ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

RECEIVED
MAY 13 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JACOB HEYWARD SEAY,

APPELLANT

APPELLATE CASE NO. 2014-001024

FINAL BRIEF OF APPELLANT

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II.

Did the trial court commit reversible error by instructing the jury to review the direct and circumstantial evidence charges and the charge on probable cause, this response exceeded the scope of the question from the jury asking, "if we have to make an assumption on the facts given does that constitute reasonable doubt," thus invading the province of jury as the sole judge of the facts?

STATEMENT OF THE CASE

On June 3, 2013, the Lexington County Grand Jury indicted Appellant, Jacob Heyward Seay, for one count of burglary first degree. R. 483.

On May 5, 2014 Appellant proceeded to trial before the Honorable Thomas Russo and a jury. R. 1. Theo Williams represented Appellant, and Assistant Solicitors Robert Elam and Gill Bell represented the State.

The jury found Appellant guilty as charged. R. 451, ll. 12-24. The trial court sentenced Appellant to fifteen years imprisonment. R. 480, ll. 3-9.

This appeal follows.

STATEMENT OF FACTS

On August 29, 2011, Dianna Owens returned home after work and noticed that her child's computer was missing. R. 61, ll. 6-18. Owens soon discovered what appeared to be blood stains on several of the walls in her house. R. 60, ll. 22 – R. 61, ll. 3. Owens then noticed a broken window above the kitchen sink and called the police. R. 61, ll. 6-12. Lexington County Deputies arrived shortly thereafter and took latent prints from the broken window and shattered glass. R. 62, ll. 12-19. None of the blood stains were tested for DNA. R. 69, ll. 21-25. No other part of the house was dusted for prints. R. 85, ll. 5 – R. 86, ll. 12. There were no witnesses to the alleged burglary. The stolen laptop was never recovered.

The Sheriff's Deputies were able to lift nine prints from the broken window and glass shards. R. 409, ll. 16-24. Of those nine five were usable for identification and run through the AFIS fingerprint comparison system. R. 410, ll. 5-14. Appellant was identified as the most likely match for the prints. R. 355, ll. 12-14. After being interviewed by law enforcement and denying ever having been in Owens' residence, Appellant was arrested and charged with first degree burglary.[1]

Trial

At Appellant's trial, Owens and the investigating officers testified. The State also called the SLED's AFIS system custodian and Wilbur Duane Johnson, a retired FBI fingerprint analyst working part time for the Lexington County Sheriff's Department. During the investigation, Johnson did a manual comparison of the prints found at the residence and Appellant's fingerprints. R. 299, ll. 11-24. Appellant did not testify.

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[1] Appellant has two prior burglary or house breaking convictions which were sentenced under the youthful offender act and made his charge eligible for first degree burglary enhancement under S.C. Code Ann. § 16-11-311(A)(2) (1985).

Jury Charge

The defense rested without presenting any evidence. R. 391, ll. 10-11. The trial court then charged the jury in the case. *Id.* at ll. 12. Reasonable doubt was explained as "proof that leaves you firmly convinced of the defendant's guilt." R. 395, ll. 10-11. The trial court then stated that if the juror's thought there was a "real possibility that the defendant is not guilty, you must give the defendant the benefit of that doubt and find him not guilty." *Id.* at 18-21.

The court also explained the difference between direct and circumstantial evidence. Circumstantial evidence was described as "proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred." R. 397, ll. 16-22. The trial court explained that the law does not distinguish between these two kinds of evidence and that the jury decides the value and weight of any evidence presented at trial. R. 393, ll. 2-10. The remainder of the charge addressed the credibility of witness testimony, the role of expert witnesses, and the elements of first degree burglary. R. 398, ll. 17 – R. 405, ll. 4.

Questions from the Jury during Deliberations

Almost immediately after beginning deliberations, the jury sent the trial court a note requesting clarification on two issues. First, the jury asked "if ***we have to make an assumption*** on the facts that were given, does that constitute reasonable doubt?"[2] R. 434, ll. 3-5 (*emphasis added*). The second question was abbreviated, but by consent of the parties was held to be asking for the definition of burglary first. R. 436, ll. 1-19. The trial court initially decided to simply refer the jury to the section of his charge on reasonable doubt. R. 434, ll. 5-15.

[2] The jury's question sheet was entered into the trial record as Court's Exhibit No. 4, and is on file with this Court.

