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**May 31 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM YORK COUNTY  
Court Of General Sessions  
The Honorable William A. McKinnon, Circuit Court Judge

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Appellate Case No. 2023-000565

THE STATE,

Respondent,

v.

MATTHEW JOSEPH HOGAN,

Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUE ON APPEAL

Under Foust, jury instructions are not erroneous if they are substantially correct, sufficiently cover the applicable law, and do not concern facts. Did the trial court err by instructing the Jury that a simple mistake does not mean a witness was not telling the truth?

## **STATEMENT OF THE CASE**

In March of 2023, a York County Grand Jury indicted Appellant Matthew Hogan for twelve counts of criminal sexual conduct with a minor, two counts of third-degree criminal sexual conduct, and one count of incest. He proceeded to a jury trial on March 27, 2023, before the Honorable William A. McKinnon, was convicted as charged and was sentenced to thirty-five years' imprisonment. This direct appeal follows.

## STATEMENT OF FACTS

Victim is Appellant's biological daughter and lived with him in a small home. (Tr. p. 340). Victim and her mother were not close, but they worked together at a restaurant<sup>1</sup>. (Tr. p. 332-3). Appellant assumed most of the household responsibilities. (Tr. p. 209-10). Victim also lived with an older brother who worked long hours as a welder. (Tr. p. 338).

Victim testified that while she was getting ready for work Appellant whistled at her to come to him<sup>2</sup>. (Tr. p. 354-5). Victim stated she responded by telling Appellant it would make her late for work. (Tr. p. 355-6). Victim testified that she went with Appellant to his bedroom where they had vaginal intercourse. (Tr. p. 357). At the time Victim was menstruating and afterwards disposed of her pad. (Tr. p. 357-9). Once at work, Victim told her mother Appellant assaulted her before she got to the restaurant. (Tr. p. 360). Victim also disclosed to her mother that Appellant had been sexually assaulting her for around two years. (Tr. p. 389). Victim's mother called the police and Victim went to the hospital. (Tr. p. 361).

Victim testified the conduct began with Appellant inappropriately touching her, even in public. (Tr. p. 210). Victim stated that when she was around thirteen or fourteen, she was assaulted for the first time. (Tr. p. 211-6). Victim testified that she slept in the same bed as Appellant because she was sick and that he assaulted her in the morning when she awoke. (Tr. p. 211-6). Victim stated that Appellant assaulted her around three to six times per week. (Tr. p. 220). Victim testified that each assault consisted of vaginal intercourse. (Tr. p. 225). Victim testified that she did not remember each specific date or time she was assaulted. (Tr. p. 221). Throughout her testimony, Victim was able to recall specific instances by examining photographs

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<sup>1</sup> Victim testified there were times Mother was not in her life and that she was not at the home often. (Tr. p. 332-3).

<sup>2</sup> Victim testified this was the way Appellant typically would approach her before an assault. (Tr. p. 355)

that were taken during the timeframe. Victim testified that Appellant was not concerned with a possible pregnancy because Appellant had a vasectomy. (Tr. p. 238-9; 289).

At trial a DNA expert testified that semen was present on the pad worn by Victim. (Tr. p. 511). The original DNA test found a mixture of Victim and an unidentified person. (Tr. p. 512). The lab then acquired the ability to use Y-String testing to further analyze the male portion of DNA evidence. (Tr. p. 512-3). The test found a match for Appellants DNA on the pad. (Tr. p. 514). The expert was not able to determine whether the DNA match was from seminal fluid. (Tr. p. 518). The examination found seminal fluids but not spermatozoa<sup>3</sup>. (Tr. p. 509; 521).

At the charge conference, Appellant objected to the proposed charge “about a witness making a simple mistake doesn’t mean they’re not telling the truth.” (Tr. p. 577). The court overruled the objection because it was standard charge language and substantively correct. (Tr. p. 577-8). The court instructed the jury as follows:

However, please keep in mind that a simple mistake does not mean a witness was not telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or unimportant detail.

(Tr. p. 596).

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<sup>3</sup> The doctor that performed Appellant’s vasectomy explained that people who undergo this procedure still produce semen but fail to produce sperm. (Tr. p. 290).

## **STANDARD OF REVIEW**

An appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.").

## ARGUMENT

**Under Foust, jury instructions are not erroneous if they are substantially correct, sufficiently cover the applicable law, and did not concern facts. Did the trial court err by instructing the Jury that a simple mistake does not mean a witness was not telling the truth?**

The trial court properly instructed the jury concerning the credibility of witnesses because the instructions were comprehensive, substantively covered the law, and in no way indicated to the jury should accept Victim's testimony.

