RECEIVED
Sep 30 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.

STACY MICHELLE RABON,

APPELLANT

APPELLATE CASE NO. 2023-001374

INITIAL BRIEF OF APPELLANT

DAVID ALEXANDER
Deputy Chief Attorney for Capital Appeals

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 AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Did the trial judge's erroneous charge on witness credibility that told the jury that "simple mistakes" were not necessarily indicative of deception prejudice appellant by excusing the mistakes made by the police in their flawed investigation of the thirty-year-old death of an infant?

STATEMENT OF THE CASE

On the morning of August 12, 1992, a fisherman found a dead infant in a bag in the Catawba River. Tr. 154-57. Twenty-nine years later, a York County grand jury indicted appellant Stacy Michelle Rabon for murder and homicide by child abuse. R. ___ (Indictments). On August 7, 2023, nearly thirty-one years after the infant was found, appellant was tried before the Honorable William A. McKinnon and a jury. Tr. 1. John Anthony and Leslie Robinson represented the State. Tr. 1. Phil Smith and Deandra Sexton represented appellant. Tr. 1. The jury could not reach a verdict on murder, but convicted appellant of homicide by child abuse. Tr. 731. Judge McKinnon sentenced appellant to life imprisonment. Aug. 23, 2023, Tr. 24-25. This appeal follows.

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

The trial judge's erroneous charge on witness credibility that told the jury that "simple mistakes" were not necessarily indicative of deception prejudiced appellant by excusing the mistakes made by the police in their flawed investigation of the thirty-year-old death of an infant.

Factual and Procedural Background

The 1992 Investigation Goes Nowhere

Over thirty years ago, on the morning of August 12, 1992, a young man fishing in the Catawba River saw a bag sitting on a rock. Tr. 155-56. The fisherman was curious and as he approached, saw the bag was from Sears. Tr. 157. He untied the bag and saw bloody water and sheets inside. Tr. 157. He unraveled the sheets and saw the back of a dead infant. Tr. 157.

The coroner took the baby from the river to the hospital morgue for an autopsy. Tr. 158. Tr. 174-75. Dr. Everett Jenkins, Jr. performed the autopsy that afternoon in 1992 and testified at appellant's trial in 2023. Tr. 420. The infant was still wrapped in garments inside the Sears bag when Dr. Jenkins began the autopsy. Tr. 421. Inside the bag were sheets, towels, a sweater, styrofoam, and a pair of scissors. Tr. 421. Tr. 433. Dark hairs were found on the sheet. Tr. 443. The umbilical cord and placenta were still attached to the female infant. Tr. 421-22. Tr. 436.

Based on the relatively good condition of the body (having been found in a river), the pathologist believed the interval between the infant's birth, death, and being found "was relatively short." Tr. 422. Dr. Jenkins found multiple abrasions, cuts, and stab wounds that he thought were consistent with the scissors found in the bag. Tr. 423. Tr. 426-27. Tr. 432. The infant's lungs were fully inflated which indicated the infant breathed after its birth. Tr. 433. The doctor did not believe the infant was alive when it was placed in the water. Tr. 441.

Dr. Jenkins took blood from the infant's body. Tr. 443. The blood collected was of "fair to poor" quality for testing. Tr. 319. He also collected and preserved samples of the infant's vital organs. Tr. 443-44. The doctor retained custody over the tissue samples at the hospital. Tr. 444-45. Dr. Jenkins agreed that the styrofoam and the hairs would have been preserved at the autopsy for later forensic evaluation. Tr. 451-52. The police collected the styrofoam and hairs from Dr. Jenkins at the autopsy. Tr. 171.

The forensic serologist who worked on the case in the early 1990s was Robin Taylor. Tr. 279-86. Taylor wrote a report from her testing that excluded a suspect. Tr. 326. An officer with the sheriff called Taylor questioning the result because the person excluded was their best suspect. Tr. 326. Taylor ran the test again and changed her report to "inconclusive." Tr. 326-28. A toxicologist found traces of a cocaine metabolite in the infant's blood, but the amount was too small to quantify. Tr. 346-47. A private DNA lab developed a DNA profile of the infant. Tr. 394-95.

The police had no evidence from their investigation in the 1990s that Rabon harmed the child. Tr. 172. The coroner admitted talking to reporters in the 1990s. Tr. 180. He admitted telling the media that the umbilical cord was attached and that they did not believe the infant died from drowning. Tr. 181.

The Limited 2020-2021 Investigation

In 2014, York County opened its own DNA lab. Tr. 352-53. The sheriff began using the lab to reinvestigate cold cases and, in 2016, reviewed the evidence in the infant's death. Tr. 353-54. Crystal Kissel was the technical leader of the lab. Tr. 377. While Kissel said nothing improper occurred with respect to appellant's case, she resigned and sued the sheriff's

department because she was pressured to do things that were outside of her lab's protocols. Tr. 404-05. The sheriff's department settled with Kissel. Tr. 405.

Using better technology than what was available in the 1990s, Kissel generated DNA profiles from some of the items stored in evidence. Tr. 386-98. She examined DNA evidence on the sheet and on the scissors. Tr. 394-98. The major DNA profile on the scissors matched the infant. Tr. 395. Kissel saw commonalities in the infant's profile from the scissors and the blood on the sheet that indicated to her a parent-child relationship. Tr. 396. She also developed a potential DNA profile for the father. Tr. 397-98. These DNA profiles were entered into a DNA database in August 2016. Tr. 397-98.

Based on the entry of the potential mother's DNA profile into the database, Rabon became a suspect in December 2019. Tr. 573-74. In October 2020, the York DNA lab received the tissue samples of the infant collected during the autopsy—called "pathology blocks." Tr. 574-75. The preservation process caused "significant damage" to the DNA. Tr. 575-76. The DNA lab developed a partial profile of the infant from the pathology blocks. Tr. 576. Rabon consented to a DNA swab in the spring of 2021 and the lab developed her DNA profile. Tr. 464. The lab concluded that Rabon was 10,000 times more likely than an unknown, unrelated individual to be the infant's mother. Tr. 586-87.

With the belief that Rabon was their prime suspect in the infant's death, lead investigator Lanelle Day implemented her plan to conduct separate interviews of Rabon and her family at the same time on March 31, 2021. Tr. 471-73. The police interviewed Rabon, Rabon's long-term boyfriend Robbie Outen ("Outen"), Rabon's mother, Rabon's sister, a friend of Rabon's, and Outen's cousin. Tr. 473. Officer Day and another officer, Pete Branham, interviewed Rabon. Tr. 474. Only Rabon's statements were entered into evidence by the State.

Officers Day and Rabon met with Rabon in her small RV behind her mother's house. Tr. 474-75. They met with her again the next day and again on July 21, 2021. Tr. 476. The State entered recordings of these interviews into evidence as State's Ex. 43. Tr. 476-78.

The officers did not tell Rabon about the infant's death until well into the interview. State's Ex. 43. Prior to the revelation of the infant's death, Rabon readily and tearfully admitted having a baby in secret and giving it up for adoption. State's Ex. 43. She could not afford an abortion. State's Ex. 43. Rabon had a transgender friend from work named Jasmine. State's Ex. 43. Rabon confided in Jasmine about her pregnancy. State's Ex. 43.

Jasmine told Rabon she knew a couple in Tega Cay who wanted a baby. State's Ex. 43. Rabon met the couple approximately twice. State's Ex. 43. She believed their names were Steve and Natalie. State's Ex. 43. The father had "some kind of felony" and could not adopt through regular channels. State's Ex. 43. She believed they were prosperous and nice people because they lived in Tega Cay and had a nice car. State's Ex. 43.

Rabon went to Jasmine's house when she thought the baby was coming. State's Ex. 43. The adoptive father came in a work van with another man she had never seen. State's Ex. 43. She got into the back of the van thinking they were going to the hospital, but the adoptive father said if they went to the hospital, there would be too many questions and they would not be able to keep the baby. State's Ex. 43.

Rabon had the baby on the side of the road in the back of the van with the two men. State's Ex. 43. She never looked at the baby. State's Ex. 43. The other man held the baby and the adoptive father drove Rabon back to Jasmine's house. State's Ex. 43. They wrapped the baby in a blanket brought by Rabon. State's Ex. 43. Rabon went home and acted like nothing happened. State's Ex. 43. She never asked about the couple or the baby and lost touch with

Jasmine. State's Ex. 43. Rabon said she kept this secret for twenty-eight years until the police interview. State's Ex. 43. Officer Day showed Rabon a press clipping about the baby's death and Rabon became inconsolable. State's Ex. 43.

The State claimed as its best piece of evidence a portion of Rabon's interview from April 1, 2021. (State's Ex. 43, named "2nd meeting clip"). In this interview, Rabon referenced older media reports and something from the news the night before. (State's Ex. 43, named "2nd meeting clip"). Officer Day said that nothing had been released to the media to the best of her knowledge. (State's Ex. 43, named "2nd meeting clip"). Rabon said someone in her family saw something in the media about a cold case file and said "the baby didn't die from injuries from drowning but from injuries from a weapon that was found in whatever they found the baby with." (State's Ex. 43, named "2nd meeting clip"). Officer Day testified on direct-examination that the police "never made public information that we had recovered those scissors with the baby." Tr. 481. The solicitor emphasized in his closing argument that Rabon must have killed the baby because no news articles said the scissors had been found with the baby. Tr. 670-71.

