STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALLEN ANGELO FIELDS,

APPELLANT

APPELLATE CASE NO 2019-001393

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err 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 line-up that included a photo of Appellant and the in-court identification was inherently unreliable?

STATEMENT OF THE CASE

In April of 2017, the Charleston County Grand Jury[1] indicted Appellant. Allen Angelo Fields for armed robbery and possession of a weapon during the commission of a violent crime, indictments #2017-GS-10-2131, 2132. On August 12, 2019, Appellant proceeded to jury trial before the Honorable Bentley Price. Brendan M. Daniels and Teresa L. Norris represented Appellant at trial. David Osborne and Lemuel C. Zeigler prosecuted the case. the jury returned verdicts of guilty on each charge. Judge Price sentenced Appellant to thirteen (13) years for armed robbery and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on August 16, 2019. This appeal follows.

[1] It is unclear who testified before the grand jury because the witness is listed as the Charleston City Police Department on both indictments. (R. p. 477, 479).

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"). "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).

ARGUMENT

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 line-up that included a photo of Appellant and the in-court identification was inherently unreliable.

The jury found Appellant guilty of robbing the TD bank in the West Ashley area of Charleston County. Bank teller Katherine Lucy Muller testified that on September 13, 2016, a man entered the bank, approached the tellers and demanded money while brandishing a knife. (R. p. 34, lines 13-22). At trial, the prosecutor asked the bank teller, "If you were to see this person [the robber] again would you have any chance in identifying him?" (R. p. 41, lines 13-14). The bank teller answered, "Yes." (R. p. 41, line 15). The prosecutor then asked, "Well, do you see him the courtroom?" (R. p. 41, line 16). The bank teller answered, "Yes." (R. p. 41, line 17). Appellant immediately objected and advised that he had a matter of law. (R. p. 41, lines 18-19). The judge excused the jury. (R. p. 41, lines 20-25).

Counsel for Appellant argued that the in-court identification was unreliable because the bank teller previously identified another individual when the police showed her a photo line-up that included a photo of Appellant. (R. p. 42, lines 1-13). The judge overruled the objection noting that counsel could cross-examine the bank teller about the prior identification. (R. p. 42, lines 14-18; p. 43, lines 2-15; p. 44, line 15). The bank teller then, in front of the jury for the first time, identified Appellant. (R. p. 45, lines 4-10). On cross-examination the bank teller admitted that she identified another individual from the photo line-up. (R. p. 52, line 10 – p. 53, 54, lines 1-2). The bank teller admitted that she identified Appellant for the first time in court. (R. p. 54, lines 5-6). The witness confirmed that the photo line-up contained six photos of African American men. (R. p. 55, lines 16-19). Counsel asked the bank teller, "Something

looks a little different lined up here. One person is a different color, quite frankly. Is that what you see?" (R. p. 54, lines 7-9). The bank teller answered, "Yes." (R. p. 54, line 10). Counsel later noted that Appellant was the only African American man seated at either counsel table. (R. p. 88, line 24 – p. 89, lines 1-5).

At the close of the State's case Appellant moved for a mistrial based on the in-court identification. (R. p. 379, lines 5-11; p. 386, line 18 – p. 387, lines 1-3; p. 389, lines 4-12; p. 390, lines 4-8). The judge denied the motion for a mistrial. (R. p. 390, line 9 – p. 391, lines 1-22). The State, citing State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005), noted that a Neil v. Biggers[2] hearing was not necessary under the facts presented. (R. p. 393, lines 16 – p. 394, lines 1-9). Counsel for Appellant stated, "I would like to just address that to clarify for the record. For Appellate purposes, ours is not a Biggers. We don't think it's – we don't think that anything short of a mistrial is curative." (R. p. 394, lines 11-14). The judge erred in allowing the bank teller to identify Appellant in court for the first time when she previously identified someone else from a photo line-up containing Appellant's photo.

First, the present case is distinguished from the Lewis case cited by the State. In Lewis the witness did not make any pre-trial identification. The Court in Lewis held that, "Accordingly, we conclude Neil v. Biggers does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations." 363 S.C. at 43, 609 S.E.2d at 518.