The State then requested the judge also reference his charge on direct and circumstantial evidence. R. 435, ll. 4-7. The defense objected, arguing, "Your honor, I'm concerned about the use of the juror's word assumption. And I'd be content with a charge referring them to reasonable doubt issue because that's what they're referring to is how they make decisions." *Id.* at ll. 8-13. Defense counsel continued, "[the jury] doesn't question whether something is direct or whether or not it's something that is circumstantial. So they've got those matters at least resolved in their head. I think a comment on that would be going further than what they've asked." *Id.* at ll. 16-23. The State countered in a discussion with the trial court:

> Solicitor: I think as it pertains to the issue of assumption and exactly what they mean, I think under circumstantial evidence your charge does point out that circumstantial evidence is proof of a chain of facts which indicate the existence of a fact. It goes on to say that it may establish collateral facts from which the main fact may be inferred, that's why I think that's irrelevant.
>
> Trial Court: And then it specifically states circumstantial evidence is based on inference and not on actual personal knowledge.
>
> Solicitor: And that's only why I'd request if you do point them to reasonable doubt, you also point them to review the definitions of types of evidence.

R. 437, ll. 3-17.

The trial court then summarized the problem of addressing the first question: "It's like if [the jurors are asking if they] have to make assumptions on the facts that were given, does that constitute reasonable doubt? " *Id.* at ll. 21-25. The Court then noted, "If we have to make an assumption on the facts that were given, does that constitute reasonable doubt? Now, as we discussed, the short answer is no; the lengthy answer is, well, tell me what it is you need to assume, da, da, da, and all of that, which is improper." R. 440, ll. 21 – R. 441, ll. 1.

The trial judge then decided to direct the jury to the portion of his charge on reasonable doubt and to the section on direct and circumstantial evidence. R. 438, ll. 24 – R. 439, ll. 5. Defense

counsel then reiterated his objection that the response went beyond what was asked. *Id.* at ll. 16-17. The trial court overruled the objection and sent its answer to the jury. R. 443, ll. 1-2.

Allen Charge

After deliberating for over two hours, the jury informed the trial court that they were deadlocked. *Id.* at ll. 6-14. Defense counsel conceded that an *Allen* charge was appropriate in the situation, but objected to the charge as prejudicial to the defense. R. 443, ll. 17 – R. 444, ll. 2. Once the jury entered the court room, the judge gave an *Allen* charge that mostly conformed with the model charge drafted by Court Administration. R. 444, ll. 9 – R. 447, ll. 8. The trial court's version of the *Allen* charge utilized the standard language concerning the impact of a mistrial:

> If you do not agree on a verdict in this case, then I must declare a mistrial. In that case, it does not mean that anybody wins. It simply means this: That at some point in the future, I will try this case with some other jury sitting right where you're sitting right now, the same participants will come and same lawyers will ask basically the same questions and get basically the same answers. And we'll go through this whole process again.

R. 445, ll. 23 – R. 446, ll. 7. However, the trial court departed from the standard language at the conclusion: "I'm going to ask you, if you would, to return to your deliberations with this -- these thoughts and this charge in mind, with the hope that you can arrive at a verdict within a reasonable period of time." R. 446, ll. 15-19. After completing the charge the trial court again stressed, "keep in mind the things that I just shared with you and make it -- make another effort, if you can, to reach unanimous verdict.... please return back to the jury room with these thoughts in mind in hopes that you may be able to reach a unanimous verdict. Okay?" R. 446, ll. 23 – R. 447, ll. 8.

Once the jury retired, defense counsel moved for a mistrial on the grounds that one of the jurors was crying. R. 447, ll. 15-18. The trial court candidly admitted that he did not see the juror crying, but that his law clerk had also observed the juror under visible distress. R. 448, ll. 8-14.

Nevertheless, the trial court denied the motion noting that the charge states: "you're not to give up your firmly held beliefs.... that's why I said at the end, let me know if you're hopelessly deadlocked, because if that's the case, if I got word that they're hopelessly deadlocked, I'm not going to expect them to sit back there and continue to deliberate." R. 448, ll. 16-22.

After seven hours of further deliberation, the jury returned a verdict of guilty. R. 451, ll. 11-24.

ARGUMENT

I.