On cross-examination, defense counsel presented Officer Day with a Xerox playing card and a notation in the file that Crimestoppers had periodically publicized the case. Tr. 509-10. The playing cards were distributed to members of the public and inmates in the Department of Corrections. Tr. 509-10. The playing card said, "The infant was only hours old when she died from injuries sustained after birth but not drowning." Tr. 510. Defense counsel also cross-examined Officer Day about meeting with the real person about whom the television show "NCIS" was based and her involvement in a potential podcast about the case. Tr. 511.

Defense counsel also cross-examined Officer Day about the circumstances involving Rabon's supposed admission to having secret knowledge about the weapon. Tr. 526-29. When

Rabon made the statement, the police heard that it was Outen who told her this. Tr. 526-29. He was standing 100 feet from the RV. Tr. 526-29. Outen had asked the police if something had been published. Tr. 526-29. Outen told the police a friend told him about the news report. Tr. 528. When asked what the friend said when they talked to him, Officer Day replied, "I did not investigate the friend. I did not talk to him. Because we knew we had not released any media." Tr. 528.

Officer Day described the police's efforts to find the adoptive couple and Jasmine which were complicated by the age of the case. Tr. 483-93. The Fort Mill side of the river had changed significantly since 1992. Tr. 483-93. The police "canvassed" that side of the river, talking to people in houses old enough to have existed in 1992. Tr. 483-93. Officer Day looked through yearbooks from Fort Mill for Jasmine. Tr. 483-93. Officer Day also said, "[B]ecause Ms. Rabon had expressed to us that [Jasmine] was sort of a party friend, this was somebody that she knew through that kind of lifestyle and that they liked to go to the clubs in Rock Hill—the straight clubs, the gay clubs—we reached out to Ms. Mangum, who was kind of well known in Rock Hill to be part of the clubbing scene back in the day." Tr. 484-85. "Ms. Mangum" did not remember a "Jasmine." Tr. 485. Officer Day also looked through property records for "Steve and Natalie" and found no leads.[1] Tr. 485-87.

Defense counsel also cross-examined Officer Day about mistakes made with the evidence in the case. Tr. 517-20. The styrofoam found with the infant was missing. Tr. 517-20. A lime green fitted sheet was missing. Tr. 521. Officer Day's chain of custody logs for the pathology blocks contained discrepancies. Tr. 532-35. The box of evidence contained empty envelopes. Tr. 535-36. A cross and note recovered from the cemetery were missing. Tr. 537-39. A

[1] Officer Day's search of the property records might have been in vain if "Steve and Natalie" had thought to give false names to the young girl from whom they were illegally adopting an infant.

PowerPoint the police created with photographs and notes about the evidence was shown to witnesses during their interviews. Tr. 544-48.

The Objection to the Trial Judge's "Simple Mistakes" Charge

During the charge conference, defense counsel objected to the court's charge on witness credibility. Tr. 642-45. Specifically, appellant objected to the paragraph of the charge that told the jury that if a witness makes a simple mistake it does not mean the witness is not telling the truth. Tr. 642-45. Appellant said he could find no cases supporting charging that language and that it was a charge on the facts. Tr. 642.

The trial judge said the charge was correct. Tr. 642-43. Appellant responded by pointing out that Rabon did not testify and the court's charge only exonerated witnesses for their "simple mistakes." Tr. 643. Rabon's statement was admitted and the State would argue that she misstated things and misled investigators, but because she was not a witness the charge would not apply to her. Tr. 643-44. Defense counsel said adding "or the defendant" to the language would improve it, but that even if added, the charge would still be improper. Tr. 644. Judge McKinnon said adding "or the defendant" would make the charge too confusing and told defense counsel he was free to argue that point in closing. Tr. 644-45.

Discussion

In this old case with no direct evidence Rabon harmed her child, Judge McKinnon's erroneous "simple mistakes" charge requires reversal. The jury deliberated nearly nine hours, hung on one charge, and asked multiple questions. Tr. 713-731. The instruction was a charge on the facts that excused the mistakes made in the investigation. S.C. Const. Art. V, § 21. The State accused Rabon of inventing Jasmine, "Steve," and "Natalie," even though the passage of time made defending this case extremely difficult.

