STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RASHEEM KEVIN THOMAS,

APPELLANT

APPELLATE CASE NO 2019-001072

ANDERS BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
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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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by refusing to conduct a full Neil v. Biggers, 409 U.S. 188 (1972) hearing where Appellant objected to the victim's identification of him where the victim had given a previous out-of-court identification of Appellant that was unduly suggestive, making the likelihood of misidentification substantial?

STATEMENT OF THE CASE

Appellant was indicted by the Florence County grand jury for armed robbery. R. 359-360. Appellant's trial was held before the Honorable Thomas A. Russo and a jury from June 24 – 26, 2019. R. 1. Appellant was represented by Matthew Swilley and the state was represented by J. Ryan White. R. 1.

The jury found Appellant guilty as charged. R. 339, ll. 8 – 17. The judge sentenced Appellant to twenty-five years imprisonment. R. 351, ll. 14 – 18.

This appeal follows.

STANDARD 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"). Trial courts must hold a preliminary hearing "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." State v. Liverman, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (finding error in trial court holding the "functional equivalent" of a Neil v. Biggers hearing).

"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).

STATEMENT OF FACTS

On May 28, 2016, Anastacia Kauth was home in her trailer when three armed men entered without permission. R. 112, l. 15 – 114, l. 15. At the time of this invasion, Kauth said she was with her fiancé William, their new-born baby, and their friend Carson. R. 113, ll. 2 – 18. Kauth recalled that someone knocked on the door and Carson answered. The person asked for beer and gave Carson a twenty-dollar bill.[1] R. 114, ll. 2 – 10. When Carson turned around to get the beer, two other men entered the trailer with bandanas covering their faces and all three men pulled out guns. R. 114, ll. 7 – 13.

The men ordered Carson to the ground and demanded to speak with "Billy."[2] R. 114, ll. 13 – 15. William testified that he was in the restroom when he heard a knock on the door followed by Kauth screaming. R. 211, ll. 13 – 20. William heard someone run down the hallway and saw one of the intruders: "He was standing at the door with a gun in his hand and a mask on." R. 211, ll. 20 – 25. William recalled that he started fighting "the guy with the gun" until the intruder struck William in the back of the head with his gun, knocking William unconscious. R. 212, ll. 1 – 10. When William woke up, he was lying face first on the floor with someone holding a gun to the back of his head. R. 212, ll. 10 – 12.

William testified that the intruders wanted to know where the guns and money were in the trailer. R. 212, l. 23 – 213, l. 4. Initially, William refused to tell them but then one of the intruders pointed his gun at William's new-born daughter and said he would kill her if William did not tell them the combination to the safe. R. 213, ll. 5 – 9. After the intruders threatened

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[1] Kauth said that she and her fiancé ran a convenience store out of their trailer for other people who lived in the trailer park and that it was not unusual for people to stop by their trailer to buy items like beer and potato chips. R. 111, ll. 2 – 25.

[2] "Billy" was William's nickname. R. 115, ll. 2 – 8.

William's daughter, he gave them the combination to his safe. R. 213, ll. 9 – 16. The intruders were able to gain access to the safe and fled the scene with its contents. According to William, the safe had four handguns, an assault rifle, ammunition, money and personal information. R. 213, ll. 17 – 23.

Kauth claimed that the person who threatened her daughter initially had a bandana covering his face, but it fell down to where she could see his face. R. 116, ll. 4 – 13. Kauth described the intruder:

> He was light-skinned. He has nappy hair kind of. He had braids or it was braids, dreads, cornrows. I'm not sure what it is, what it looked like at that point. I just know it was, like, kind of nappy I guess is what you would call it. He was small and he had some weird facial hair going, like a long goatee beard or something.

R. 117, l. 21 – 118, l. 5. Kauth claimed she was able to see his face for "at least" ten minutes and that she would never forget his face. R. 123, ll. 8 – 14; R. 124, ll. 18 – 21.

