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**May 01 2023**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Laurens County

Honorable Daniel D. Hall, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

WENDY MICHELLE GREEN,

APPELLANT

APPELLATE CASE NO. 2022-001036

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INITIAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge's jury instruction on reasonable doubt unconstitutionally shift the burden of proof by implying that Appellant was required to prove that there was a "real possibility" that she was not guilty and confuse jurors as to the State's burden of proof?

## STATEMENT OF THE CASE

In April of 2022, the Lauren County Grand Jury indicted Appellant, Wendy Michelle Green, for trafficking methamphetamine, indictment #2022-GS-30-557<sup>1</sup>. On July 11, 2022, Appellant proceeded to jury trial before the Honorable Daniel D. Hall. Catherine T. West and Tristan M. Shaffer represented Appellant at trial. Jacob C. Lampke and Jared W. Simmons prosecuted the case. The jury returned a verdict of guilty. Judge Hall sentenced Appellant to ten (10) years. A timely notice of intent to appeal was served on July 20, 2022. This appeal follows.

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<sup>1</sup> The witness is listed as Robert Wilkie of the Laurens County Sheriff's Department. Mr. Wilkie's knowledge of and involvement with the case is unclear from the record.

## **STANDARD OF REVIEW**

“An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). “When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial.” State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016).

## ARGUMENT

**The trial judge's jury instruction on reasonable doubt unconstitutionally shifted the burden of proof by implying that Appellant was required to prove that there was a "real possibility" that she was not guilty and confused jurors as to the State's burden of proof.**

Appellant was the backseat passenger traveling in a car when the car was stopped by Deputy Williams and Deputy Parham of the Laurens County Sheriff's Office for having an improper tag light. (Tr. p. 76, lines 1-19; p. 81, lines 15-18). Both officers wore body cameras and the videos from those cameras were admitted in evidence, without objection, as State's exhibits #2 and #5. (Tr. p. 53, lines 1-11). Deputy Williams obtained consent from the driver, Catherine Clark, to search the car. (Tr. p. 82, lines 5-24). After obtaining consent to search, Deputy Williams asked Clark to step out of the car. (Tr. p. 83, lines 4-6). Deputy Parham asked the front seat passenger, Jeffrey Green, to step out of the vehicle. (Tr. p. 194, lines 2-3). Deputy Parham searched Jeffrey Green and then asked him to step back in front of the patrol vehicle. (Tr. p. 194, lines 4-23).

Appellant was in the backseat putting a leash on her dog, Levi, when Deputy Williams asked her to step out of the car. (Tr. p. 196, lines 8-9). Appellant got out of the vehicle and the driver, Clark, offered to take the dog. (Tr. p. 196, lines 10-24). Deputy Parham testified that after the dog changed hands he saw a white crystal like substance and a pipe on the ground. (Tr. p. 197, line 21 – p. 198, lines 1-14). The crystal substance tested positive for 11.53 grams of methamphetamine. (Tr. p. 259, lines 12-16). None of the three occupants of the car claimed ownership of the methamphetamine. Appellant was the only person arrested. (Tr. p. 98, lines 4-15).

During the charge conference counsel for Appellant objected to the "real possibility" language included in the reasonable doubt instruction, arguing that the language was burden

shifting in violation of both the state and federal constitutions. (Tr. p. 276, line 9 – p. 277, 278, lines 1-4). Appellant acknowledged prior state case law that supported the language. The judge overruled the objection. (Tr. p. 278, lines 5-6).

During the charge the judge instructed the jury:

The presumption of innocence is not a mere legal theory. It is not just a legal phrase. It is a substantial right which every defendant is entitled, unless you, the jury, are satisfied from the evidence of the Defendant's guilt beyond a reasonable doubt.

What is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The burden -- the State has the burden of proving the Defendant guilty beyond a reasonable doubt.

Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or preponderance of the evidence. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are very few things in the world that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt.

