STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOEY DEAN COLEMAN,

APPELLANT.

APPELLATE CASE NO. 2020-000231

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by admitting an eyewitness's identification of Appellant as the armed robber when the unnecessarily suggestive police identification procedure utilized while the witness was in custody and suspected of being involved in the robbery caused a substantial likelihood of misidentification rendering the identification unreliable as a matter of law?

STATEMENT OF THE CASE

A Hampton County Grand Jury indicted Appellant on March 13, 2019 for armed robbery, two counts of kidnapping, two counts of first degree assault and battery, and possession of a weapon during the commission of a violent crime. R. 346-357. His case was called to trial on February 3, 2020 before the Honorable Carmen T. Mullen, and a jury. R. 1. Assistant Solicitor Reed Evans represented the state. R. 2. Diana Dewitt represented Appellant. R. 2.

On February 5, 2020, the jury found Appellant guilty as indicted. R. 325, l. 25 – 326, l. 16. He was sentenced to thirty years for armed robbery, thirty years for each count of kidnapping, ten years for each count of first degree assault and battery, and five years for the weapons offense. All sentences were ordered to be served concurrently. R. 336, ll. 12-21.

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). "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. (citing Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-888 (1994)). "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." Id. (citing State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct. App. 1993)). "However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." Id. (citing Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976)).

ARGUMENT

The trial judge erred by admitting an eyewitness's identification of Appellant as the armed robber when the unnecessarily suggestive police identification procedure utilized while the witness was in custody and suspected of being involved in the robbery caused a substantial likelihood of misidentification rendering the identification unreliable as a matter of law.

Relevant Facts

On November 15, 2018, a convenience store called Snappy Foods in Yemassee was robbed by an armed man. The robbery was recorded by surveillance cameras placed throughout the store. R. 168, ll. 4-9. The man walked into the store, grabbed a large bottle of beer from one of the coolers, and waited in line. When it was his turn to pay, he placed the bottle of beer on the counter, pulled a gun, and demanded money from the two clerks behind the counter.

Yashkumar Patel, who was behind the counter, looked up and saw the firearm. Almost immediately, the man fired between Patel and the other clerk, Hetalsinh Solanki. R. 179, l. 1 – 180, l. 15. The man then came behind the counter and fired again. R. 181, ll. 9-23. He ordered Patel and Solanki to get on the ground. Patel screamed, "Just take the money, but don't shoot." R. 180, ll. 23-25. The armed man struck Patel on his back and then fired a third time. R. 181, ll. 9-23. Patel's ears were "ringing" from the close range gunshots. He also could not see because when the robber hit him it knocked his "hoodie" onto his face. App. 188, ll. 6-17. Eventually, the other clerk, Solanki, told Patel to stand up, that the robber had left. App. 188, ll. 18-24.

Karen Wilcox was walking to Snappy Foods on the afternoon of November 15, 2018 to purchase dish soap. Her cousin, Damian Finnel, who was a passenger in a white vehicle, offered to give her a ride to the store. Wilcox accepted the offer. R. 192, l. 25 – 193, l. 23. She sat in the backseat on the passenger side next to Finnel. R. 202, l. 20 – 203, l. 18. Wilcox knew the

driver because her mother taught him in school. R. 203, ll. 19-22. However, she did not know the front seat passenger. R. 195, l. 2 – 196, l. 1; R. 204, ll. 6-14.

When they arrived at Snappy Foods, the driver parked the vehicle by one of the gas pumps. Wilcox went into the store and bought dish soap. She walked back to the car and got inside. While she was waiting for Finnel and the front seat passenger to return to the car, she heard "all these gunshots." R. 194, ll. 5-18. Wilcox "jumped out" of the car and "tried to hide." R. 196, ll. 21-22. As she was hiding, she saw the front seat passenger come out of the store. She claimed he got back into the white car and made the driver "drive off." As the car was leaving, the man "kept shooting, shooting, shooting" and Wilcox "ducked." R. 199, 2-11.

Wilcox left Snappy Foods before law enforcement arrived. R. 207, ll. 7-25. However, officers identified Wilcox on the surveillance footage of the armed robbery. Officers went to her residence, placed her in custody, and transported her to the police station. R. 208, ll. 4-7; R. 224, ll. 5-10. Once at the police station, Wilcox was read her Miranda rights. R. 208, ll. 8-10. The police considered her a suspect at the time. R. 215, l. 25 – 216, l. 11; R. 224, ll. 11-12.