Kauth maintained that on February 23, 2017, as she was scrolling through her Facebook news feed, she saw a picture of the man who robbed her and threatened her daughter. R. 124, l. 25 – 126, l. 23. The man was identified as Appellant in the Facebook post and Kauth informed the police that Appellant was the man who robbed her and her family. William also testified that he recognized the picture Kauth saw on Facebook as being the man who robbed him and threatened his daughter. R. 216, l. 10 – 217, l. 4. R. 127, l. 4 – 129, l. 4.

Defense counsel made a pretrial motion to suppress the identification of Appellant by Kauth. R. 44, ll. 8 – 12. The photograph of Appellant that Kauth saw on Facebook was Appellant's mug shot from when he was arrested for an unrelated murder.[3] R. 38, l. 25 – 39, l. 18. The mug shot was contained in a media release which was released by the Florence County

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[3] Appellant's murder charge was nolle prossed after he was convicted of this armed robbery.

Sheriff's Office and sent to the news station WBTW, which then posted it to their Facebook page. R. 40, l. 24 – 41, l. 17. Counsel maintained that this procedure of showing Appellant's photograph to Kauth was impermissibly suggestive and therefore unreliable. R. 44, l. 4 – 45, l. 11.

Defense counsel further argued that because Kauth's prior out-of-court identification was the result of impermissibly suggestive police procedures, the judge would need to determine whether the identification was still reliable. R. 42, l. 22 – 43, l. 21. Counsel argued that the judge could not make such a determination without hearing witness testimony. R. 43, l. 23 – 44, l. 7.

The assistant solicitor argued that the procedure was not unduly suggestive because the Sheriff's Office was required to present the media with "these types" of press releases. Furthermore, the solicitor contended that "if [Kauth] was just going to latch onto any photo because it was unduly suggestive, that in the seven months prior . . . she would've latched onto any photo that she saw from that same website." R. 46, ll. 2 – 11.

The judge ruled that the press release was not unduly suggestive because there was nothing in it that tied Appellant to the crime for which Kauth was a victim. Instead, he reasoned, it tied Appellant to an unrelated murder. R. 48, l. 13 – 49, l. 4. The judge further ruled that because the identification did not result from impermissibly suggestive police procedures, the judge did not need to consider the second prong, i.e., whether the identification was still reliable. R. 50, ll. 12 – 24. No witnesses were called by the state to establish the reliability of Kauth's identification.

In front of the jury, Kauth testified that she saw Appellant's picture on Facebook several months after the robbery and was one hundred percent certain that he was the person who robbed

her. R. 124, l. 25 – 128, l. 13. Kauth also identified Appellant in court as the person who robbed her and her family. R. 131, ll. 1 – 9.

ARGUMENT

The trial court erred by refusing to conduct a full *Neil v. Biggers*, 409 U.S. 188 (1972) hearing because Appellant objected to the victim's identification of him where the victim had given a previous out-of-court identification of Appellant that was unduly suggestive, making the likelihood of misidentification substantial.

"An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification." State v. Dukes, 404 S.C. 553, 557, 745 S.E.2d 137, 139 (Ct. App. 2013) citing State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). "A witness's subsequent in-court identification is inadmissible 'if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.'" State v. Dukes, 404 S.C. 553, 557, 745 S.E.2d 137, 139 (Ct. App. 2013) quoting State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis omitted).

In Neil v. Biggers, 409 U.S. 188 (1972), the Supreme Court established a two-part analysis in determining whether an identification of a defendant violated due process. First, the trial judge must determine whether the identification was the result of an "unnecessarily suggestive" procedure by the police. Id. at 198-199. If the judge finds that the identification was the result of "unnecessarily suggestive" police procedures, it next must determine "whether under the 'totality of the circumstances' the identification was reliable." Id. at 199. However, "[i]f the court finds the identification did not result from impermissibly suggestive police

procedures, the inquiry ends there and the court does not need to consider the second prong." Dukes, 404 S.C. at 557-558, 745 S.E.2d at 139.

