STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY LAMONT ESAW

APPELLANT

APPELLATE CASE NO. 2017-002213

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge violate Appellant's Sixth Amendment right to a fair trial by failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject?

STATEMENT OF THE CASE

In January 2016, a Lexington County grand jury indicted Appellant for possession of a weapon during a violent crime (2016-GS-32-206), armed robbery of Franklin Vasquez (2016-GS-32-213), armed robbery of Rafael Izaguirre (2016-GS-32-214), armed robbery of Hector Vasquez (2016-GS-32-216), murder of Hector Vasquez (2016-GS-32-217), and attempted murder of Franklin Vasquez (2016-GS-32-218). R. 537-555.

The state, represented by Rhonda Patters and Angela Martin, called the case to trial before the Honorable Thomas W. Cooper and a jury on October 16-19, 2017. R. 1. Concerning the armed robbery charges involving Hector and Franklin Vasquez, at trial, the state alleged Appellant attempted to rob those individuals. R. 3, ll. 1-3; R. 3, l. 23 – R. 4, l. 6; R. 4, ll. 16-22. Finally, concerning the attempted murder charge, the state alleged Appellant attempted to kill Franklin Vasquez through the conduct of another individual, Wilfred Pitts. R. 3, ll. 5-15.[1]

Jason Chehoski and Elizabeth Fullwood represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 534, l. 13 – R. 535, l. 13. Based upon the state's service of its intent to seek life imprisonment without the possibility of parole (LWOP), Judge Cooper sentenced Appellant to LWOP for two counts of attempted armed robbery, armed robbery, attempted murder, and murder. R. 536, ll. 5-12; R. 537-555. For the weapon, Judge Cooper

[1] At the conclusion of the trial, the judge instructed the jury that malice required to be proven for attempted murder could be inferred. R. 515, l. 18 – R. 516, l. 2. Along these lines, the judge charged the jury that some of the allegations against Appellant required the jury to consider the conduct of Wilfred Pitts and the theory of accomplice liability. R. 519, ll. 5-23. Specifically, the judge instructed the jury that Appellant was "accused of the attempted murder of Franklin Vasquez through the acts of Mr. Pitts." R. 515, ll. 18-20. This was made abundantly clear during the final portions of the jury charge when the judge instructed the jury to find Appellant guilty of attempted murder of Franklin Vasquez if the state "met its burden of proof under the theory of the hand of one is the hand of all." R. 527, ll. 5-10. Despite the erroneous nature of these charges, trial counsel failed to object. See State v. King, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (explaining that "[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill").

sentenced Appellant to five years imprisonment. R. 536, ll. 3-5; R. 537-555. Judge Cooper ordered the sentences to be served concurrently. R. 536, ll. 12-14; R. 537-555.

On October 20, 2017, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

Violating Appellant's Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject.

Relevant facts

The state's primary evidence against Appellant was the testimony of an eyewitness, Franklin Vasquez. Seventeen-year-old Franklin went to play basketball with two friends in his neighborhood during the afternoon and early evening of August 9, 2015. R. 9, l. 12 – R. 10, l. 7. When it was too dark to continue to play, Franklin returned home. R. 9, ll. 20-22. At home, Franklin found his father, Hector, standing near a white fence in front of the house where a baptism party was occurring. R. 10, ll. 8-13. Franklin walked behind the house to a cooler to get a drink. R. 10, ll. 14-16. Then, Franklin returned to his father. R. 3, ll. 23-24.

Franklin claimed that as a sedan passed buy, the driver said something. R. 9, l. 24 – R. 10, l. 2. Hector turned around and said something back to the driver. R. 10, l. 2. The car then stopped. R. 10, l. 3. Franklin claimed a man got out of the car, pointed a gun at him, and demanded he empty his pockets. R. 10, l. 25 – R. 11, l. 2. Hector jumped in front of Franklin and asked the man what his problem was. R. 12, ll. 1-2. The man pointed the gun at Hector and told him to empty his pockets. R. 12, ll. 2-4. When Hector responded that he did not have anything, the man "tried to shoot the gun, but the gun jammed." R. 12, ll. 4-6. Hector hit the man "upside the head with a beer bottle" and the two began to struggle over the gun. R. 12, ll. 6-7.

Although Franklin initially "froze," he "snapped out of it." R. 13, ll. 2-4. He threw a soda can at the man and kicked him in the face. R. 13, ll. 4-5; R. 13, ll. 13-18. A second man then shot a gun through the passenger's side of the car. R. 13, ll. 5-7. The bullet grazed Franklin. R. 13, ll. 7-8. Franklin ran inside, grabbed his keys, and chased the men in his car. R. 13, ll. 8-11. He was unable to catch them. R. 13, l. 12.

