

RECEIVED

Jul 03 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP R. LAWSON,

APPELLANT

APPELLATE CASE NO. 2023-001190

INITIAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT..... 4

CONCLUSION.....12

TABLE OF AUTHORITIES

<u>Allen v. United States</u> , 164 U.S. 492 (1896).....	10
<u>Pantovich v. State</u> , 427 S.C. 555, 832 S.E.2d 596 (2019).....	10
<u>State v. Brown</u> , 438 S.C. 146, 881 S.E.2d 771 (Ct. App. 2022).....	3, 9
<u>State v. Burdette</u> , 427 S.C. 490, 832 S.E.2d 575 (2019).....	9
<u>State v. Cheeks</u> , 401 S.C. 322, 737 S.E.2d 480 (2013).....	10
<u>State v. Grant</u> , 275 S.C. 404, 272 S.E.2d 169 (1980).....	10
<u>State v. Hughey</u> , 339 S.C. 439, 529 S.E.2d 721 (2000).....	10
<u>State v. Jennings</u> 394 S.C. 473, 716 S.E.2d 91 (2011).....	10
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490 (2013).....	10
<u>State v. Phillips</u> , 430 S.C. 319, 844 S.E.2d 651 (2020).....	11
<u>State v. Stukes</u> , 416 S.C. 493, 787 S.E.2d 480 (2016).....	8, 9, 10
<u>State v. Taylor</u> , 427 S.C. 208, 829 S.E.2d 723 (Ct. App. 2019).....	10
S.C. Const. Art. V, § 21.....	9

STATEMENT OF ISSUE ON APPEAL

Where this entire sexual abuse case rested on the credibility of the complainants, did the trial court's witness credibility charge, which included explanations excusing "simple mistake[s]" that the witnesses might make, bolster the credibility of the complainants and violate the constitutional provision against charges on the facts and the evidence?

STATEMENT OF THE CASE

Appellant was indicted in York County for six charges related to the sexual abuse of two brothers, both minors. Tr. 132-35. Appellant was charged with one count of first-degree criminal sexual conduct (“CSC”) with a minor, one count of second-degree CSC with a minor, and one count of third-degree CSC with a minor related to Younger Brother. Tr. 132-35. Appellant was charged with one count of second-degree CSC with a minor, and one count of third-degree CSC with a minor related to Older Brother. Tr. 132-35. Appellant was charged with dissemination of obscene material to a minor related to Older Brother. Tr. 132-35.

Appellant was first brought to trial on October 17, 2022, before the Honorable William McKinnon, but Judge McKinnon declared a mistrial because of inadmissible hearsay during the first witness’s testimony. Oct. 17, 2022, Tr. 1, 176-77, 191. Appellant was again brought to trial on July 17, 2023, before Judge McKinnon and a jury. Tr. 1. Jenny Desch and Jessica Russo represented the State. Tr. 1. Melissa Inzerilo represented appellant. Tr. 1. Judge McKinnon directed a verdict of acquittal on the dissemination charge. Tr. 430. The jury acquitted appellant on all charges related to Older Brother, but convicted him on the three charges related to Younger Brother. Tr. 518-19. Judge McKinnon sentenced appellant to life imprisonment for first-degree CSC, twenty years’ imprisonment for second-degree CSC, and fifteen years’ imprisonment for third-degree CSC, to be served concurrently. Tr. 532. R. ___ (sentencing sheets).

STANDARD OF REVIEW

The question of whether a jury charge is an improper charge on the facts is a question of law and should be reviewed *de novo*. Reversal is required if the trial court abused its discretion and the charge as a whole remains prejudicial to the defendant. State v. Brown, 438 S.C. 146, 881 S.E.2d 771 (Ct. App. 2022).

ARGUMENT

Because this entire sexual abuse case rested on the credibility of the complainants, the trial court's witness credibility charge, which included explanations excusing "simple mistake[s]" that the witnesses might make, bolstered the credibility of the complainants and violated the constitutional provision against charges on the facts and the evidence.