Wilcox admitted that she did not know the front seat passenger's name, but she heard "he stay across the river." She told law enforcement that the man was from Colleton County. R. 198, ll. 8-23; R. 216, ll. 12-16. The Yemassee Police Department shared a still shot of the robber obtained from the surveillance footage with Sergeant Brian Varnadoe, a detective with the Colleton County Sheriff's Office, and asked Varnadoe if he could identify the man. R. 216, ll. 17-24; R. 219, l. 15 – 221, l. 17. Varnadoe claimed he recognized the man immediately as Appellant. R. 220, l. 21 – 221, l. 20.

During trial, Wilcox identified Appellant as the front seat passenger. She testified:

Q: Who did you see come out of the store?

A: That guy right there.

Q: This gentleman sitting next to Ms. Dewitt [the defense attorney]?

A: Uh-huh.

Q: Could you describe what he's wearing?

A: Actually, I can't remember.

Q: Not back then, but today.

A: Got a black coat on - - is that a coat? I can't see that well. I got the wrong glasses. Can barely see you [the assistant solicitor], it's so blurry.

Q: But that's the gentleman that you saw?

A: That is him. It is him.

R. 197, ll. 1-12.

On cross-examination by defense counsel, Wilcox explained that she recently purchased new glasses, but she brought the wrong glasses to court. She further testified:

Q: Okay. Now you testified that you could not tell if the man sitting at my table was wearing a jacket or what. Can you see from where you're sitting?

A: My vision is blurry. But I recognize his face.

Q: Your vision is blurry?

A: Yes, right now with these glasses. But I recognize his face very well. I can't forget his face.

. . .

Q: Ms. Wilcox, isn't it true that you identified my client because he's the only black man sitting at the table over there at the defense table?

A: No, ma'am, that is not why. I believed he was a really nice person, you know, until the incident. It disrupted me.

R. 210, l. 13 – 212, l. 1.

The beer bottle placed on the counter by the armed robber was sent to the Beaufort County Sheriff's Office for DNA testing. R. 251, ll. 11-24. A DNA analyst found a mixture of DNA on the bottle and compared it to the known DNA profile of Appellant. R. 253, l. 17 – 255, l. 25. He determined that Appellant's DNA "matched" the DNA found on the bottle. R. 256, ll. 5-15.

Neil v. Biggers Hearing

Appellant moved pretrial to suppress Karen's Wilcox's identification of Appellant as the armed robber. The trial judge held a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972). During the hearing, Captain Joe Loadholt with the Yemassee Police Department testified that after Sergeant Varnadoe recognized the armed robber as Appellant from a still shot obtained from the surveillance footage, the department contacted the Beaufort County Sheriff's Office and requested it create a photographic lineup with Appellant's photograph included. R. 57, l. 15 – 60, l. 17. Chief Greg Alexander personally requested the lineup. He testified it took Beaufort County about fifteen to twenty minutes to send the lineup once requested. R. 91, ll. 1-12.

After they obtained the lineup, Chief Alexander, Captain Loadholt, and Sergeant Watson showed the lineup to Wilcox, who was in custody at the time and had not been ruled out as a suspect. R. 61, ll. 1-11; R. 87, l. 3 – 88, l. 8; R. 96, ll. 16-23. Alexander testified that one of the officers, although he could not remember who, handed Wilcox the lineup in a folder. Alexander maintained that they used a folder so the officer would not inadvertently suggest to Wilcox who she should pick based on the placement of the officer's hands or fingers on the lineup. R. 88, l. 14 – 89, l. 5. Wilcox was told that the suspect may or may not be included in the lineup. R. 63, l. 6 – 65, l. 3. She ultimately identified Appellant by circle his photograph and writing her initials. R. 65, ll. 14-23.

As mentioned, Wilcox was in custody at the time she was shown the lineup. She had been transported to the police station by law enforcement and read her Miranda rights. R. 80, l. 23 – 82, l. 24. She gave a written statement forty minutes before she was shown the lineup. R. 95, l. 19 – 96, l. 23. Captain Loadholt admitted Wilcox was "exposed" to the armed robber for only about ten to fifteen minutes total. R. 73, ll. 1-5. He also testified that Wilcox was seated in the backseat of the car directly behind the armed robber who was the front seat passenger. R. 79, l. 16 – 80, l. 2.

