STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Bentley Price, Circuit Court Judge

Appellate Case No. 2019-001393

THE STATE, Respondent,

v.

ALLEN ANGELO FIELDS, Appellant.

INITIAL BRIEF OF RESPONDENT

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The trial judge did not abuse his discretion in allowing an in-court identification even though witness previously misidentified Appellant in a photo lineup.

STATEMENT OF THE CASE

Appellant was indicted in April 2017 for armed robbery and possession of a weapon during the commission of a violent crime. Appellant proceeded to a jury trial August 12-14, 2019, in Charleston County before the Honorable Bentley Price. The State was represented by Assistant Solicitors David Osborne and Lemuel C. Zeigler. Brendan M. Daniels and Teresa L. Norris represented the Appellant. The jury found Appellant guilty of both charges. He was sentenced to thirteen years for armed robbery and five years concurrent for the weapons charge. This appeal follows.

STATEMENT OF FACTS

On September 13, 2016, at 4:44 p.m., a robbery occurred at T.D. Bank in the West Ashley area of Charleston County. (Tr. 56). A black male wearing a black baseball cap, dark jeans, light colored shirt and sunglasses was seen entering the bank, where he threatened the tellers with a knife and demanded money. (Tr.67). Katherine (Lucy) Muller testified that Appellant brandished a knife, presented a bag and said "give me all your money." (Tr. 77). He then approached Allison Wilson, another bank teller, and robbed her. (Tr. 77). Appellant exited the bank through the front doors and went behind the bank building where a Sonoco Gas Station was located. (Tr. 67, 78, 103) He was seen jumping the fence and entering the passenger side of a black Chevy Impala, which then drove away. (Tr. 78, 103).

Jeffrey Fort, an investigator with the Charleston County Solicitor's office reviewed the surveillance footage from the bank. (Tr. 122). He noticed that besides a knife, the defendant was holding a white bag with a logo on it such as one that might be used by convenience stores. (Tr. 122). Fort then went to the Sonoco located behind the bank where he found the bags used there matched the one seen in the video. (Tr. 123). In the surveillance video from the Sonoco parking lot, a man is seen exiting a black vehicle, purchasing a beer from inside, and then returning to the vehicle. (Tr. 353) The man was later identified as Travis Simmons. (Tr. 362). The black Chevy Impala from which Simmons was seen exiting and entering, was determined to belong to Janae Nelson. (Tr. 373). Nelson is the girlfriend of Appellant's brother, Chris Wright. Detective James Richardson, of the Charleston Police Department, determined that Wright and Simmons were neighbors. (Tr. 331-32, 374).

After the robbery occurred, the news media posted a still frame photo of the suspect. (Tr. 213; State's 47). In response to the media coverage Levi Singleton called the crime stopper hotline and identified the suspect in the photo as the Appellant Allen Fields, also known as

"Bubba". (Tr. 216). Singleton confirmed this identification when he testified in court. (Tr. 213). Singleton, who lived in the same residence as Appellant's father, testified that on the day of the robbery, he saw Appellant, Appellant's brother Wright, and another man on his porch. (Tr. 204). He saw them arrive in the black Impala seen in the surveillance footage of the Sunoco at the time of the robbery. (Tr. 204).

Detective Richardson also spoke with Allen Matthews, father of the Appellant,. (Tr. 237). Jaqueline Grant, Appellant's aunt, had called Matthews to tell him to watch the news. (Tr.237). Matthews was shown the still frame photo from the news and identified the suspect as his son, the Appellant. (Tr. 385). Matthews also testified that on the afternoon of the robbery, Appellant, Wright, and another man arrived at his house in the black Impala matching the one from the Sunoco surveillance footage at the time of the robbery. (Tr. 232).

Detective Richardson then spoke with Jaqueline and Kelvin Grant. Kelvin, Appellant's cousin, told Fort that he saw Wright and Appellant on the afternoon of the robbery in a black Impala that matched the one seen in the Sunoco surveillance footage from the time of the robbery. (Tr. 277). He later testified he only saw Wright in the Impala. (Tr. 267). Jaqueline Grant was shown the still shot photo from the news and identified the suspect as Appellant. (Tr. 389). She signed the picture acknowledging her identification. (State's 43). However, during trial both Jaqueline Grant and Matthews testified that they didn't remember identifying Appellant as the man in the picture. (Tr. 233, 254-255).