After this jury deliberated until almost 8:00PM on the day the trial ended, and again from 9:30AM until 4:55PM the next day, it acquitted appellant of all charges related to Older Brother. Tr. 516-19. It convicted appellant of three sexual abuse crimes related to Younger Brother. Tr. 516-19. Judge McKinnon earlier directed a verdict for appellant on another charge. Tr. 430. In this close case with no physical evidence, the trial court's erroneous jury charge prejudiced appellant and requires a new trial.

Appellant Phillip Lawson ("Lawson"), a former marine, took the stand and denied the State's charges for molesting two brothers who were friends with his own children. Tr. 435-39. Tr. 442. The brothers frequently spent the night at Lawson's house. Tr. 449. Older Brother made friends with Lawson's son on the bus. Tr. 148. Older Brother's sister made friends with Lawson's daughter ("Daughter"). Tr. 148-49. The families became close and even went on vacations together. Tr. 448-49.

Lawson's wife had severe health problems and passed away before the trial. Tr. 150-51. Her health problems were so severe that she had to sleep on a mattress in the family's living room. Tr. 150-51. Older Brother testified that when they spent the night at the Lawsons' small house, they would sleep on a mattress on the floor in Lawson's bedroom. Tr. 152-53. Older Brother said that, like most young boys, he and Lawson's son would "roughhouse during the night and wake people up" and then would be moved to Lawson's room. Tr. 161. Lawson

agreed in his testimony saying that he would keep Younger Brother in his room “to keep him from bothering my wife when she was sick.” Tr. 449.

During pretrial motions, Judge McKinnon ruled that the substance of Younger Brother’s forensic interview was admissible because even though he was over twelve years old when the interview occurred, his cognitive abilities made him much younger. Tr. 104-06. Looking at a report from the school district, the court stated that Younger Brother’s IQ was 63. Tr. 105. R. ___ (Court’s Ex. 4). Older Brother testified that he first noticed improper behavior by Lawson towards Younger Brother when Lawson would assist Younger Brother in the shower. Tr. 155-60.

Older Brother also alleged sexual abuse of both of the boys at the same time in Lawson’s bedroom. Tr. 160-61. Lawson supposedly showed the boys his penis, asked them to touch it, and taught them how to masturbate. Tr. 160-61. Older Brother said he was curious and asked questions about it, which led to Younger Brother’s participation. Tr. 163-64.

The abuse continued and Older Brother claimed Lawson asked the brothers to “do stuff” to each other, but they both refused. Tr. 165. Older Brother alleged that he and Lawson performed oral sex on each other. Tr. 168-69. The abuse stopped when Older Brother was approximately fourteen and Lawson took him to a store to buy lube and condoms. Older Brother, anticipating a request for anal sex, told Lawson they needed to stop. Tr. 169-70.

Older Brother admitted denying any abuse occurred when he was first confronted about it by his parents after Younger Brother claimed Lawson abused him. Tr. 176-77. Tr. 187. Older Brother’s mother “kept asking” him “for a few days” if any abuse happened and he denied it. Tr. 184. He said the only person he told was Lawson’s son. Tr. 186-87.

The solicitor asked Older Brother if Lawson had any identifying marks. Tr. 178-79. Older Brother said Lawson had a scar on his chest and on his left leg, but did not identify any other unusual things. Tr. 178-79. Older Brother was nineteen at the time of his testimony. Tr. 147. Lawson has a ten centimeter mole in his groin “almost the size of a shirt button” that has “been mistaken for a tick ever since” he was a child. Tr. 437-38. Lawson also has a severe bend in his penis when it is erect because of Peyronie’s Disease. Tr. 437-38.

Younger Brother was fifteen at the time of trial and said the Lawsons had been in his family’s life as long as he could remember. Tr. 240-41. Younger Brother said Lawson “raped and molested my brother and me.” Tr. 243. The abuse started in a car after the bus dropped him off from school. Tr. 244. Like Older Brother, Younger Brother described manual and oral sex in Lawson’s bedroom, often when Older Brother was present. Tr. 250-60.

Younger Brother said he told his parents about the alleged abuse when his stepfather confronted him about a change in his attitude. Tr. 262. Younger Brother said he stopped talking to people and “my dad sat me down and said—asked me why my attitude changed.” Tr. 262. Younger Brother described a scar on Lawson’s chest, but did not mention the tick-like mole or the Peyronie’s Disease. Tr. 265-66.