Franklin asserted he had "pretty good" eyesight, that he was "focused on the driver pointing the gun" at him and Hector. R. 13, l. 19 – R. 14, l. 3. He estimated the entire incident took between five and ten minutes. R. 14, ll. 23-24.

Days later, on August 13, 2015, Franklin picked Appellant from a photographic line-up. R. 17, ll. 9-25. At trial, Franklin claimed he made his selection based upon the "facial features" of the man. R. 18, ll. 6-9. He further claimed he made his selection in less than a minute. R. 18, ll. 15-17.

During the trial, Appellant called Dr. Dawn McQuiston as an expert witness in eyewitness identification and psychology. R. 49, ll. 21-23; R. 51, ll. 19-21. Dr. McQuiston described the phenomenon of cross-race effect on memory and identifications. R. 58, ll. 2-4. She explained that "people tend to not recognize people of other ethnic groups as well as people of their own ethnic group." R. 58, ll. 5-8. The research indicated that "many ethnic groups are susceptible to the cross-race effect, so people … tend to not be as accurate when they're trying to recognize or identify a face of a different ethnic group versus their own." R. 58, ll. 11-21. The cross-race effect affects all racial groups all over the world. R. 59, ll. 4-11. Based upon the research in the area, the reason that a person of one ethnic group may not be as accurate in identifying a person of another ethnic group is due to "contact." R. 58, ll. 22-25. In essence,

"the more contact [a person has] with another ethnic group, the less susceptible [the person] would be to this effect." R. 59, ll. 1-3.

During the closing argument, the solicitor remarked upon Dr. McQuiston's testimony. According to the solicitor, Dr. McQuiston "didn't really say anything unusual, things common sense might tell us." R. 473, ll. 16-25. The solicitor emphasized that Dr. McQuiston "couldn't comment on Franklin's identification" because she "never met that young man," didn't "know anything about his life experiences, "and "wasn't present when Detective Moore presented the lineup." R. 474, ll. 3-9. The solicitor then explained that she questioned Franklin about the race of his friends and classmates because she knew the defense was "going to call the doctor" and "were going to make race an issue." R.474, ll. 10-14.[2] The solicitor told the jurors: "It's not a factor, it's a distraction. ... It's a nonissue. There's nothing wrong with his identification." R. 474, ll. 14-19.

At the conclusion of the trial, trial counsel requested the judge instruct the jury regarding cross-race identifications. R.465, l. 21 – R.466, l. 10. Relying upon, State v. Cromedy, 727 A.2d 457 (N.J. 1999), trial counsel asked the judge to instruct the jury as follows:

> When a witness who is a member of one race identifies a member who is of another race, we see that there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness' original perception and/or accuracy of the subsequent identification.

R.465, l. 21 – R.466, l. 10; see also R. 536-538. Suggesting that the instruction was a "charge on the facts," the judge refused to instruct the jury as requested. R. 466, ll. 11-23.

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[2] The solicitor elicited that Franklin attended school with African-Americans, had friends who were African-American, lived in a neighborhood with African-Americans, and had played basketball that day with African-Americans. R. 19, ll. 15-24.

Instead the judge instructed the jury that one of the issues in the case was "the identification of the defendant as a person who committed the crime charged." R.520, ll. 12-14. After explaining that the state had the burden of proving identity beyond a reasonable doubt, the judge defined "[i]dentification testimony" as "an expression or a belief of an impression by a witness." R. 520, ll. 14-21. He told the jurors to "consider the believability of the identification witness in the same way as any other witness." R.520, ll. 23-25. Critically, he explained the jurors could consider "whether the witness had an adequate opportunity to observe the offender at the time of the offense, and this can be affected by things about how long or short the time was available or how far or close the witness was, the lighting conditions, whether the witness had a chance to see or know the person in the past." R.521, ll. 1-7.

Discussion

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). Therefore, a trial court must instruct the jury to ensure the jury's verdict is based upon the evidence presented. Jury instructions are important particularly in matters of witness identifications due to the high number of wrongful convictions based upon erroneous identifications. See Perry v. New Hampshire, 565 U.S. 228, 244-245 (2012).

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law."

State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). The South Carolina Supreme Court addressed jury instructions concerning witness identifications in State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975). The Court held that the trial judge's failure to provide the model instruction[3] concerning identification was not error where two witnesses identified the defendant as the perpetrator of the crime. Id. at 326, 215 S.E.2d at 194. Nevertheless, the Court explained its holding was based upon the fact that the trial court's instructions adequately focused the attention of the jury on the necessity of finding that the testimony identified the defendant as the perpetrator beyond a reasonable doubt in order to convict. Additionally, the Court noted the identification presented "no peculiar problem." Id.