If based on the consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find the Defendant guilty. If, on the other hand, you think there's a **real possibility** that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find her not guilty.

(Tr. p. 349, line 15 – p. 350, lines 1-16)(emphasis added). At the close of the jury instruction Appellant renewed the previous objections. (Tr. p. 359, lines 22-23). During deliberations the jury asked for a definition of reasonable doubt and asked, “What happens if we don’t agree?” (Tr. p. 361, line 23- p. 366, lines 1-7; R. p. \*\* - Court’s Exhibit #9 – Jury Note). The judge re-charged the jury on reasonable doubt, again including the “real possibility” language. (Tr. p. 366, line 16 – p. 367, lines 1-14). One of the attorneys for the State noticed that one of the jurors had a note pad and was writing down the charge. (Tr. p. 368, lines 17-22).

The judge asked the juror to give the notes to the bailiff. (Tr. p. 369, lines 3-19). The notes were marked as Court's Exhibit #10. (Tr. p. 371, lines 20-21; R. p. \*\* Court's #10 – Juror's notes). In the note the juror wrote the words "real possibility." The judge erred by including the "real possibility" language.

The Supreme Court of the United States wrote, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). "Due process requires the prosecution to prove beyond a reasonable doubt that a defendant is guilty of the crime charged. E.g., S.C. Const. art. I, § 3; In re Winship, 397 U.S. 58, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)." State v. Cherry, 348 S.C. 281, 289, 559 S.E.2d 297, 301 (Ct. App. 2001). In State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016), the South Carolina Supreme Court wrote:

Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous. Id. When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial. State v. Curry, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013).

The jury charge in the present case containing the "real possibility" language shifted the burden of proof to Appellant and confused the jury as to the State's burden of proof.

In United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987), the district court instructed the jury that, "If, based on your consideration of the evidence, you are firmly convinced the defendant was guilty of the crimes charged, any particular defendant, you must find that

particular defendant guilty. If, on the other hand, you think there is a real possibility he's not guilty, you must give him the benefit of the doubt and find him not guilty." The Fourth Circuit Court of Appeals criticized the instruction that included the "real possibility" language writing:

The district court's instruction in this case illustrates the confusion that is engendered by attempting to define a reasonable doubt in terms of a "real possibility" that the accused is not guilty. The district court did not explain the difference that it perceived between a "possibility" and a "real possibility." It failed to tell the jury that the accused did not have the burden of showing a "real possibility" of innocence. Implying the evidence must show a real possibility of innocence to justify acquittal trenches on the principle that a defendant is presumed to be innocent. If the court believed that the jury could understand its concept of a "real possibility" and allocate the burden of proof on this issue, there was no reason for it to question the jury's ability to understand the prosecution's obligation to prove the charges beyond a reasonable doubt.

821 F.2d at 973. The Fourth Circuit, however, found the error did not require reversal because the instruction failed to allocate the burden of proof rather than shifted the burden and additional instructions cured the omission writing, "The instructions taken as a whole properly described the prosecution's burden and the protection the law affords the accused. Therefore, the error, which introduced the unnecessary concepts of being "firmly convinced" of guilt and a "real possibility" of innocence, did not affect the substantial rights of the accused. It should be disregarded. *See Fed.R.Crim.P. 52.*" 821 F.2d at 973.

Importantly, in addition to the instruction including the "real possibility" language, the district court also instructed the jury that:

The law presumes a defendant to be innocent, and the presumption of innocence alone is sufficient to acquit a defendant, unless the jury is satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of the evidence introduced at trial.

A defendant has no obligation to establish his innocence. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt, and this burden

never shifts to the defendant. If the jury, after careful and impartial consideration of all the evidence, has a reasonable doubt that a defendant was guilty of the charge under consideration, you must find that defendant not guilty of that charge.

If, on the other hand, the jury finds that the evidence is sufficient to overcome the presumption of innocence and to convince you beyond a reasonable doubt of the guilt of the defendant of the charge under consideration, it must find the defendant guilty of that charge.