Younger Brother admitted not disclosing any abuse when he was first questioned by the police. Tr. 268-69. Forensic interviewer Dr. Lynn McMillan testified that Younger Brother told her about oral sex. Tr. 303-04. The camera failed to record the first part of her interview with Younger Brother and the trial court excluded the remainder of the video, but allowed the interviewer to testify from her notes about Younger Brother’s claims pursuant to S.C. Code Ann. § 17-23-175(F). Tr. 299-304.

Lawson's daughter testified for the State. Tr. 390-91. She said that Older Brother slept in the living room or with her brother and Younger Brother slept in Lawson's room. Tr. 391. She claimed she confronted her parents about Lawson's behavior with Younger Brother that made her feel uncomfortable. Tr. 391-95. She said once Younger Brother was in Lawson's room with the door locked and sometimes would come out of the bedroom sweaty and flushed, but Lawson said it was because they were wrestling. Tr. 392. Daughter said Lawson told her she was overreacting and she believed him because Lawson had years earlier convinced her that she made up abuse allegations about her brother that caused the children to be taken from the home. Tr. 394-96.

After denying any abuse, Lawson testified that where abuse allegedly occurred in a car was "directly in the middle of all the trailers" in the trailer park. Tr. 437. Lawson said he would pick up the children in the daytime and there was always traffic going to and from the trailers. Tr. 445. The door to his bedroom did not lock. Tr. 449. The State introduced into evidence rags collected from Lawson's bedroom that contained Lawson's sperm, but contained no DNA evidence from either of the brothers. Tr. 333-37. When the solicitor could wring no inculpatory admission from Lawson on cross-examination, she asked him if he told the boys why he used rags. Tr. 453. Lawson told them he used the rags to wipe his nose and to wipe away sweat. Tr. 453-54. The solicitor ceased her cross-examination after these questions. Tr. 454.

At the charge conference, defense counsel stated, "Your Honor, I would also note my objection to the Court's standard charge regarding credibility of witnesses and how they can be mistaken. I believe, Your Honor, does charge that every time and I just object." Tr. 459. Judge McKinnon asked her for specifics and defense counsel noted the portion of the charge that states a simple mistake does not mean a witness is telling the truth. Tr. 459. She argued, "Your Honor,

I think that's more keen in this case because it does come down to ability if they believe the two complaining witnesses or if they believe Mr. Lawson." Tr. 459. The court said the charge was correct and noted the objection. Tr. 459.

Judge McKinnon's charge on "Credibility and believability of the witnesses" spans three paragraphs. Tr. 474-75. The entire charge is set forth below and the objectionable portion is the third paragraph, which is italicized:

Credibility and believability of the witnesses. When I say that you must consider all the evidence, I do not mean you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, how important that testimony was. In making those decisions, you may believe or disbelieve any witness in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

In deciding whether to believe a witness, I suggest you ask yourself a few questions. Did the [witness] impress you as one who is telling the truth? Did they have any particular reason not to tell the truth, or have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Do they have the opportunity and ability to accurately observe the things they testified to? Did the witness appear to understand the questions clearly and answer them directly? If their testimony differs from other witnesses or other evidence.

However, please keep in mind that a simple mistake does not mean a witness wasn't 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 about an unimportant detail.

Tr. 474-75 (emphasis added).

The trial court erred in giving this charge. Charges concerning the believability of witnesses in child sexual abuse cases are particularly problematic because these cases almost always turn into a referendum on whether the jury believes the complaining witness. See State v.

Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). The “simple mistake” language combined with discussing “innocent lapses” versus “intentional deceptions” inured only to the benefit of the children who claimed they were abused, but gave descriptions that changed and evolved over time. The children’s “innocent lapses” were juxtaposed against the alleged child molestor’s “intentional deceptions” about the reasons the children slept in his bedroom, whether his door locked, and the unlikelihood of any abuse taking place in a car in an open area.

“Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. Art. V, § 21. In Stukes, the Supreme Court eliminated the charge that a victim’s testimony in a sexual assault case need not be corroborated. Id. at 498-500, 787 S.E.2d at 482-83. The Court found that charge violated Article 21’s prohibition on courts commenting on the facts to the jury. Id. “By addressing the veracity of a victim’s testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury.” Id. “The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak.” Id.

