 ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MELVIN P. STUKES,

APPELLANT

APPELLATE CASE NO. 2012-212628

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2015-UP-014

PETITION FOR REHEARING

RECEIVED
JAN 29 2015
SC Court of Appeals

Pursuant to Rule 221(a), SCACR, counsel for Melvin P. Stukes petitions the Court for rehearing. Counsel respectfully submits that this Court overlooked the fact that based on the particular facts of this case, the jury charge as a whole failed to comport with the law. The jury found Petitioner guilty of criminal sexual conduct first degree and burglary first degree. The defense was consent. The judge instructed the jury, over objection, that pursuant to S.C. Code §16-3-657 the testimony of the victim does not need to be corroborated. The jury was confused by the instruction and asked if the no corroboration

rule implied that the victim's testimony must be accepted as being true. Instead of instructing the jury that the no corroboration rule does **not** imply that the witness/victim's testimony must be accepted as true, the judge simply re-charged the jury with the general credibility of witness instruction.

In this case, involving the defense of consent where credibility of the witness/victim was a critical factor for determination by the jury, the no corroboration jury instruction is confusing, places undue emphasis on the testimony of the prosecuting witness/victim creates an improper implication that the jury must accept the prosecuting witness/victim's testimony as true and constitutes an improper comment on the facts. The trial judge erred in giving the no corroboration jury instruction. The error was compounded by the trial judge's failure, in response to the jury's question of whether they had to accept the victim's testimony as true, to instruct the jury that the statute does **not** require them to accept the victim's testimony as being true. The judge also failed to clarify for the jury that the prosecuting witness, or victim as referenced in the statute, is a witness for purposes of determining credibility. Viewing the charge as a whole, including the improper response to the jury's question, the charge fails to comport with the law. Petitioner respectfully seeks rehearing.

Prior to trial Petitioner moved to prevent any reference to S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated. (R. p. 74, lines 7-16). Appellant submitted a written motion and memorandum in support of the motion, marked as Court's Exhibit #1. (R. p. 75, lines 8-9; Court's Exhibit #1, R. p. 654). The judge withheld ruling on the motion until the close of the case but before the charge to the jury. (R. p. 74, line 22 – 75, lines 1-6).

At the close of the case but before the charge to the jury, Appellant objected to any mention of S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated. (R. p. 544, line 11 – p. 545, 546, 547; pp. 549-552). Appellant argued that the State should be barred from mentioning the law in closing argument. (R. p. 547, lines 10-11). In the alternative, Appellant objected to the judge charging the jury with the law and argued that the standard charge on credibility of the witnesses was sufficient. (R. p. 547, lines 11-19). Appellant specifically argued that constituted an impermissible comment on the facts by the judge. (R. p. 545, lines 1-3). Additionally, Appellant argued that the charge improperly bolstered the testimony of the prosecuting witness. (R. p. 546, line 10 – p. 547, lines 1-7). The judge overruled Appellant’s objection to charging the jury with S.C. Code §16-3-657, citing State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct.App. 2011). (R. p. 550, line 18 – p. 551, 552, lines 2-4).

In closing argument the State referenced the statute arguing:

The judge is also going to tell you about the law in this State, 16-3-657 of the South Carolina Code of Laws, and that statute says that the testimony of a victim does not need to be corroborated in a criminal sexual conduct case. That is the law in this state, and what that means in simple terms, if the victim says that she was raped, there doesn’t have to be other evidence for you, if you believe her, to find a man guilty of the CSC. It doesn’t have to be corroborated. It can be her word versus his and if you take her word, that’s all it takes.

(R. p. 581, line 24 – p. 582, lines 1-8).

In charging the jury the judge stated, “The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence. Necessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.”

(R. p. 604, lines 4-10). The judge went on to give the general credibility of witnesses charge. (R. p. 604, lines 11-22). Appellant renewed the objection to charging §16-3-657. (R. p. 616, lines 17-20). The State made no objection to the jury charge. (R. p. 616, line 16).

During deliberations the jury asked for a re-charge on the law of criminal sexual conduct. (R. p. 619, lines 22-24; Court's Exhibit #5, R. p. 703). The jury also asked for a definition of aggravated battery. (R. p. 630, lines 4-7; Court's Exhibit 6, R. p. 704). The jury requested to see the defendant's transcript testimony and asked, "The South Carolina that the victim—the South Carolina law that the victim's testimony in CSC – CSE does not have to be corroborated, does the victim – does that law imply that the victim's testimony must be accepted as being true?" (R. p. 637, lines 1-13; Court's Exhibit #7, R. p. 705; Court's Exhibit #8, R. p. 706). The judge replayed Petitioner's testimony and then instructed the jury:

Ladies and gentlemen of the jury, you must determine the credibility of all witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.

In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses, or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the witness in its entirety, or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motives in this case. You may also consider the appearance and manner of a witness while on the witness stand.

(R. p. 640, lines 1-16). The jury then returned with verdicts of guilty.

Appellant renewed the objection to charging the jury with S.C. Code §16-3-657. (R. pp. 645 – 648). Again, Appellant argued that the charge was an improper comment

on the facts and improperly bolstered the testimony of the prosecuting witness. (R. p. 646, lines 6-11). The judge noted that in response to the jury's question about accepting the victim's testimony as true, she informed the jury that they must determine the credibility of **all witnesses**. (R. p. 648, line 15 – p. 649, lines 1-6). The judge, however, did not tell the jury that the statute does **not** require them to accept the **victim's** testimony as being true. Despite the trial judge's efforts with inclusion of the word "all", the answer to the jury's question was confusing and misleading and failed to clarify that the prosecuting witness, or victim as referenced in the statute, is a witness for purposes of determining credibility. As evidenced by the jury's question, instructing the jury that the victim's testimony need not be corroborated confused the jury, improperly bolstered the testimony of the prosecuting witness and constituted an improper comment on the facts of the case.

This Court affirmed writing:

Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."); State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006) ("A trial [court] is not required to charge [section 16-3-657 of the South Carolina Code (2003)], but when the [trial court] chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law."); State v. Hill, 394 S.C. 280, 297-300, 715 S.E.2d 368, 378-79 (Ct. App. 2011) (holding it was not reversible error for the trial court to give the "no corroboration" jury instruction from section 16-3-657 when the instruction was not unduly emphasized and the jury charge as a whole comported with the law).

State v. Stukes, Op. No. 2015-UP-014 (S.C.Ct.App. Filed January 14, 2015).

The present case is distinguished from Rayfield and Hill because the jury's question demonstrates that, despite the charge "as a whole" the jury was still confused when instructed that the victim's testimony need not be corroborated. The jury in the present case asked if S.C. Code §16-3-657 implied that the victim's testimony must be accepted as being true, a clearly erroneous implication. The judge's attempt to answer the jury's question further confused the jury because the judge failed to instruct the jury that the statute does **not** require them to accept the victim's testimony as being true and failed to clarify that the prosecuting witness, or victim as referenced in the statute, is a witness for purposes of determining credibility. The jury's question demonstrates the point made in the dissent in Rayfield that instructing the jury that the victim's testimony need not be corroborated " . . . has the potential for creating more problems than solutions, for it might cause confusion when read with the general charge on witness credibility." Id. 369 S.C. at 120, 631 S.E.2d at 251, (citing State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980)).

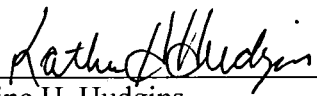
As noted by the dissent in Rayfield:

Although section 16-3-657 contains current and correct law, it is not a proper subject of a jury charge. Section 16-3-657 prevents courts, either on a dispositive motion at the trial level or on appellate review, from finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is uncorroborated. *See* James Cranston Gray, Jr., *Criminal Law—Rape Reform in South Carolina*, 30 S.C. L.Rev. 45, 55-60 (1979) (discussing the no-corroboration rule as governing judicial review of the sufficiency of the evidence); *cf. Ludy v. State*, 784 N.E.2d 459, 463 (Ind.2003) (holding that the no-corroboration rule is a legal standard for a court reviewing a conviction).

State v. Rayfield, 369 S.C. 106, 119-20, 631 S.E.2d 244, 251 (2006). The trial court erred in instructing the jury that the testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence. The judge's

failure, when specifically asked, to instruct the jury that the statute does **not** require them to accept the victim's testimony as being true rendered the whole charge improper. Based on the above argument Petitioner seeks rehearing and asks this Court to reverse the conviction based on the improper jury charge and remand the case for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

This 29th day of January, 2015.

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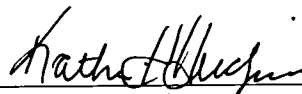
MELVIN P. STUKES,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mary S. Williams, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 29th day of January, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day
of January, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.