RECEIVED
Jan 26 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
The Honorable Bentley Price, Circuit Court Judge

Appellate Case No. 2022-000041

THE STATE, Respondent,

v.

ALLEN ANGELO FIELDS, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting St.
Suite 400
Charleston, SC 29401
(843)-958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 7

I. The Court of Appeals properly found the trial judge did not his discretion in allowing an in-court identification even though witness previously misidentified Petitioner in a photo lineup 7

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Byrd v. State, 25 A.3d 761 (Del. 2011) 11

Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 609 s.e.2D 506 (2005).......... 6

Manson v. Brathwaite, 432 U.S., 97 S.Ct. 11

Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375 (1972) 7, 8, 9, 11

State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App 2003).......... 6, 10

State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011).......... 12

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) 7

State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982).......... 9

State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005).......... 9, 10

State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).......... 8

State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) 7

State v. Singleton, 395 S.C. 6, 716 S.E.2d 332 (Ct. App 2011) 6, 11

State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980) 11

State v. Traylor, 360 S.C. 74, 600 s.e.2d 523 (2004).......... 6, 9

State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007) 9

U.S. v. Bennett, 675 F.2d 596 (4th Cir. 1982).......... 10

United States v. Lincoln, 494 F.2d 833 (9th Cir. 1974).......... 9

QUESTION PRESENTED

Did the Court of Appeals err in finding the trial judge properly allowed an in-court identification even though witness previously misidentified Petitioner in a photo lineup?

STATEMENT OF THE CASE

Petitioner was indicted in April 2017 for armed robbery and possession of a weapon during the commission of a violent crime. Petitioner proceeded to a jury trial August 12-14, 2019, in Charleston County before the Honorable Bentley D. Price. The State was represented by Assistant Solicitors David Osborne and Lemuel C. Zeigler. Brendan M. Daniels and Teresa L. Norris represented the Petitioner. The jury found Petitioner guilty of both charges. He was sentenced to thirteen years for armed robbery and five years concurrent for the weapons charge. A timely notice of intent to appeal was served on August 16, 2019 and the direct appeal perfected. On November 17, 2021, the South Carolina Court of Appeals affirmed the convictions in an unpublished opinion. State v. Fields, Op. No. 2021-UP-408 (S.C. Ct. App. filed Nov. 17, 2021). (App. 1-2). A petition for rehearing was timely filed and then denied on December 16, 2021. (App. 3-17). A timely Petition for Writ of Certiorari was filed on January 13, 2022. This Return 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. (R. 13). 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. (R. 24). Katherine (Lucy) Muller testified that Petitioner brandished a knife, presented a bag and said "give me all your money." (R. 34). He then approached Allison Wilson, another bank teller, and robbed her. (R. 34). Petitioner exited the bank through the front doors and went behind the bank building where a Sonoco Gas Station was located. (R. 24, 35, 60) He was seen jumping the fence and entering the passenger side of a black Chevy Impala, which then drove away. (R. 35, 60).

Jeffrey Fort, an investigator with the Charleston County Solicitor's office reviewed the surveillance footage from the bank. (R. 79). 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. (R. 79). Fort then went to the Sonoco located behind the bank where he found the bags used there matched the one seen in the video. (R. 80). 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. (R. 310) The man was later identified as Travis Simmons. (R. 319). The black Chevy Impala from which Simmons was seen exiting and entering, was determined to belong to Janae Nelson. (R. 330). Nelson is the girlfriend of Petitioner's brother, Chris Wright. Detective James Richardson, of the Charleston Police Department, determined that Wright and Simmons were neighbors. (R. 287-288, 331).

After the robbery occurred, the news media posted a still frame photo of the suspect. (R. 170; 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 Petitioner Allen Fields, also known as

"Bubba". (R. 173). Singleton confirmed this identification when he testified in court. (R. 170). Singleton, who lived in the same residence as Petitioner's father, testified that on the day of the robbery, he saw Petitioner, Petitioner's brother Wright, and another man on his porch. (R. 161). He saw them arrive in the black Impala seen in the surveillance footage of the Sunoco at the time of the robbery. (R. 161).

Detective Richardson also spoke with Allen Matthews, father of the Petitioner. (R. 194). Jaqueline Grant, Petitioner's aunt, had called Matthews to tell him to watch the news. (R.194). Matthews was shown the still frame photo from the news and identified the suspect as his son, the Petitioner. (R.342). Matthews also testified that on the afternoon of the robbery, Petitioner, 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. (R. 189).

Detective Richardson then spoke with Jaqueline and Kelvin Grant. Kelvin, Petitioner's cousin, told Fort that he saw Wright and Petitioner 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. (R. 234). He later testified he only saw Wright in the Impala. (R. 224). Jaqueline Grant was shown the still shot photo from the news and identified the suspect as Petitioner. (R. 346). She signed the picture acknowledging her identification. (State's 43). However, during trial both Jaqueline Grant and Allen Matthews testified that they didn't remember identifying Petitioner as the man in the picture. (R. 190, 211-212).

Henry White, who was in jail with Petitioner after his arrest, testified that Petitioner told him he was in for a bank robbery. (R. 248). White testified that Petitioner 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. (R. 249). White further testified that Petitioner told him he had called home and that his aunt and father were not willing to testify. (R. 250).