Our Supreme Court has recently emphasized the importance of not “elevating facts” in jury charges. See State v. Brown, 438 S.C. 146, 151, 881 S.E.2d 771, 774 (Ct. App. 2022) (noting trend in cases). “Recent precedent has directed circuit courts to refrain from giving instructions that guide juries on the inferences they can draw from evidence or that tells the jury to consider particular evidence and how to construe it.” Id.

Brown cites the recent cases paring down jury charges and leaving comments and inferences to lawyers in argument. Id. In State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the Court eliminated the charge that malice can be inferred from a deadly weapon. The Burdette Court frowned on giving juries “examples of conduct the jury may consider when

determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven.” Burdette at 502, 832 S.E.2d at 582. Burdette cited with approval cases eliminating the charge that a defendant’s flight is evidence of guilt, the refusal to charge specific examples of legal provocation, and eliminating a charge on inferences a jury can draw from a defendant’s actual knowledge of the presence of a drug. Id. citing State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) (flight); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (legal provocation); State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013) (drug knowledge). See also Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) (restricting use of good character charge).

The line of cases dealing with improper comments on victim credibility in child sex cases further shows the prejudice of the trial judge’s “simple mistakes” charge. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Jennings 394 S.C. 473, 716 S.E.2d 91 (2011). Kromah and Jennings both dealt with forensic interviewers opining—directly or indirectly—on the credibility of a child witness. These cases, together with Stukes, show the importance of leaving the credibility of the complainant within the province of the jury.

“Because the trial judge is the authority figure in the courtroom, jurors look to the trial judge for guidance not only on the law, but for matters such as courtroom conduct and protocol, even permission for breaks, meals, and telephone calls.” State v. Taylor, 427 S.C. 208, 215-16, 829 S.E.2d 723, 727 (Ct. App. 2019). Taylor, an Allen¹ charge case, emphasizes that jurors “scrutinize the trial judge’s statements and instructions” and that this scrutiny elevates during deliberations. Id.

¹ Allen v. United States, 164 U.S. 492 (1896).

The jury deliberated for a very long time in this case—approximately a day and a half. Tr. 516-19. Even though both Younger Brother and Older Brother testified that they saw Lawson abuse the other brother, the jury only convicted Lawson of abuse related to Younger Brother. Tr. 516-19. Because of Younger Brother’s cognitive difficulties, the “simple mistakes” language improperly excused any mistakes he made. The jury had the Court replay the testimony of both boys during deliberations. Tr. 514-15.

The improper charge helped the State in its closing argument. The solicitor said, “There is no one hour conversation that can distill all the information that these children know into the legally important facts especially when they are just discovering that it’s wrong and it’s inappropriate.” Tr. 486. The solicitor argued that children would not know that Lawson’s misshapen penis was different, but also argued that the complainants, as they got older, would realize that other behavior was wrong. Tr. 494 *compared with* Tr. 486-87. Even though the brothers were fifteen and nineteen when they testified, not being able to describe a scarred, bent penis was implied to be a simple mistake.

The solicitor ended her rebuttal argument by talking about credibility. Tr. 508-09. She said, “Credibility of these witnesses, who you choose to believe is so important and you all have your own experiences to take back there with you and I would urge you to do that.” Tr. 508. She then gave an example about her own inability to recall all of her cases, but that she could recall the few that were most significant. Tr. 508. She said she might pick different cases from one day to the next as her “funniest case” and “that is truthful and honest and it’s not perfect and it never will be.” Tr. 508.

In a case this close, the improper charge is not just a simple mistake that can be excused. The court’s charge let the jury excuse mistakes by the complainants. As the solicitor correctly

argued, the credibility of the witnesses was the most important factor in this case. Lawson's credibility was pitted against his accusers and, but for the improper charge, Lawson would have been acquitted of the charges about Younger Brother just as he was acquitted of the charges about Older Brother.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of July, 2024.

RECEIVED
Jul 03 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP R. LAWSON,

APPELLANT

APPELLATE CASE NO. 2023-001190

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 3rd day of July, 2024.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT