

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

RECEIVED

Oct 28 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANTHONY KWAME MAYS,

APPELLANT

APPELLATE CASE NO 2019-001918

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by admitting a photographic lineup and subsequent identification of Appellant, where the witness was hospitalized for emergency surgery, where the police officer who interviewed the witness failed to determine the witness's mental and physical health following the shooting and surgery, where the witness expressed some uncertainty regarding the identification, and where the lineup was unduly suggestive in that it only depicted one heavysset individual—Appellant—such that the identification was unreliable, suggestive, and inadmissible?

STATEMENT OF THE CASE

On September 26, 2017, Appellant was indicted by a Greenville County grand jury for murder, attempted murder, assault and battery by a mob in the first degree, and assault and battery by a mob in the second degree. R. __ (Indictments). Appellant proceeded to trial before the Honorable Letitia H. Verdin on November 4, 2019. Randall Chambers represented Appellant; Allen O. Fretwell and Jonathan Gregory appeared on behalf of the state. Susannah Ross represented Appellant's co-defendant, Shyheem Rice. The state proceeded on only the murder and attempted murder charges. Tr. 23, ll. 4 – 22. Following a five-day trial, Appellant was found guilty on the murder and attempted murder charges. Judge Verdin sentenced Appellant to forty years on the murder charge and thirty years on the attempted murder charge. Tr. 922, ll. 7 – 8.

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”). “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 court erred by admitting a photographic lineup and subsequent identification of Appellant, where the witness was hospitalized for emergency surgery, where the police officer who interviewed the witness failed to determine the witness’s mental and physical health following the shooting and surgery, where the witness expressed some uncertainty regarding the identification, and where the lineup was unduly suggestive in that it only depicted one heavysset individual—Appellant—such that the identification was unreliable, suggestive, and inadmissible.

Relevant facts

The trial in this matter followed a shooting that occurred in Greenville on April 2, 2017 wherein one individual died and another was hospitalized. One witness described the scene leading up to the altercation as follows: Appellant and two other males approached a car with four people in it. Tr. 264, l. 1 – 267, l. 10. Two of the passengers got out of the car and ran. Id. Shots were fired. Id.; Tr. 306, ll. 9 – 25; Tr. 354, ll. 3 – 12.

One of the individuals who was shot, Jaikario Poole, was treated at Greenville Hospital by Dr. Brian Dach on April 2, 2017. Tr. 316, l. 9 – 320, l. 2. Poole arrived at the hospital at 2:17 p.m. and was sent to the OR at 2:28 p.m. Tr. 324, ll. 2 – 15. Dr. Dach testified that Poole suffered an injury to his liver as well as his colon. Tr. 325, l. 2 – 326, l. 23. Dr. Dach characterized the nature of Poole’s injuries as “quite severe” and “[a]bsolutely life-threatening.” Tr. 328, ll. 19 – 23. The other individual who was shot was Azaveon Cook. Tr. 481, l. 19 – 482, l. 11. Cook suffered two gunshot wounds which tragically resulted in his death. Tr. 483, ll. 2 – 5; Tr. 490, ll. 9 – 16.

Prior to opening statements, the trial court heard testimony from multiple witnesses regarding photographic lineups as well as statements made by Appellant and his co-defendant. The first witness was Darrell Kicklighter, an officer in Greenville County. Tr. 69, l. 25 – 70, l. 5. On April 2, 2017, he showed a collection of six photographs to a man named Marcus Foster; Foster identified Appellant as “the individual involved in this particular homicide.” Tr. 70, l. 6 – 73, l. 9. During the pre-trial hearing, Kicklighter identified Appellant as the person who Foster selected from the photo lineup. Id. Foster, in turn, identified Appellant at trial. Tr. 360, l. 23 – 361, l. 13.

Randall Evett, another officer with the Greenville County Sheriff’s Officer, testified pre-trial that he went to the hospital the day after the shooting and spoke with Jaikario Poole, one of the individuals who was shot. Tr. 96, l. 21 – 100, l. 5. Poole was also shown a six-photo lineup which was marked as State’s Exhibit 92. Id. Poole indicated that he was “80 percent” sure that Photo Number 2 was the shooter. Id.; R. __ (State’s Exhibit 93). Evett then identified Appellant as the individual who was shown in Photo Number 2. Tr. 99, l. 19 – 100, l. 5.

On cross-examination, Evett noted that Poole was being treated at the hospital for a gunshot wound to the stomach. Tr. 108, ll. 7 – 13. Evett was unaware that Poole had emergency surgery the previous day. Tr. 108, ll. 14 – 24; Tr. 121, ll. 10 – 24. Prior to questioning Poole, Evett did not check with any of the medical staff on hand to determine Poole’s well-being or ability to answer questions. Tr. 108, ll. 17 – 24. Further, Evett was unaware if Poole had been administered any medication. Tr. 109, ll. 6 – 10.