### Analysis

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). In its instruction, the trial judge must instruct the jury on the substance of the law but is not required to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). The trial judge may refuse a specific request if the substance of the request is incorporated in the instructions. Burroughs v. Worsham, 352 S.C. 382, 391–92, 574 S.E.2d 215, 220 (Ct. App. 2002) (citing Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986)); Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001). Jury instructions are not erroneous if they are substantially correct, sufficiently cover the applicable law, and do not contain comments on the facts. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996).

The Court of Appeals for the Eleventh Circuit has noted it does not "engage in word-by-word hairsplitting when reviewing jury instructions given at trial, because a trial judge is given wide discretion as to the style and wording employed in the instructions." Johnson v. Breeden, 280 F.3d 1308, 1314 (11th Cir. 2002).

The question of witness' credibility is a matter reserved for the jury. State v. Hughes, 749 N.W.2d 307 (Minn. 2008). As a result, when credibility is a central issue a court may give

instructions pertaining to credibility. 75A Am. Jur. 2d Trial § 1122. Courts may instruct juries to “consider the relationship of the witnesses to the parties, if any is shown, their interest in the result of the suit, their temper, feeling, or bias, if any has been shown, their demeanor on the stand, their means of information, and the reasonableness of the story told by them.” Id.

The Supreme Court of the Virgin Islands specifically considered whether a “simple mistake” charge was proper. Alexander v. Virgin Islands, 60 V.I. 486, 498 (2014). In Alexander, appellant asserted that his motion in limine was improperly denied. As part of its analysis the Alexander Court noted that the jury has the responsibility of determining credibility of a witness not the court. Id. The trial court’s instruction to the jury included “a simple mistake by a witness does not mean that he or she is not telling the truth<sup>4</sup>.” Id. The Alexander Court then noted “the jury was properly instructed on how to rationalize conflicting testimony.” Id.

The instructions at issue aid the jury’s ability to reach a proper verdict. These instructions provide no ambiguity that would give rise to a reasonable mistake as to determining the credibility of a witness. The court instructed the jury that it could accept a witnesses’ testimony in any part or reject it entirely. (Tr. p. 595). The court also instructed the jury to consider whether a witness has an interest in the outcome, whether a witness seemed to have a good memory, the ability of the witness to observe events, and whether the witness’s testimony was consistent with

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<sup>4</sup> The trial court instructed “In deciding the facts, you have to ... decide what testimony to believe. You may believe everything that a witness says, part of it or none of it. ... Of course, a simple mistake by a witness does not mean that he or she is not telling the truth as he or she remembers it since people sometimes hear and see things differently and sometimes forget things. You need to consider whether a contradiction is an innocent lapse of memory or an intentional falsehood and that may depend on whether it has to do with an important fact or only a small detail. If a person is shown to have knowingly testified falsely concerning an important matter, you have the right to distrust the testimony of that witness concerning any other matter. You may accept or reject some or all of the testimony of the witness and give it as much or as little weight as you think it deserves.” Alexander, 60 V.I. 486, 498 (2014).

evidence produced. (Tr. p. 595). The instructions allowed the jury to determine the credibility of the witness' and in no way indicated favorability to any witness.

Further, it is well established that a simple mistake on the part of a witness does not mean the witness is lying. See Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007) (“Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness’s entire testimony, few trials would get all the way to judgment”). This charge contains correct guidance and adequately covers the applicable law.

The instructions enlighten the jury and aid its ability to reach a correct verdict. The trial court did not abuse its discretion as to the style and wording of its instructions. The trial court properly instructed the jury concerning the determination of credibility because the instruction was legally correct, the court has discretion with particular verbiage, and the instructions sufficiently cover the applicable law.

To reverse a criminal conviction on the basis of an erroneous jury instruction, there must be a prejudicial error. State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). Prejudice occurs when an erroneous jury charge affects the jury’s deliberations. State v. Bowers, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022); State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993). When considering whether a flawed jury instruction constitutes harmless error, appellate courts review the charge in its entirety. State v. Burdette, 427 S.C. 490, 498, 832 S.E.2d 575, 580 (2019).

Here, it is unlikely that the charge, taken in its entirety, contributed to the verdict. The instruction challenged was preceded by two paragraphs relating to the believability of witnesses and followed by three paragraphs relating to specifically expert witnesses. While the testimony

of Victim was important, the DNA evidence matching Appellant to Victim's pad coupled with the presence of semen and not spermatozoa was a significant component of the State's case as well. Under such circumstances, the instructions considered in their entirety comprehensively cover the applicable law and any error is not likely to have contributed to the verdict.

This court should affirm.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,


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