Judge McKinnon's improper charge on witness credibility 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 and how important their testimony was. In making those decisions, you may believe or disbelieve any witness in whole or in part. The number of witnesses testifying about a particular point does not 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 was telling the truth? Did they have any particular reason to not tell the truth or have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did they have the opportunity and the ability to accurately observe the things they're testified about? Did the witness appear to understand the question clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?
>
> *However, please keep in mind that a simple mistake by a witness doesn't mean the 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 misstates 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. 657-59 (emphasis added).

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. Art. V, § 21. In State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), 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.

In State v. Brown, 438 S.C. 146, 151, 881 S.E.2d 771, 774 (Ct. App. 2022), this Court noted that our Supreme Court has recently emphasized the importance of not "elevating facts" in jury charges. "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. The Supreme Court vacated this Court's decision in Brown because it found the error harmless, but agreed with this Court that the jury charge improperly elevated the facts in violation of the state constitution. State v. Brown, 443 S.C. 196, 199, 904 S.E.2d 448, 449 (2024).

Like this Court, the Supreme Court's Opinion in 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. A witness making a "simple mistake" is exactly the kind of "example of conduct" condemned in these cases.

Brown also cited State v. Stewart, 433 S.C. 382, 391, 858 S.E.2d 808, 813 (2021) that disapproved of an inference charge about knowledge of possession of drugs. Brown cited State v. Smith, 430 S.C. 226, 230, 845 S.E.2d 495, 496 (2020) that confirmed implied malice charges should not be given when a defendant presents evidence of self-defense. Other cases from this jurisprudential trend cited in Brown are: Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596

(2019) (restricting use of good character charge); State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (preventing comment on a suicide attempt); Stukes; State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013) (drug knowledge); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (legal provocation); and State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) (flight).

"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 Allen[2] charge case, emphasizes that jurors "scrutinize the trial judge's statements and instructions" and that this scrutiny elevates during deliberations. Id.

The State argued first with no rebuttal and preemptively attempted to excuse the simple mistakes made during the investigation. The solicitor excused Officer Day for not reinterviewing witnesses or reviewing evidence from the 1990s. Tr. 676-77. The solicitor excused the police losing evidence that was found not with the baby. Tr. 677-78. The solicitor blamed Rabon for the police's mistakes, citing her unwillingness to ride in a police car. Tr. 679. He said, "So it's a little bit late to come in now, complaining about what the Sheriff's Office didn't do and the imperfections in a 30-year investigation when you aren't willing to take a car ride and help it along." Tr. 679.

The DNA evidence in the case was far from conclusive that Rabon murdered her baby instead of giving it to people who said they wanted to adopt an infant. On a green sheet, Kissel developed three DNA profiles, only one of which was suitable for comparison (Rabon's). Tr. 590-91. On a white sheet, a mixture of three individuals was found. Tr. 592. One was Rabon's

[2] Allen v. United States, 164 U.S. 492 (1896).

and the infant's profile was excluded. Tr. 592-93. An unknown female individual's DNA profile was found. Tr. 593. Two DNA profiles were found on the scissors. Tr. 597-98. One was the infant's. Tr. 597. Rabon was excluded from the scissors. Tr. 597-98, On another cutting from a white sheet, the analyst found the infant's DNA and another contributor, but Rabon was excluded. Tr. 603-04. The DNA evidence shows that Rabon's blood and DNA were on some of the items and was consistent with her giving birth, but notably her DNA was absent from the scissors which the State claimed was the murder weapon. The DNA also showed other people handled the materials found with the baby.

The jury's lengthy deliberation included multiple questions. Tr. 713-31. The jury asked a very specific question about the definition of extreme indifference and intended outcome. Tr. 713. The jury asked how long they would be allowed to deliberate that night. Tr. 726. The jury asked about the sentencing range on the charges. Tr. 728. They asked for the procedure for a hung jury on one charge. Tr. 728. The jury hung on the murder charge and only convicted on the homicide by child abuse charge. Tr. 731.

The closeness of this case requires reversal because the error cannot be harmless. The State's best evidence was that Rabon supposedly knew secret information about the bag containing a weapon. Appellant showed the limited value of this "gotcha" through the multiple contacts by the police with the media and the distribution of a playing card stating that the baby died from injuries and not from drowning. The police never bothered to question the person who told Rabon's boyfriend (who told Rabon) about the supposed secret knowledge. The DNA evidence proved Rabon gave birth, but did not disprove her story. And the fact that a "Ms. Mangum" who was a supposed expert on the Rock Hill party scene in the early 1990s could not

recall Jasmine certainly does not make the erroneous charge harmless. This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.

David Alexander
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

This 30th day of September, 2024.