In State v. Liverman, 398 S.C. 130, 139, 727 S.E.2d 422, 426 (2012), the Supreme Court acknowledged that the determination of whether an eyewitness' identification is admissible under Neil v. Biggers "should be made during an *in camera* hearing, outside the presence of the jury." The purpose of this 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." Id. quoting State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001). The Liverman Court went on to hold that an *in camera* hearing regarding the admissibility of the identification "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 140-141, 727 S.E.2d at 427.

Here, the trial court erred in failing to hold a full evidentiary hearing on the admissibility of Kauth's identification of Appellant. Defense counsel objected to the admissibility of Kauth's identification as being the result of improperly suggestive state action by way of the media release containing Appellant's mug shot from his murder arrest. Counsel correctly argued that witness testimony was required for the judge to determine whether Kauth's identification was reliable because it was the result of impermissibly suggestive police procedures. Because counsel "contended that [the] identification [was] obtained under unnecessarily suggestive circumstances arranged by state action," the trial judge was required to hold a full *in camera* hearing on the matter. Liverman, 398 S.C. at 140-141, 727 S.E.2d at 427.

In State v. Tisdale, 338 S.C. 607, 612, 527 S.E.2d 389, 392 (Ct. App. 2000), this Court held that a Neil v. Biggers hearing is not necessary in cases in which the identification is the

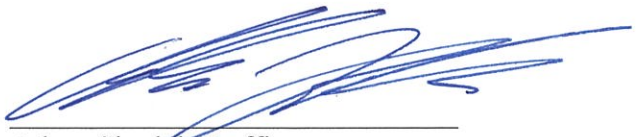
result of suggestiveness from a nongovernmental source. Tisdale was convicted of entering a bank with intent to steal and other related offenses. Tisdale, 338 S.C. at 609, 527 S.E.2d at 391. Tisdale's initial arrest was based on an eyewitness' description of his vehicle and that same eyewitness' subsequent identification of Tisdale as the person he saw fleeing the bank. Id. at 610, 527 S.E.2d at 391.

After Tisdale was arrested, the news media released video from his post-arrest bond setting, which one of the bank tellers who was present at the time of the robbery saw on television. Id. In response to seeing the news report of Tisdale's arrest, the bank teller called the police and stated she believed that Tisdale was the robber. Id. Another teller also stated that she identified Tisdale as the robber after seeing his photograph in a newspaper article about his arrest. Id. The Tisdale Court reasoned that "because the televised bond hearing and newspaper article were non-governmental sources of the suggestiveness," the trial court did not err in allowing the tellers' identifications of the defendant. Id. at 611-613, 527 S.E.2d at 392.

This case is distinguishable from Tisdale because the source of the suggestiveness was law enforcement. Even though Kauth saw Appellant's photograph on a news website, the source of the photograph, and the announcement of Appellant's arrest for murder, was a police press release. The press release itself was impermissibly suggestive because it included Appellant's mug shot along with a statement that he had been arrested for murder. This created a strong likelihood of misidentification by Kauth as a result of the police suggestive press release. Therefore, Kauth's identification of Appellant was the result of state action and the trial judge erred in not conducting a full Neil v. Biggers hearing. Therefore, Appellant's conviction should be reversed. See State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed, and this case remanded to the Florence County Court of General Sessions for a new trial.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of July, 2020.

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rasheem Kevin Thomas states:

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

2. He has reviewed the record of appellant's trial before Judge Thomas A. Russo, which was held on June 24 - 26, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, He asks the Court to relieve him as counsel for Rasheem Kevin Thomas.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

This 31st day of July, 2020.

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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) True-billed indictment(s);
(2) Entire trial transcript.

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

July 31, 2020

Adam Sinclair Ruffin
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

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 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."

July 31, 2020.

Adam Sinclair Ruffin
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