STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Calhoun County

Maite Murphy, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

UNTONYO FERJEARL JOHNSON,

APPELLANT

APPELLATE CASE NO 2017-001673

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# FINAL BRIEF OF APPELLANT

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TAYLOR D GILLIAM
Appellate Defender

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

ATTORNEY FOR APPELLANT

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II. Whether the trial court erred in admitting Appellant's statement, where Appellant was handcuffed, under arrest for attempted murder, and not free to leave the sheriff's station at the time his statement was given?

## STATEMENT OF THE CASE

Appellant was indicted on January 19, 2018 by a Calhoun County grand jury for attempted murder, possession of a firearm during the commission of a violent crime, and possession of a firearm by a person convicted of a violent crime. R. 190. He proceeded to trial on July 25, 2017 before the Honorable Maite Murphy and a jury. R. 1. Bakari Sellers and Carolina Strom represented Appellant, and Ted Lupton served as the assistant solicitor. R. 1. The jury found Appellant guilty as indicted, and Judge Murphy sentenced Appellant to five years on the two possession of a weapon charges and twenty-five years on the attempted murder charge, concurrent. R. 184, l. 18 – R. 185, l. 1; R. 187, ll. 14 – 25.

This brief follows.

## STANDARDS OF REVIEW

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was "patently suggestive"). "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." Moore at 288, 540 S.E.2d at 448. "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. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct.App.2004). This court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct.App.2004).

## ARGUMENT

**I. The trial court erred in admitting Mark Edmonds' in-court identification of Appellant, where his first identification came while he was hospitalized after being shown a single photograph rather than a line-up.**

*Relevant facts*

Mark Edmonds got in a verbal argument with a man he had never met before at a gas station during the early morning hours of October 1, 2015. R. 29, l. 24 – R. 40, l. 25. For a few minutes, the two men argued. Id. Edmonds left soon thereafter, headed to his mother's house. Id. About an hour and ten minutes after leaving the store, Edmonds was shot while in his car at a stop sign. Id. Law enforcement was called after Edmonds arrived at his mother's house, and Edmonds supposedly told the police that the man who shot him was the same man who he got into an argument with at the gas station. Id. While at the hospital, Edmonds was shown a single picture, supposedly of Appellant. R. 36, l. 13 – R. 37, l. 7. Edmonds identified the photograph as a still image from the video taken at the gas station. Id.

During an *in camera* hearing prior to Appellant's trial, Edmonds identified Appellant as the man who he saw at the store and who shot him. Id. Counsel for Appellant moved to suppress the in-court identification. R. 29, ll. 12 – 13. After hearing the above testimony by Edmonds, the trial court denied the motion and found that "the identification by Mr. Edmonds was made with absolute certainty on his part." R. 46, ll. 19 – 20. The court found "from the evidence that the identification [was] reliable," and the court allowed the identification. R. 48, ll. 9 – 11.

Jimmy Wausaw, an employee with the Calhoun County Sheriff's Office, interviewed Appellant at the sheriff's office soon after the shooting. R. 15, l. 19 – R. 27, l. 9. According to

Wausaw, Appellant allegedly admitted to being at the gas station and getting into an argument with someone, although the eight minute interview was not recorded. Id. Wausaw suggested that Appellant signed a Miranda rights form on the date of the interview, October 7, 2015. R. 189.

Following *in camera* testimony from Wausaw and John Regales, a second employee at the Calhoun County Sheriff's Department, the State argued that the statement was freely and voluntarily given. The trial judge found "by the greater weight or preponderance of the evidence that the statement was freely and voluntarily given." R. 28, l. 24 – R. 30, l. 10. The State's motion to admit the statement was granted. Id.

*Discussion*

A defendant may be deprived of his due process rights through an identification procedure that is unnecessarily suggestive and encourages irreparable mistaken identification. State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 1967)(citing Stovall v. Denno, 388 U.S. 293 (1967)). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification." Id. at 502-03, 589 S.E.2d at 784.