A week after the incident, Ms. Muller, the bank teller, was shown a lineup of six individuals that included Petitioner. (R. 42, 45) Muller was in California at the time and viewed the photo lineup on a cell phone. (R. 45). Muller chose someone other than Petitioner from the lineup. (R. 45). However, at trial Muller identified Petitioner as the man who robbed her. (R. 45). Ms. Wilson, the second teller, was also shown a, lineup but did not choose anyone from the lineup. (R. 64).

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 Court of Appeals properly found that the trial judge did not abuse his discretion in allowing an in-court identification even though witness previously misidentified Petitioner in a photo lineup

Petitioner argues the Court of Appeals erred in affirming the trial judge's decision to allow a witness to make an in-court identification of Petitioner because the witness previously identified another individual when the police showed her a photo lineup that included a photo of Petitioner and that the in-court identification was inherently unreliable. Petitioner's argument is invalid because the admissibility of an eyewitness identification is within the discretion of the judge, there were three other identifications of Petitioner, and Petitioner had the opportunity to cross examine the witness as well as address the in-court identification during closing arguments.

Error Preservation

Petitioner relied on State v. Lewis to argue that a Biggers[1] hearing was required where Petitioner could more stringently question witnesses about what influence the prior identification had on the in-court identification of Petitioner. (Final 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 Petitioner; (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).

Petitioner pointed out that counsel for Petitioner during trial stated "For appellate purposes, ours is not a Biggers." (Final Brief of Appellant, pg. 5; R. 394). A Biggers hearing was

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

not requested in the trial; therefore, the issue was not raised, not ruled upon, and not preserved for appellate review.

Admissibility

Petitioner argued that "[a]lthough the witness in the present case identified someone other than Petitioner pre-trial, a hearing was still required where Petitioner could more stringently question witnesses about what influence the prior identification had on the in-court identification of Petitioner." (Final 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 because Petitioner had the opportunity to cross examine the witness and addressed the in-court identification during the closing arguments.

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 [Petitioner] 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. (R. 42, 45).

In State v. Ford, our Supreme Court held that there was nothing impermissibly suggestive in a six person photographic lineup, where photos matched Petitioner'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 Petitioner'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 six person lineup was sent to Muller's cell phone. There is no indication that Petitioner's photo was drastically different than the other photos. Significantly, in his brief, Petitioner did not challenge any aspect of the lineup that was sent to Muller as being suggestive of Petitioner as the correct choice. Most importantly, Muller identified someone other than the Petitioner 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. In affirming the conviction the Court of Appeals cited to State v. Lewis[2] stating that because Petitioner had the opportunity

---

[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).

to cross examine the witness and addressed the in-court identification in closing arguments the trial judge did not abuse his discretion. State v. Fields, Op. No. 2021-UP-408 (S.C. Ct. App. Filed Nov. 17, 2021). (App. 1). Therefore, the Court of Appeals properly held that the trial judge did not abuse its discretion in admitting the in-court identification of Appellant and this Court should affirm.

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 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 Petitioner in court as the person who robbed her when she previously did not identify him in a photo lineup. (R. 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 Petitioner, 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]

(R. 43).

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 Petitioner even though witnesses had previously failed to identify Petitioner 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 Petitioner by a police officer, the officer's in-court identification was subject to cross examination and argument, and in-court identification was no more suggestive than the normal inherent suggestiveness that is 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 was 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. Petitioner 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 had abused his discretion in admitting the in-court identification by eyewitness Muller, it was harmless error because there were three other identifications of

Petitioner. "To warrant the reversal based on the admission or exclusion of evidence, the Petitioner 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, was 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, Petitioner'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." (R. 385). Fort also testified that when the same photo was shown to Jaqueline Grant, Petitioner's aunt, she also identified the man in the photo as Petitioner. (R. 389). Although both Grant and Matthews testified at trial that they did not remember identifying Petitioner in the still photo, the State provided the jury with evidence that they had previously identified the Petitioner. (R. 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 Petitioner. (R. 213). Even if the trial judge had abused his discretion in admitting the in-court identification by Muller, it was harmless because there were three other identifications of Petitioner and credibility of witnesses is a question for the jury. Therefore the Court of Appeal'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.

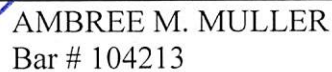
Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting St.
Suite 400
Charleston, SC 29401



BY:________________________
AMBREE M. MULLER
Bar # 104213

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 26, 2022

RECEIVED
Jan 26 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
The Honorable Bentley Price, Circuit Court Judge

Appellate Case No. 2022-000041

THE STATE, Respondent,

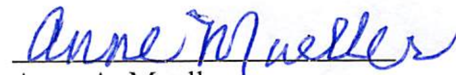
v.

ALLEN ANGELO FIELDS, Petitioner.

CERTIFICATE OF SERVICE

I, Anne Mueller, certify that I have served the Return To Petition For Writ Of Certiorari on Kathrine H. Hudgins, Esquire, counsel of record for Petitioner, by sending one copy by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 26th day of January, 2022.



Anne A. Mueller
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727