ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V

GREGORY D DANIELS,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Should the jury have been instructed that they were acting "for the community" and that their verdict would represent truth and justice for the parties?

STATEMENT OF THE CASE

On April 2, 2009, Appellant was indicted by the Florence County Grand Jury for the offenses of Murder and possession of a firearm during the commission of a violent offense On April 12, 2010, Appellant was called to trial before the Honorable Thomas Russo and a jury R 1 Appellant was represented by Jack Lawson and Grayson Smith The State was represented by John Jepertinger and Steven Deberry

The jury found Appellant guilty on both charges R 547, l 19 – R 548, l 4 Appellant was sentenced to life R 555, ll 3-10

ARGUMENT

The jury should not have been instructed that they were acting "for the community" and that their verdict would represent truth and justice for the parties

Introduction

"[T]here is *no* physical evidence linking [Appellant] to this crime, *no* eyewitnesses", said Deputy Solicitor John Jepertinger during the State's opening argument R 12, ll 21-22 In fact, outside of an alleged confession made to a snitch looking for a federal sentence reduction, there was no direct or substantial circumstantial evidence[1] presented showing that Appellant committed the murder The majority of the State's evidence was presented to show suspicious behavior or a possible motive However, the evidence of motive was so weak that the State had to present at least two completely different theories of why Appellant might have committed the offense

In the midst of this trial that was plagued by the State's vacuous lack of proof, the trial court instructed the jurors that they are "acting for the community" and that their verdict "will represent *truth and justice for all parties* that are involved " This charge demanded that the jurors to do more than merely weigh the evidence, but required them to seek justice in the interest of the community In doing so, this charge also diluted the reasonable doubt standard

Relevant Facts

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[1] *But for* a few lines in the transcript from the least credible witness called, this trial might have ended in a directed verdict *Cf State v Bostick*, 392 S C 134, 142, 708 S E 2d 774, 778 (2011) ("The evidence presented by the State raised, at most, a mere suspicion that

On September 4, 2005 Appellant attended a cookout with some fifty to a hundred other people in North Florence The party goers consisted of people from the rival neighborhoods of Woodmont and North Florence R 172, ll 6-25

The decedent was also at the cook out At the cookout there was a dispute between the decedent and Bernard Cooper Appellant was trying to fuel this dispute by talking about the decedent to Cooper R 177, ll 2-16 At some point, Appellant and the decedent allegedly got into a verbal argument Appellant allegedly asked the decedent to come down the street to presumably fight him R 103, ll 4-5 The decedent declined, and later Appellant left the party However around 3 30 a m the next morning, Appellant was allegedly seen walking around the neighborhood Appellant was wearing dark clothing R 104, ll 3-4

Around 5 a m that morning the decedent was walking to meet up with his girlfriend The decedent was on the phone with Shovonne Gass Right before his death the decedent told Gass "That n**** I was arguing with at the cookout is behind me you want to talk to him" R 194, ll 4-5 Appellant was killed by a gunshot wound to the back of the head Around the time of the gunshot his girlfriend claims to have seen a man dressed in dark clothing running from the scene R 29, ll 3-10 Appellant was arrested for the murder of decedent

Three months prior to trial, Andre Bradley, an acquaintance of Appellant was facing federal drug charges Bradley decided to give a proffered statement to the United States Attorney In that Statement Bradley Claimed that Appellant had been paid to kill the

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Bostick committed this crime Under settled principles, the trial court should grant a directed verdict motion when the evidence merely raises a suspicion of guilty")

decedent by Gary Bostic R 354, ll 2-7 Bradley agreed to testify against Appellant in hopes of receiving a sentencing reduction R 343, ll 2-6

At trial, the State presented differing versions of the alleged argument between decedent and Appellant The State presented different theories concerning Appellant's motive to kill the decedent He either had an argument at the cook out which escalated into the killing or Appellant was paid to kill him The State's key evidence were letters that Appellant had written to his girlfriend In these letters Appellant rightly informs her that the court can not convict him without "substantial" evidence against him R 507, ll 2-3

Prior to closing arguments, the trial court held a charge conference During this conference Appellant was able to review the trial court's proposed jury instructions Citing to *Cage v Louisiana*[2], Appellant objected to the proposed charge to the jury that everyone is entitled to justice because it shifted the burden from the State R 469, ll 5-12, R 470, ll 3-17 In overruling Appellant's objection, the trial court announced that he intended to instruct the jury that "everyone is entitled to justice " R 469, ll 20-24, R 470, l 18 – R 471, l 6 Appellant also argued that instructing the jury to act "for the community" to return a just verdict essentially was a "golden rule violation " R 467, l 21 – R 468, l 7, R 472, ll 8-12 The trial court overruled Appellant's "golden rule" objection R 473, ll 2-8

During his charge on the law, the trial court instructed the jury, "You are acting for the community and that is why we must see to it that this trial is fair and that the verdict is just " R 538, ll 14-17 The jury was also instructed, "this court is of the confirmed opinion that whatever verdict you reach will represent *truth and justice for all parties involved* in

this case " R 539, ll 15-18 When the trial court finished his charge, Appellant did not raise any objections "other than what was [previously] discussed " R 541, ll 16-18

