

Lara M. Caudy

Lara M. Caudy
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589