Poole’s testimony followed Evett’s. He recalled being interviewed at the hospital on April 3, 2017. Tr. 115, l. 23 – 116, l. 1. Following his selection, he filled out an Affidavit of Photographic Identification which was marked as State’s Exhibit 93. Tr. 118, l. 25 – 119, l. 5.

Poole identified Appellant during the pre-trial hearing as well. Tr. 119, l. 6 – 120, l. 8. Both State’s Exhibit 92 and 93 were admitted, subject to Appellant’s previous objection, during Poole’s testimony at trial. Tr. 576, ll. 9 – 22; Tr. 578, ll. 10 – 20. Poole identified Appellant in the jury’s presence. Tr. 578, l. 22 – 579, l. 13. During Evett’s trial testimony, counsel for Appellant again preserved his objection. Tr. 704, ll. 15 – 23.

At the conclusion of the Neil v. Biggers hearing, counsel for Appellant moved to suppress Poole’s identification of Appellant. Tr. 145, l. 4 – 146, l. 12. Counsel acquiesced to the introduction of Foster’s identification but objected to Poole’s. Regarding the lineup, counsel noted that Appellant was “the most heavyset person there” such that he stood out:

[J]ust based on the faces that we can see there, the most heavyset person there, he stands out. That’s significant because there are witnesses that indicated that they saw a heavyset person. One person he described as far walked to the car. He’s clearly the most heavyset person there. So in my mind, and I believe objectively speaking, that is unnecessarily suggestive.

Tr. 145, ll. 17 – 24. Regarding the second prong of Biggers, counsel articulated that there was a substantial likelihood of misidentification based on the witness’s condition and uncertainty. Tr. 145, l. 25 – 146, l. 12.

The trial judge denied the motion and allowed the identification to be presented to the jury. Tr. 146, l. 13 – 147, l. 19. As mentioned, Appellant renewed his motion throughout trial.

Discussion

“A criminal defendant may be deprived of due process of law by an identification procedure arranged by police 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.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. 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. 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

South Carolina courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); see also Rule 104(c), SCRE (providing that “[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury”). “The purpose of the *in camera* 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.” Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

Because Appellant was the only husky individual depicted in the lineup shown to Poole, the lineup was unduly and improperly suggestive. The photographic lineup, created by law enforcement, shows only one heavysset individual. R. ___ (State’s Exhibit 92). Numerous witnesses throughout trial described the shooter as some variation of heavy. Tr. 266, ll. 4 – 9; Tr. 563, ll. 7 – 11; Tr. 754, ll. 8 – 21. Accordingly, Poole, who admitted he was not entirely sure that the individual whose photograph he circled was the shooter, was aided by the suggestive lineup. Poole’s reluctance to describe his certainty as “100%” was probative of both the suggestive nature as well as the reliability of his out-of-court identification.

Regarding the reliability prong, Poole’s hospitalization and recent life-saving surgery likely prevented his identification from being reliable enough to be admissible. Although unknown to the officer who conducted the photographic lineup at the time, Poole was “taken straight to the operating room after a brief examination and X-rays in the emergency room.” Tr. 323, ll. 7 – 14. Poole spent approximately three hours in surgery. Tr. 324, l. 2 – 325, l. 1. While in the operating room, Poole was given general anesthesia. Tr. 325, ll. 2 – 13. Exploratory surgery occurred, and part of his abdomen was removed. Tr. 325, l. 2 – 328, l. 18. Dr. Dach described Poole’s injuries as severe and characterized them as life-threatening. Tr. 328, ll. 19 – 23. While Dr. Dach could not recall with particularity the pain medication he prescribed Poole, he suggested that it “would have been something pretty strong.” Tr. 332, ll. 2 – 19.

Poole was hospitalized for eight days. Tr. 571, ll. 1 – 10. He was interviewed on his second day there, one day after emergency life-saving surgery. His injuries were severe, and he was only able to say with eighty percent certainty that the person he identified was Appellant.

Thus, the certainty of his identification was adversely impacted. His out-of-court identification was unreliable and based on an unduly suggestive lineup. Further, it tainted his in-court identification. State's Exhibit 92 and 93 should have been suppressed, and Poole should not have been allowed to identify Appellant at trial.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse his conviction and remand for a new trial.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of October, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter has been served upon opposing counsel this 28th day of October, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Anthony Kwame Mays, #379500, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472.

s/Taylor D. Gilliam
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Appellate Defender
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