Burden Shifting Discussion

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt '" *Cage*, 498 U S at 39, 111 S Ct at 329 (*citing In re Winship*, 397 U S 358, 364, 90 S Ct 1068, 1073 (1970)) A jury's job is to weigh the evidence and determine if the State has proven its case beyond a reasonable doubt Courts should not impute truth or justice to a verdict because it is essentially asking the jury to make their decision on something other than the reasonable doubt standard *Cf State v Aleksey* 343 S C 20, 26-27, 538 S E 2d 248, 251 (2000) ("Jury instructions on reasonable doubt which charged the jury to seek the truth are disfavored because they run the risk of unconstitutionally shifting the burden of proof to the defendant") "A jury's job is *not* to solve a case It is *not*, as the State claims, to declare what happened on the day in question Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt " *State v Anderson*, 153 Was, App 417, 429, 220 P 3d 1273, 1280 (Wash Ct App 2009) (emphasis added) (internal citations omitted) [3]

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[2] *Cage v Louisiana*, 498 U S 39, 111 S Ct 328 (1990) (the test used in *Cage* was later disapproved of in footnote four of *Estelle v McGuire*, 502 U S 62, 73, 112 S Ct 475, 482 (1991))

[3] In *Anderson*, the Washington Court of Appeals found that the prosecutions demands to "declare the truth" were improper However, that court found the prosecutions comments about justice were not error because "they were clearly made in the context of jury instructions that explained what 'justice' would be in this case " *See Anderson*, 153 Wash App at 429, 220 P 3d at 1280

When the trial court told the jury that in his "*confirmed* opinion" their verdict would "represent *truth and justice* for all parties," the jury *likely* interpreted their job as to return a verdict that represented the *truth* of what happened and *justice* for the decedent *Cf Aleksey*, 343 S C at 28, 538 S E 2d at 252 ("As an abstract concept, seeking the truth suggests the jury determine whose versions of events is more likely true, the government's or defendant's, and thereby intimates a preponderance of the evidence standard") In actuality, truth and justice have little to do with a juror's inquiry in a criminal case *See Anderson, supra*

Due to the extremely weak case that the State presented, Appellant was prejudiced by this burden shifting language In its opening argument, the State admitted that, "there is *no* physical evidence linking [Appellant] to this crime, *no* eyewitnesses " R 12, ll 21-22 The State had little evidence of Appellant's guilt therefore any shift in the burden of proof would have been prejudicial Additionally, Appellant was prejudiced by this language by the many comments made by the Solicitor during closing arguments that expressed personal views concerning the sufficiency of the State's evidence[4] R 504, ll 12-13, R 505, ll 11-19, R 510, ll 10-13, R, 511, l 2 Essentially, the Solicitor was personally endorsing the position that the State had met its burden Furthermore, the Solicitor echoed the burden shifting charges in the State's closing argument, and even commanded the jury to "give a true verdict in this case " R 505, ll 18-22, R 510, ll 10-13

"Golden Rule" Discussion

[4] These comments were not objected to at trial but might later give rise to an ineffective assistance of counsel claim *See State v Northcutt*, 372 S C 207, 222-223, 641 S E 2d 873, 881 (2007) (*holding* Northcutt should be granted a new sentencing hearing based on the Solicitor interjecting personal opinions)

It is improper for the court to suggest that the jurors "stand in the shoes" of a party because "it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest rather than evidence " *Cf State v Brown*, 383 S C 506, 516, 680 S E 2d 909, 915 (2009) (*citing State v Reese*, 359 S C 260, 271, 597 S E 2d 169, 175 (Ct App 2004) A juror should not convict a criminal defendant "in order to protect community values, preserve civil order, or deter future lawbreaking " *See State v Liberte*, 336 S C 648, 654, 521 S E 2d 744, 747 (Ct App 1999) (*commenting* "The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear")

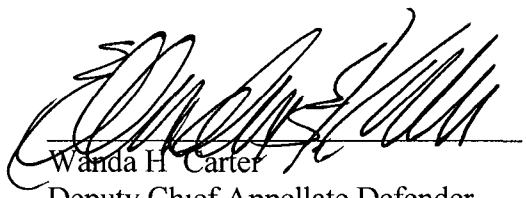
When the trial court told the jury that they were acting "for the community" and must seek a just verdict, the court was essentially asking them to stand in the shoes of the State whose job is to seek justice *See Northcutt*, 372 S C at 222, 641 S E 2d at 881 ("While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done") Therefore this charge was a golden rule violation because it asked the jury to act for the community in seeking justice rather than to determine if the State has met its burden of proof

In sum, justice, truth, or a duty to act for the community are not valid considerations for a jury in a non-capital case The jury's sole purpose was to examine the State's evidence, weigh credibility, and decide if the State has proven its case beyond a reasonable doubt In this case the trial court's instruction asked the jury to do more Therefore this Court should reverse the trial court and Appellant a new trial

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this court grant him a new trial

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of January, 2012

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings"

January 30th, 2012

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendan J McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of January, 2012

Wanda H Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of January, 2012

(L S)
Notary Public for South Carolina

My Commission Expires October 2, 2013