Although the Supreme Court found no error in a trial court's instructions to the jury on the issue of identification where the judge instructed the jury that the defendant had asserted an alibi claiming she was not at the scene of the crime, the court "admonish[ed] the trial bench that in single witness identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state." State v. Simmons, 308 S.C. 80, 83-84, 417 S.E.2d 92, 94 (1992).

In State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371-372 (1991), the South Carolina Supreme Court held that expert testimony concerning eyewitness identification was admissible where the witness was a qualified psychologist who explained how certain aspects of everyday experience affect human perception and memory and therefore affects the accuracy of

[3] In the United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir.1972), the Court of Appeals for the District of Columbia explained that the presumption of innocence "must be a premise that is realized in instruction and not merely a promise." Thus, the judicial system required "special instruction on the key issue of identification, which emphasize[d] to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt." Id. As a result of the concerns attendant to criminal prosecutions based upon witness identifications, the Court issued a model jury instruction. Id. at 558-559.

eyewitness identification. The Court further explained that the expert's testimony was particularly relevant where the witness testified that her assailant's features were partially obscured during the entire incident, the identification involved cross race, and each witness had been exposed to the assailant for a short length of time. Id. at 143, 406 S.E.2d at 372.

In Cromedy, the New Jersey Supreme Court explained that a "cross-racial identification occurs when an eyewitness is asked to identify a person of another race." Cromedy, 727 A.2d at 461. The court noted that "[f]or more than forty years, empirical studies concerning the psychological factors affecting eyewitness cross-racial or cross-ethnic identifications have appeared with increasing frequency in professional literature of the behavioral and social sciences." Id. Further, the court noted that "jurors tend to place great weight on eyewitness identifications, often ignoring other exculpatory evidence." Id. According to the research, "eyewitnesses are superior at identifying persons of their own race and have difficulty identifying members of another race." Id. In other words, "eyewitnesses experience a 'cross-racial impairment' when identifying members of another race." Id.

No one disputed the identification at issue at Cromedy's trial involved a cross-ractial identification. Id. at 466. Cromedy's trial counsel argued there was a mistaken identification, but the state argued the identification was credible. Id. Cromedy "requested a cross-racial identification jury instruction that would treat the racial character of the eyewitness identification as one of the factors bearing on its reliability in much the same way as lighting and proximity to the perpetrator at the time of the offense." Id. The New Jersey Supreme Court held "a cross-racial identification, as a subset of eyewitness identification, requires a special jury instruction in an appropriate case." Id. at 467. The court went on to explain that the instruction "should be

given only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." Id. at 467.

Several years later, the Supreme Court of New Jersey addressed the matter of cross-racial jury instructions again. State v. Henderson, 27 A.3d 872 (N.J. 2011). The court held that in light of the additional research on "own-race bias" in identifications, trial courts should instruct juries on cross-racial identifications "whenever" those are "in issue at trial." Id. at 926.

The trial judge erred in failing to instruct the jury with the specific requests made by Appellant concerning evaluating witness identifications. Appellant's proposed instructions encompassed the evidence presented to the jurors and allowed them to synthesize the matter in evaluating the evidence. Not only did the judge refuse to give the proposed charge, but he used his "standard charge," which omitted certain items and failed to include any type of catch-all provision. Having standard charges benefits judges, but trial judges should not abdicate their duties of charging the jury on the law as presented by the facts to a book of general charges. Rather, trial judges must mold standard charges to fit the particular circumstances of each case.

As the South Carolina Supreme Court explained in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) "standard charges" or "approved charges" do not prohibit a trial judge from crafting charges designed to address the specific case. In Fuller, 297 S.C. at 443, 377 S.E.2d at 331, the Court explained that "[i]n charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." The trial courts are required to "specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). In Day, the Court further stated that "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the

issues raised by the defendant." Id. As with jury instructions on self-defense, there is no logical reason to refrain from charging the jury on facts and theories presented by the defendant in an eyewitness identification case. See Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005); State v. Long, 721 P.2d 483 (Utah 1986) (discussing the importance and need for tailoring jury instructions on eyewitness identifications to the facts and circumstances of each individual case).

In Appellant's case, the jury instructions left the jury with the impression that it could only consider the factors expressly stated - whether the witness had an adequate opportunity to observe the offender at the time of the offense, which may have been affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past. What the instruction failed to do was inform the jury of how it should synthesize and analyze the additional facts and factors uncovered during cross-examination of the witnesses and through the testimony of Appellant's expert. In fact, the nature of the instruction left the jury with the impression that most of the evidence produced by Appellant, particular the evidence of potential mis-identifications when the individuals are of different races, was not to be considered by the jury during its deliberations. This was error.

CONCLUSION

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

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Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of February, 2019.

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."

February 21, 2019

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