In Neil v. Biggers, 409 U.S. 188, 198 (1972), the United States Supreme Court articulated a set of factors by which a trial court judge should evaluate both out-of-court identifications and their subsequent use by a witness in court. Those factors include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Id. at 199. The Court stated that the trial court judge should look at the totality of

the circumstances when evaluating the likelihood of misidentification. Id. at 196. "Reliability is the linchpin in determining admissibility of identification testimony" and the Biggers factors must be weighed against the "corrupting effect of the suggestive identification itself." Manson v. Braithwaite, 432 U.S. 98, 114 (1977).

The United States Supreme Court recognized that single photographic lineups are inherently suggestion. Simmons v. United States, 390 U.S. 377, 383 (1968). The Court explained that after a suggestive lineup, such as using a single photograph, "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." Id. at 383-384.

Here, the assistant solicitor showing Edmonds the single photograph of Appellant immediately prior to trial was unduly suggestive as it was a single photograph line-up conducted by a governmental agent. Therefore, an analysis of the Biggers factors is required. The first factor to consider is Edmonds opportunity to observe the perpetrator at the time of the crime. Edmonds testified that he observed the individual for a "couple of minutes" minutes soon after arriving at the gas station at 5:30 or 6:00 in the morning. R. 29, l. 24 – R. 31, l. 20. Edmonds had not seen this individual before. He indicated that the purpose of his early morning gas station trip was to visit his girlfriend. According to the footage from the security camera it was still dark outside when the man with whom Edmonds supposedly argued left the gas station. (State's Exhibit 19, on file with this Court).

Approximately one hour and ten minutes after Edmonds left the gas station, he was shot. R. 33, l. 4 – r. 34, l. 2. When law enforcement interviewed him at the hospital, he told an officer that the man he had seen at the gas station was the one who shot him. R. 35, ll. 16 – 25. The

accuracy of the witness' prior description therefore is entirely self-serving and cannot be ascertained. Edmonds did not provide any distinguishing features during his pre-trial *in camera* testimony, nor did he provide any specific details about the physical characteristics of the man who shot him. R. 137, ll. 14 – 22. He unsurprisingly denied being influenced by the single photograph that he was shown. R. 36, ll. 13 – 22.

During the pre-trial direct and cross-examination of Edmonds, he never testified that he provided a description of the individual to law enforcement while at the hospital. Thus, the third factor – the accuracy of the witness' description – weighs in favor of excluding the identification.

Finally, the temporal factor weighs in favor of excluding the identification as well. The alleged crime occurred on October 1, 2015, and Appellant's trial began over a year and a half later on July 25, 2017. For almost two years, Edmonds had been unable to identify the individual and unable to provide a more specific description. Yet, on the day of trial, he suddenly identified Appellant as the perpetrator. An analysis of the Biggers factors does not overcome the inherently suggestive one-photograph identification employed in this matter. Therefore, the trial court erred in failing to exclude Edmonds' identification of Appellant.

**II. Whether the trial court erred in admitting Appellant's statement, where Appellant was handcuffed, under arrest for attempted murder, and not free to leave the sheriff's station at the time his statement was given?**

On or about October 7, 2015, Appellant was interviewed at the Calhoun County Sheriff's Office. R. 15, l. 19 – r. 27, l. 9; R. 189 The following exchange took place at the outset of Wausaw's *in camera* examination following a request by defense counsel that the statement be excluded:

Q: Was he under arrest when he walked in the door?

A: Yes, sir.

Q: Was he handcuffed?

A: Yes, sir.

Q: Was he told that he was not free to leave?

A: Yes, sir.

Q: All right. Did you all go to pick him up?

A: Yes, sir.

Q: Where did you interview him?

A: In our conference room at the Sheriff's Office there in Calhoun County.

R. 17, ll. 9 – 19. Prior to the interrogation, Regales informed Appellant that "he needed to come down to the Sheriff's Station." R. 22, ll. 12 – 16. Wausaw reiterated on cross-examination that he never advised Appellant that he was free to leave or that he was not under arrest. R. 22, l. 23 – R 23, l. 3. Additionally, Wausaw informed Appellant during the interrogation that he was about to be charged with attempted murder. R. 23, ll. 4 – 6. Nonetheless, Wausaw opined that the statement was freely and voluntarily given. R. 23, ll. 22 – 24.