Henry White, who was in jail with Appellant after his arrest, testified that Appellant told him he was in for a bank robbery. (Tr. 291). White testified that Appellant gave many details about the robbery, including that they used his brother's girlfriend's car to get away and that they

hid out at his aunt's house. (Tr. 292). White further testified that Appellant told him he had called home and that his aunt and father were not willing to testify. (Tr. 293).

A week after the incident, Ms. Muller, the bank teller, was shown a lineup of six individuals that included Appellant. (Tr. 85, 88) Muller was in California at the time and viewed the photo lineup on a cell phone. (Tr. 88). Muller chose someone other than Appellant from the lineup. (Tr. 88). However, at trial Muller identified Appellant as the man who robbed her. (Tr. 88). Ms. Wilson, the second teller, was also shown a, lineup but did not choose anyone from the lineup. (Tr. 107).

STANDARD OF REVIEW

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. State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) "Generally, the decision to admit an eyewitness identification is in a trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error." State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App 2003). "To warrant reversal based on the admission or exclusion of evidence, the [A]ppellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

ARGUMENT

The trial judge did not abuse his discretion in allowing an in-court identification even though witness previously misidentified appellant in a photo lineup

Appellant argues the trial judge erred in allowing a witness to make an in-court identification of Appellant because the witness previously identified another individual when the police showed her a photo lineup that included a photo of Appellant and that the in-court identification was inherently unreliable. Appellant's argument is invalid because the admissibility of an eyewitness identification is within the discretion of the judge, and there were three other identifications of Appellant.

Error Preservation

Appellant relies on State v. Lewis to argue that a Biggers[1] hearing was required where Appellant could more stringently question witnesses about what influence the prior identification had on the in-court identification of Appellant. (Initial Brief of Appellant pg. 6). In order for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003).

Appellant points out that counsel for Appellant during trial states "For appellate purposes, ours is not a Biggers." (Initial Brief of Appellant, pg. 6; Tr. 437). A Biggers hearing was not requested in the trial; therefore, the issue was not raised, not ruled upon, and not preserved for appellate review.

[1] Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375 (1972).

Admissibility

Appellant argues that "[a]lthough the witness in the present case identified someone other than Appellant pre-trial, a hearing was still required where Appellant could more stringently question witnesses about what influence the prior identification had on the in-court identification of Appellant." (Initial Brief of Appellant, pg. 6). Even if a Biggers hearing would have been appropriate under the circumstances of this case, it would not have been an inadmissible identification.

In Neil v. Biggers, the United States Supreme Court found that a court must review the totality of the circumstances to determine whether an identification is reliable. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972). The factors to be considered in evaluating the likelihood of misidentification include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (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. "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).

The purpose of these Biggers hearings is to determine whether an identification was unduly suggestive. "A criminal [Appellant] may be deprived of due process of law by an identification procedure 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. Here, the out-of-court identification procedure was not unduly suggestive. Muller was shown a six person photo lineup. (Tr. 85, 88).

In State v. Ford, our Supreme Court held that there was nothing impermissibly suggestive in a six person photographic lineup, where persons matched Appellant's general description. State v. Ford, 278 S.C. 384, 386 296 S.E.2d 866, 867 (1982). In State v. Turner, the court held that different background colors in a six person lineup did not make a photo lineup unduly suggestive. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 697 (2007). The court in United States v. Lincoln held that the fact that Appellant's photo was in color and the photos of the other individuals in the lineup were black and white did not make it impermissibly suggestive. United States v. Lincoln, 494 F.2d 833, 839 (9th Cir. 1974).