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[2] 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

In the present case, however, the witness made a pre-trial identification and identified someone other than Appellant. As noted by the Court in footnote nine in Lewis:

> The Court of Appeals found that the protection afforded a defendant when there has been an out-of-court identification does not apply to the situation where there has been only an in-court identification. If there had been a pre-trial identification, a hearing is mandated on the admissibility of that identification. *See* Rule 104(c), SCRE (hearings on admissibility of pretrial identifications of an accused shall in all cases be conducted out of the jury's hearing); State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (2002) (*in camera* hearing required by Rule 104(c) allows defendant to question witness more stringently regarding possible misidentification or bias outside jury's presence; *per se* rule requiring court to hold *in camera* hearing when State offers identification testimony and defendant challenges in-court identification as being tainted by previous illegal identification.).

363 S.C.at 42, 609 S.E.2d at 517–18. Although 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.

In State v. Simmons, 308 S.C. 80, 82–83, 417 S.E.2d 92, 93 (1992), the South Carolina Supreme Court wrote:

> State v. Williams, 258 S.C. 482, 189 S.E.2d 299 (1972) is dispositive of this case. The question is whether Ricky Crosby's identification of Simmons arises solely from his observation of her when she made the buy on the night of August 15, 1989. The identification must be free of and independent of any later suggestion that Simmons was the person who sold him the crack. The identification may be so tainted by the circumstances surrounding the bond hearing as to require that it be suppressed. In State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971), this Court adopted a *per se* rule requiring the court to hold an *in camera* hearing when the state offers witnesses whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous illegal identification. Contra Watkins v. Souder, 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981). The lower court refused to hold a hearing. This error warrants reversal.

The Court in Simmons remanded the case for a hearing to determine if the identification was so tainted as to require suppression at trial. Counsel in the present case did not specifically request a hearing but objected to the in-court identification based on inherit unreliability. This Court should find that the judge erred in admitting the in-court identification because it was inherently unreliable. Alternatively, this Court should remand the case, based on the objection, for a hearing outside the presence of the jury to determine if the in-court identification of Appellant by the bank teller was so tainted by the prior identification to require suppression.

Second, contrary to the holding in Lewis, other courts have found that in-court identifications implicate due process protections. In State v. Dickson, 322 Conn. 410, 422, 141 A.3d 810, 821–22 (2016) (n. 8 omitted), the Supreme Court of Connecticut wrote:

> With this general background in mind, we now turn to the case law governing in-court identifications that are not preceded by an unnecessarily suggestive identification procedure, which is the case here. The United States Supreme Court has not yet addressed the question of whether first time in-court identifications are in the category of unnecessarily suggestive procedures that trigger due process protections. See Galloway v. State, 122 So.3d 614, 663 (Miss.2013) ("[t]he United States Supreme Court has not decided whether *Biggers* applies to an in-court identification not preceded by an impermissibly suggestive pretrial identification"), cert. denied, —— U.S. ——, 134 S.Ct. 2661, 189 L.Ed.2d 209 (2014).

The Connecticut Supreme Court then held:

> Accordingly, we conclude that first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court. United States v. Greene, 704 F.3d 298, 308 (4th Cir.) (applying *Biggers* constitutional analysis to in-court identification), cert. denied, —— U.S. ——, 134 S.Ct. 419, 187 L.Ed.2d 279 (2013); United States v. Rogers, 126 F.3d 655, 658 (5th Cir.1997) (same); United States v. Hill, 967 F.2d 226, 232 (6th Cir.) ("We hold that the *Biggers* [constitutional] analysis applies to ... in-court identifications for the same reasons that the analysis applies to impermissibly suggestive [pretrial] identifications. The due process concerns are identical in both cases and any attempt to draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary. All of the concerns that underlie the *Biggers* analysis, including the degree of