Following pre-trial testimony from Wausaw and Regales, the state argued that Appellant's statement was freely and voluntarily given. R. 27, l. 20 – R. 28, l. 4. The assistant solicitor suggested that because Appellant appeared calm and appeared to understand what was going on, the statement provided by a handcuffed man, under arrest for attempted murder and unable to leave the sheriff's station, somehow could not have been coerced. Id.

In response, counsel for Appellant argued that the State must "present evidence to prove that [there was no coercion or there was no pressure] and the burden is by the preponderance of the evidence." R. 28, ll. 5 – 23. Counsel noted the lack of evidence and pointed out the failure of career law enforcement officials to record the interrogation or make any notes. Id. Counsel concluded:

> We would actually assert that my client had no other choice but to either run or bring himself in there. There were two uniform officers in conversation with him so he was not free to leave.
>
> As the Officer said, you are under arrest; you're under arrest for attempted murder. I may not be in law enforcement but I find it hard to believe that suspects for attempted murder or any of the charged that carry twenty-five years - - you make contact with the suspect and there is no contemporaneous record at all.
>
> They may have been trying to meet their burden but they simply did not.

R. 28, ll. 12 – 23. The trial court found that the statement was freely and voluntarily given, and in contravention to the fact that Wausaw testified that officers picked him up, found that Appellant came to the station on his own. R. 17, ll. 15 – 16; R. 28, l. 24 – R. 29, l. 10.

Whenever evidence is introduced that was allegedly obtained by conduct violative of a defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing outside of the presence of the jury at the threshold point to establish circumstances under which it was gained. State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978). In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the United

States Supreme Court declared it axiomatic that a defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury. Thus, where there is conflicting evidence about a statement, the court must first make a finding as to the validity of the statement. See State v. Silver, 307 S.C. 326, 414 S.E.2d 813 (1992), aff'd as modified, 314 S.C. 483, 431 S.E.2d 250 (1993); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989).

The test of admissibility of a statement is voluntariness. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). Any statement given freely and voluntarily without any compelling influence is admissible in evidence. Id., 382 S.E.2d at 912. Certainly, if a defendant is not "in custody" at the time he makes a statement to the authorities, Miranda warnings are not required. The Miranda safeguards are employed to insure the voluntariness of a defendant's statements once he is in custody. See Franklin, 382 S.E.2d at 912–913 quoting from Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) ("The Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.")

In making the determination, the trial judge should examine the totality of circumstances surrounding the utterance to determine whether the state has met its burden of proof so as to warrant admission of the confession. Part of the State's burden during this hearing is to prove that the statement was voluntary and taken in compliance with Miranda. State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). The trial judge's resolution of the issue of voluntariness of a statement will not be disturbed on appeal absent an error of law. State v. Atchison, 268 S.C. 588, 235 S.E.2d 294 (1977).

In State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), the South Carolina Supreme Court instructed:

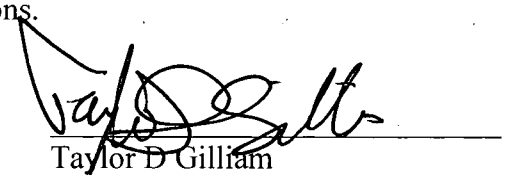
> In determining whether a confession was given "voluntarily," this Court must consider the totality of the circumstances surrounding the defendant's giving the confession. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). As the United States Supreme Court has instructed, the totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." Id. (internal citations omitted). Furthermore, no one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. Id.

Pittman, 373 S.C. at 566, 647 S.E.2d at 164.

Appellant's statement was coerced and was a product of pressure from law enforcement officials. After being picked up by law enforcement officers, Appellant was forced to participate in the interview and offered potentially incriminating information about his location the day of the shooting. The Miranda rights form was signed by only one witness, even though two blanks existed. His statement was not freely and voluntarily given, and it should be excluded.

## CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand this matter to the Calhoun County Court of General Sessions.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of December, 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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 18, 2018

Taylor D. Gilliam
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