STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GABRIEL JON RIOS,

APPELLANT

APPELLATE CASE NO. 2013-000493

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT IN REPLY

The trial judge erred in refusing to charge the jury with the law on alibi when Appellant presented alibi evidence at trial.

Appellant presented alibi evidence at trial. As noted in the initial brief of Respondent, "Though the only evidence proffered by the Defendant on the alibi defense is an alleged phone call placed from a residential phone to his wife's cell phone, the trial court nevertheless allowed Rios to argue alibi in closing." (Initial Brief of Respondent, p. 10).(footnote omitted). Respondent attempts to minimize the alibi evidence, an issue for the jury to decide, but admits that there was evidence of alibi presented. Alibi and self defense are treated in the same manner such that if there is any evidence in the record from which it could reasonably be inferred that the defendant was asserting an alibi defense, the defendant is entitled to instruction on the defense and the refusal to charge alibi constitutes reversible error. See State v. Smalls, 98 S.C. 297, 82 S.E.421 (1914); State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 609 (Ct.App. 2012) (If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense). If there was no evidence of alibi presented, the judge would have correctly prohibited counsel from arguing alibi during closing argument. The judge in the present case, however, allowed counsel to argue alibi in closing argument because there was evidence of alibi presented at trial. The judge erred in refusing to instruct the jury on the law of alibi.

Respondent argues that Appellant was not entitled to an alibi instruction because the alibi defense presented was incomplete. (Initial Brief of Respondent p. 6). The Respondent, however, ignores State's witness Marie Ollinger who testified that she saw a

stranger walking in the neighborhood near the Holts' house close to 7:30 AM. (Tr. pp. 162-168). The State offered this testimony in an attempt to establish that Appellant was the stranger seen by the neighbor. It would have been impossible, however, for Appellant to have been the stranger the neighbor saw close to 7:30 AM as he was making a phone call at 7:25 AM and was 16 minutes away. While Mrs. Holt testified that the crime took place between 7:30 and 8:00, the stranger seen by the neighbor at 7:30 and implied as the assailant by the State could not have been Appellant. The Appellant presented complete alibi evidence. The trial judge erred in refusing to instruct the jury on the law of alibi when there was evidence presented of alibi.

The Respondent, relying on Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013), argues in issue two in the brief that "Rios [Appellant] suffered no prejudice from the trial court not instructing the Jury on the Alibi Defense in light of Rios' closing argument and the entirety of the Jury instruction." (Initial Brief of Respondent, p. 9). Respondent's reliance on Gibbs is misplaced as that case involved ineffective assistance of counsel raised during post conviction relief. The present case involves trial court error raised on direct appeal. The Gibbs case and the present case are in different procedural postures with different standards of review. In Gibbs the South Carolina Supreme Court, applying the Strickland analysis found that counsel was ineffective in not requesting a jury instruction on the law of alibi but found no prejudice writing, "Given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt, the PCR court's finding of no prejudice must be sustained under the any evidence standard of review." Gibbs, 403 S.C. at 496, 744 S.E.2d at 176. The Strickland analysis is inapplicable in the present case.

Additionally neither the judge's charge nor the closing argument correct the impression that may have been given by the State in closing argument that Appellant had the burden of proving alibi. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1994). In closing the State reminded the jury that one of the alibi witnesses, Appellant's wife, had been convicted of giving false information to the police. (Tr. p. 322, lines 8-15). The State further argued in closing, "He's had over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No One said they were with him that morning. Nobody, nobody that testified for him accounted for his whereabouts. Nobody." (Tr. p. 322, line 24 – p. 323, lines 1-3). The alibi charge was necessary to correct any impression that Appellant bore any burden of proof at trial. The trial judge erred in refusing to charge the jury with the law on alibi.

In issue three Respondent argues, "Rios [Appellant] was not prejudiced by the trial court's failure to instruct on the alibi defense because there is not a reasonable probability that the outcome would have changed." (Initial Brief of Respondent, p.12). As discussed above, the Strickland analysis is inapplicable in the present case. Respondent then argues that any error in refusing to instruct the jury in the law of alibi is harmless because the State presented overwhelming evidence of guilt. First, a harmless error analysis in the context of failure to charge alibi when there is any evidence of alibi is not applicable in the same way a harmless error analysis is not applicable in the context of a failure to charge self defense when there is any evidence of self defense. In State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 609 (Ct.App. 2012), the South Carolina Court of Appeals wrote, "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is

entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error. State v. Day, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000)."

As noted by the dissent in Gibbs, "An alibi charge is required where the defendant claims to be elsewhere at the time the crime was committed. State v. Robbins, 275 S.C. 373, 374–75, 271 S.E.2d 319, 319–20 (1980). Generally, the failure to give an alibi charge under these circumstances constitutes reversible error. Id. However, if the State presents overwhelming evidence of a defendant's guilt at trial, then there is no reasonable probability that the result of the trial would have been different had trial counsel requested an alibi charge, and reversible error is not present. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994)." 403 S.C. at 496, 744 S.E.2d at 176." While overwhelming evidence of guilt may be sufficient to overcome the prejudice requirement in post conviction relief cases like Gibbs and Ford, the harmless error analysis is inapplicable in the context of trial court error in the refusal to charge alibi and challenged on direct appeal.

Second, without conceding that a harmless error applies, the State did not present overwhelming evidence of guilt. The State's case at trial was based on the testimony of Gale Holt and a fingerprint found on a piece of broken glass found at the scene. If a showing of prejudice is required, prejudice is demonstrated, as discussed above, by the failure to instruct the jury on the law of alibi combined with the State's closing argument that left the impression that Appellant had the burden to prove alibi. (Tr. p. 322, line 24 – p. 323, lines 1-3); See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1994).

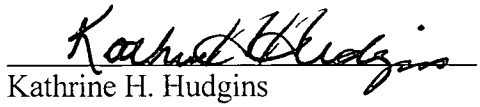
In State v. Williams 400 S.C. 308, 314, 733 S.E.2d 605, 608 – 609 (Ct. App.2012), the South Carolina Court of Appeals wrote, "The law to be charged must be

determined from the evidence presented at trial.' State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (internal citations omitted); see also Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (stating appellate courts should 'consider the court's jury charge as a whole in light of the evidence and issues presented at trial')." When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. Cole, 338 S.C. at 101, 525 S.E.2d at 512–13. Viewing the evidence in the light most favorable to Appellant, there was evidence of alibi requiring the judge to instruct the jury on the law of alibi. The failure to instruct the jury on the law of alibi requires reversal.

CONCLUSION

Based on the above argument and the arguments presented in the initial brief, this Court should reverse the sentence and conviction and remand for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

This 14th day of April, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of April, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 14th day of April, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.