> suggestiveness, the chance of mistake, and the threat to due process are no less applicable when the identification takes place for the first time at trial."), cert. denied, 506 U.S. 964, 113 S.Ct. 438, 121 L.Ed.2d 357 (1992); United States v. Rundell, 858 F.2d 425, 427 (8th Cir.1988) (noting "suggestiveness inherent in the witnesses' knowing that [the defendant] was the sole [person] charged with the [crime]" and applying *Biggers* factors to in-court identification); United States v. Archibald, 734 F.2d 938, 943 (witness' in-court identification suggestive when on cross-examination, witness stated he had "feeling he would be sitting next to" defense counsel, and applying *Biggers* factors), modified, 756 F.2d 223 (2d Cir.1984); E. Mandery, "Due Process Considerations of In–Court Identifications," 60 Alb. L.Rev. 389, 423 (1997) ("[t]here is no sound basis for this distinction" between in-court identifications and suggestive out-of-court identifications); see also Commonwealth v. Crayton, 470 Mass. 228, 241–42 and n. 16, 21 N.E.3d 157 (2014) (concluding pursuant to "[c]ommon law principles of fairness" that first time in-court identifications are inadmissible except for "good reason," as when identity is not at issue or eyewitness knew defendant before crime [internal quotation marks omitted].).

Dickson, 322 Conn. 410, 426–30, 141 A.3d 810, 824–27 (2016) (footnotes omitted).

In United States v. Greene, 704 F.3d 298 (4th Cir. 2013), the Fourth Circuit Court of Appeals applied the Neil v. Biggers analysis to an in-court identification writing, "Sitting across the courtroom from the defendant, with the judge and jury looking on, and a prosecutor drawing her attention to the defendant and asking for similarities, the witness understandably may have felt pressure to find something in the defendant that reminded her of the bank robber. These circumstances present a suggestive situation in which it is not clear whether the witness's own recollections, or outside pressures, are driving the testimony." 704 F.3d at 307. While the prosecutor's questioning in the present case did not include the resemblance questioning used in Greene, the questioning was still suggestive and presented the same problems discussed in Greene.

Importantly, the Fourth Circuit in Greene wrote:

> The Second Circuit has found that when a defendant was the only African–American in the courtroom, and was seated at the defense table, the in-court identifications by three witnesses were "so clearly suggestive as to be impermissible." United States v. Archibald, 734 F.2d 938, 942–43 (2d Cir.1984).

> "Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor." Id. at 941. The court ultimately found, however, that admitting the in-court identifications was harmless error because the witnesses had also identified the defendant in photo arrays prior to trial. *Id.* at 943.

704 F.3d at 306. As noted by defense counsel, Appellant was the only African American male seated at counsel table. (R. p. 88, line 24 – p. 89, lines 1-5). The in-count identification in the present case, like the in-court identification in Archibald, was unduly suggestive and impermissible. The error in the present case, however, was not harmless.

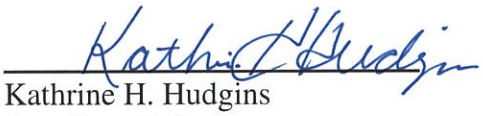
In Greene the Fourth Circuit also discussed a case from the Fifth Circuit writing:

> The Fifth Circuit, in another bank robbery case in which a teller's in-court identification was at issue, held that "it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant." United States v. Rogers, 126 F.3d 655, 658 (5th Cir.1997). In Rogers, when the teller first took the stand, she described what the robber was wearing. Id. at 657. But following cross-examination, the prosecutor thought that he saw something odd about the witness. Id. He asked an FBI agent to approach the witness, and she told the agent that she recognized the defendant as the robber. The witness was recalled to the stand and provided an in-court identification. Id. In holding the identification to be impermissibly suggestive, the Fifth Circuit noted that ten months had passed between the crime and the identification and stated that the circumstances surrounding the identification rose to the level of a due process violation. Id. at 659. "Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime." Id.

704 F.3d at 306–07. As in Rogers, the circumstances surrounding the in-court identification in the present case rose to the level of a due process violation. The judge erred in admitting the unduly suggestive inherently unreliable in-court identification.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's conviction and remand for a new trial.



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This 20th day of October, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

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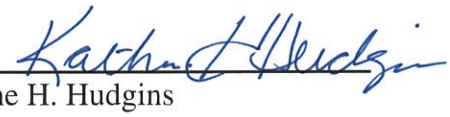
Respectfully Submitted,



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This 20th day of October, 2020.