At the conclusion of the hearing, defense counsel moved to suppress Wilcox's identification. She argued the fact that Wilcox was in custody and the procedure law enforcement used was "overly suggestive." R. 100, l. 11 – 101, l. 3.

The trial judge found that under the totality of the circumstances, Wilcox's identification of Appellant was reliable. The judge asserted, "I think she [Wilcox] certainly had the ability to see, her degree of attention seemed fine . . . [A]ccuracy and length of time between . . . the crime and . . . when she saw it was all within reasonable limits. So . . . provided she can ID him [Appellant] in court, I'm going to go ahead and rule that way." R. 104, l. 23 – 105, l. 7.

Discussion

The trial judge erred by admitting Wilcox's identification of Appellant as the armed robber because the identification procedure used by law enforcement was unnecessarily suggestive, particularly since Wilcox was in custody and suspected of being involved in the robbery at the time she was shown the lineup and three officers were present. This caused a substantial likelihood of misidentification rendering Wilcox's identification unreliable as a matter of law.

"When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-pronged inquiry to determine whether due process requires suppression." State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) (citing Neil v. Biggers, 409 U.S. 188, 198-200 (1972) and State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). "First, the court must determine whether the identification resulted from 'unnecessarily suggestive' police identification procedures." Id. (quoting Biggers, 409 U.S. at 198-199 and Liverman, 398 S.C. at 138, 727 S.E.2d at 426). "The Supreme Court of the United States has repeatedly emphasized 'that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.'" Id. (quoting Perry v. New Hampshire, 565 U.S. 228. 238-239 (2012)); See Manson v. Brathwaite, 432 U.S. 98, 107 (1977); Biggers, 409 U.S. at 198. "If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong." Id. (citing United States v. Sanders, 708 F.3d 976, 984 (7th Cir. 2013)); See Perry, 565 U.S. at 730 ("[C]ourts will only consider the second prong if a challenged procedure does not pass muster under the first."); See also State v. Dukes, 404 S.C. 553, 557-558, 745 S.E.2d 137, 139 (Ct. App. 2013).

"If, however, the court determines the procedures were both suggestive and unnecessary, the court must then determine 'whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.'" Id. at 311, 806 S.E.2d at 710 (citing Liverman, 398 S.C. at 138, 727 S.E.2d at 426); See Biggers, 409 U.S. at 198-199. In assessing the reliability of an otherwise unnecessarily suggestive identification procedure, courts are to consider the following factors, under the totality of the circumstances: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness' degree of

attention, (3) the accuracy of the witness' 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. Biggers, 409 U.S. at 199-200.

The six person photographic lineup utilized by law enforcement was inherently suggestive. On top of the method used, Wilcox was in custody at the time she viewed the lineup and surrounded by three officers. This coercive environment, which pressured Wilcox to select a person from the lineup as the suspect, rendered her identification unreliable. Moreover, Wilcox did not have a sufficient opportunity to view the suspect. She was seated in the backseat of the vehicle directly behind the front seat passenger, who she claimed was the armed robber. Because this individual's back was to Wilcox she did not have a good view of him. Additionally, it was unlikely Wilcox was focused on this individual while the group was driving to the store. It was a person she did not previously know and she had little reason at the time to interact with him. Finally, no evidence was presented about the level of certainty Wilcox felt in her identification.

Respectfully, this Court should hold the trial judge erred by admitting Wilcox's identification of Appellant, reverse Appellant's convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,

s/ Lara M. Caudy_____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOEY DEAN COLEMAN,

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joey Dean Coleman states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial, which was held on February 3-5, 2020 before the Honorable Carmen T. Mullen, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Joey Dean Coleman.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 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) Complete Trial Transcript Dated February 3, 2020;
(2) Complete Trial Transcript Dated February 4, 2020;
(3) Complete Trial Transcript Dated February 5, 2020;
(4) True Billed Indictments;
(5) Sentence Sheets.

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

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

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ATTORNEY FOR APPELLANT

November 12, 2020

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."

s/ Lara M. Caudy
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