821 F.2d at 973.

The instructions given in the present case did not include the additional language, “If the jury, after careful and impartial consideration of all the evidence, has a reasonable doubt that a defendant was guilty of the charge under consideration, you must find that defendant not guilty of that charge.” The instruction taken as whole in the present case failed to properly define the State’s burden of proof, shifting the burden on Appellant to prove there is a real possibility that she is not guilty.

In State v. McHoney, 344 S.C. 85, 98–99, 544 S.E.2d 30, 36–37 (2001), the South Carolina Supreme Court wrote:

We specifically approved a similar reasonable doubt instruction in State v. Darby, 324 S.C. 114, 477 S.E.2d 710 (1996). As we stated in Darby, “[c]ourts specifically addressing whether the ‘real possibility’ language lessens the government’s burden of proof have held it does not in the context of the preceding language requiring that the juror be ‘firmly convinced’ of the defendant’s guilt.” Id. at 116, 477 S.E.2d at 711 (citations omitted). We also found there is nothing in this language to suggest the defendant bears the burden of proof. Id. Furthermore, the “real possibility” language is found in the proposed jury instruction developed by the Federal Judicial Center, and was cited with approval in Justice Ginsberg’s concurring opinion in Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Id. at n. 1. Finally, we approved the use of the “real possibility” language in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), and the Court of Appeals approved the language in State v. Lowery, 332 S.C. 261, 503 S.E.2d 794 (Ct.App.1998).

Respectfully, this Court should revisit the propriety of the reasonable doubt instruction that includes the “real possibility” language. Judge King criticized the “real possibility” language in his dissent in United States v. Walton, 207 F.3d 694, 704–05 (4th Cir. 2000), writing:

I find such simplicity and clarity to be embodied in the definition of reasonable doubt approved in 1987 by the FJC. This succinct instruction was discussed with approval by Justice Ginsburg in her concurring opinion in Victor. I propose today a slightly modified version of the FJC definition, providing as follows:

The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you are not firmly convinced of his guilt, you must find him not guilty.

The sole distinction between the instruction suggested here and that sponsored by the FJC lies in the last sentence thereof. In its closing sentence, the FJC instruction provides:

If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

I would amend this provision to make its language consistent with the penultimate sentence of the FJC instruction. I am convinced that consistency is the best approach, and I find further support in United States v. Porter, 821 F.2d 968 (4th Cir.1987), where we criticized the “real possibility” aspect of the FJC instruction. In Porter, the district court had charged the jury in accordance with the FJC instruction. On appeal, the defendants challenged the “real possibility” language of the instruction, arguing that it was confusing and improperly shifted the burden

of proof. While concluding that the district court's instructions taken as a whole properly placed the burden of proof on the prosecution, we criticized the “real possibility” terminology, writing that,

Implying the evidence must show a *real possibility* of innocence to justify acquittal trenches on the principle that a defendant is presumed to be innocent.

*Id.* at 973 (emphasis added). Judge Butzner's criticism of the “real possibility” language is persuasive, and I have concluded that the slight modification of the FJC instruction, explained above, would render it of greater assistance to perplexed jurors.

As noted by Judge King in his dissent, the proposed modification of the instruction, omitting the “real possibility” language is discussed in Lawrence M. Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt, 78 Tex. L. Rev. 105, 147 (1999). As noted by the dissent and the law review article, the Supreme Court of New Jersey adopted the following definition of reasonable doubt, omitting the “real possibility” language:

The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is necessary to prove only that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find

him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.

State v. Medina, 147 N.J. 43, 61, 685 A.2d 1242, 1251–52 (1996).

The trial judge in the present case erred by including the “real possibility” language in the reasonable doubt instruction. The instruction taken as whole failed to properly define the State’s burden of proof, shifting the burden on Appellant to prove there is a real possibility that she is not guilty. The error requires reversal.

**CONCLUSION**

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

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 1<sup>st</sup> day of May, 2023.