In the present case, a 6 person lineup was sent to Muller's cell phone. There is no indication that Appellant's photo was drastically different than the other photos. Significantly, in his brief, Appellant does not challenge any aspect of the lineup that was sent to Muller as being suggestive of Appellant as the correct choice. Most importantly, Muller identified someone other than the Appellant in the lineup which only serves to underline the fact the lineup was not unduly suggestive when considered through the analysis of Neil v. Biggers. Therefore the in-court identification is admissible. (Tr. 88).[2]

Reliability

"Generally, the decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission

[2] In State v. Lewis, the Supreme Court held that a Biggers hearing "does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument." State v. Lewis, 363 S.C. 37, 42, 609 S.E.2d 515, 517 (2005).

of prejudicial legal error." State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003). In this case, Muller identified Appellant in court as the person who robbed her when she previously did not identify him in a photo lineup. (Tr. 88).The South Carolina Supreme Court in State v. Lewis held that a Biggers hearing does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument. State v. Lewis, 363 S.C. 37, 42, 609 S.E.2d 515 (2005). Similarly the trial judge in this appeal stated,

> What precludes you from going down the line of testimony with her asking her all of those questions about whether she has had an opportunity to identify him before, has she been given any other subsequent photos of the Appellant, did you—when was the last – the proximity of time in which the six-pack was made and given to her as opposed to the proximity of time that has transpired now, three years. You could ask her all of those questions. So I am going to let—so I am going to let her – I am going to let her do – well, she hasn't – she has identified him; but, you know, we will have to just kind of go down that line of questioning, whatever they are going to do. [sic]

(Tr. 86).

The Fourth Circuit Court of Appeals held in U.S. v. Bennett, during a prosecution for bank robbery, the court did not abuse its discretion in allowing in-court eyewitness identification of Appellant even though witnesses had previously failed to identify Appellant from his photograph or had previously mistakenly identified him as the gunman rather than as one who had vaulted teller counter. U.S. v. Bennett, 675 F.2d 596, 598 (4th Cir. 1982). The Delaware Supreme Court held in Byrd v. State, the trial court did not abuse its discretion in allowing in-court identification of Appellant by a police officer, the officer's in-court identification was subject to cross examination and argument, and in-court identification was not more suggestive present in any other trial. Byrd v. State, 25 A.3d 761, 767 (Del. 2011). "The general rule is that, absent an unduly suggestive pretrial identification procedure, questions as to the reliability of a

proposed in-court identification affect only the in-court identification's weight and not its admissibility." Byrd v. State, 25 A.3d 761, 767 (Del. 2011).

Here, the pretrial identification was not unduly suggestive, therefore the reliability of the out-of-court identification is a question for the jury. "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." State v. Stewart, 275 S.C. 447, 451, 272 S.E.2d 628, 630 (1980) (quoting Manson v. Brathwaite, 432 U.S. 98, 116, 97 S.Ct. 2243,-2254 (1977)).The in-court identification was admissible under the test of Neil v. Biggers. Appellant had ample opportunity for cross-examination, and any question regarding the weight and reliability of the identification is a question for the jury to consider.

Harmless Error

Even if the trial judge did abuse his discretion in admitting the in-court identification by eyewitness Muller, it was harmless error because there were three other identifications of Appellant. "To warrant the reversal based on the admission or exclusion of evidence, the Appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App 2011) Appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011).

The admission of the in-court identification by Muller, is not reversible error because there were three other identifications presented to the jury. Through the testimony of Investigator Fort, the State presented an identification by Allen Matthews, Appellant's father. Fort testified

that when he showed Matthews a still frame photo of the suspect in the bank robbery, Matthews identified suspect as "his son Bubba." (Tr. 385). Fort also testified that when the same photo was shown to Jaqueline Grant, Appellant's aunt, she also identified the man in the photo as Appellant. (Tr. 389). Although both Grant and Matthews testified at trial that they did not remember identifying Appellant in the still photo, the State provided the jury with evidence that they had previously identified the Appellant. (Tr. 293). Despite the fact that Grant and Matthews changed their testimony on the stand, Levi Singleton testified in court that when he saw the news of the bank robbery, the man in the still frame was Appellant. (Tr. 213). Even if the trial judge did abuse his discretion in admitting the in-court identification by Muller, it was harmless because there were three other identifications of Appellant and credibility of witnesses is a question for the jury. Therefore the trial court's decision should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Kathrine H. Hudgins, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required to be served by Rule have been served.
This 3rd day of September, 2020.

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Attachments:	Fields Allen - Initial Brief of Respondent and Designation of Matter (02370924xD2C78).PDF

Dear Ms. Hudgins,

Attached to this email is the State's Initial Brief and Designation of Matter in the above matter. This brief will be filed with the Court later today via AIS One Drive.

Please acknowledge receipt of this email and the attachment by return email.

Sincerely,

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