The Allen charge given by the trial court was unconstitutionally coercive where (1) it was improperly directed to the juror or jurors voting not guilty, at least one of whom was visibly crying; (2) the trial court strongly urged the jury to return a verdict by directing that if they failed to reach a verdict, a mistrial would be declared, the case would be retried, and the parties would "go through this whole process again;" and (3) the trial court repeatedly telling the jurors he was charging them, "with the hope that you can arrive at a verdict within a reasonable period of time."

Discussion

The South Carolina Supreme Court has stated that the test for granting a mistrial is whether a "mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Ferguson*, 376 S.C. 615, 618, 658 S.E.2d 101, 103 (Ct. App 2008) (citing *State v. Edwards,* 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)).

A "determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *State v. Douglas,* 367 S.C. 498, 523, 626 S.E.2d 59, 72 (Ct.App.2006) (citing *State v. Fletcher,* 363 S.C. 221, 609 S.E.2d 572 (Ct.App.2005)). "'Whether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances.'" *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988)). This State's Supreme Court has explained:

> In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the

opinion merely to reach a verdict.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (internal citations omitted).

In *Tucker*, the South Carolina Supreme Court adopted the standard set by the United States Supreme Court in *Lowenfield* to determine whether an *Allen* charge is unconstitutionally coercive. In *Lowenfield*, the Supreme Court considered the following factors:(1) whether there are indications that the charge was directed to the minority juror(s); (2) whether the judge used mandatory, suggestive or threatening language; (3) the length of deliberations before the charge, after the charge, and in total; (4) whether the jury requested additional instructions; and (5) whether there was an inquiry into the jury's numerical division, which is generally coercive. *Tucker*, 346 S.C. at 492, 552 S.E.2d at 716 (citing *Lowenfield*, 484 U.S. at 237).

Applying the above outlined factors, the Supreme Court found the *Allen* charge given in *Tucker* was unconstitutionally coercive. Specifically, the court concluded (1) when viewed as a whole, the jury charge was directed to the minority juror or jurors; (2) while the trial court did not use mandatory language, the jury was told of the importance of a unanimous verdict; (3) even though the jury informed the trial judge of their numerical split, the judge failed to instruct the jurors not to disclose their division in the future; and (4) Tucker's jury returned a verdict approximately an hour and a half after receiving the *Allen* charge. *Tucker*, 346 S.C. at 492-94, 552 S.E.2d at 717-18.

Here, the *Allen* charge in Appellant's trial was similarly coercive and the trial court should have ordered a mistrial when it became clear that the charge may have contributed to overcoming the will of the visibly distressed or crying juror. While the trial court's charge did admonish the jurors to take into consideration opposing views, the charge as a whole was directed to the minority. First, the trial court deviated from the Court Administration's model

charge and on three occasions implored the jurors to "reach a unanimous verdict." R. 444, ll. 21-24; R. 446, ll. 15 – R. 447, ll. 8.

Second, the jury had already asked the court about what constituted reasonable doubt and whether an acquittal was mandatory in certain circumstance, indicating some indecision regarding whether the State met its burden of proof. R. 434, ll. 3-15. Third, minutes after denying Appellant's motion for a mistrial, the court sent a bailiff into the jury to take dinner orders, reinforcing to the jury the court's desire for a timely verdict. R. 449, ll. 10-24. Finally, the State's case was far from overwhelming, the only direct evidence was Appellant's fingerprints on broken glass; there were no witnesses, and no DNA evidence was taken from the crime scene despite blood being found in several areas of the home.

Under these circumstances, once the trial court became aware that one of the jurors was crying or visibly upset, the trial court should have reevaluated the propriety of the just-given *Allen* charge and its coercive impact on the emotional juror and ordered a mistrial to protect the Appellant's right to a fair trial and just verdict.

II.

The trial court committed reversible error by instructing the jury to review the direct and circumstantial evidence charges and the charge on probable cause, this response exceeded the scope of the question from the jury asking, "if we have to make an assumption on the facts given does that constitute reasonable doubt," thus invading the province of jury as the sole judge of the facts.

A trial judge must narrowly tailor his or her response to the specific question asked by the jury. *State v. Smith*, 304 S.C. 129, 132, 403 S.E.2d, 162, 164 (Ct. App 1991). The answer provided by a trial judge must not mislead the jury as to an element charged in the indictment or improperly suggest the answer to a question of fact. *Id.* at 131, 403 S.E.2d at 163. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21 (2009). As this Court stated in *Smith*:

> ***It is not always sufficient for a judge to simply open a charge book and read a generic statement of the law to a jury, no matter how correct that statement may be in the abstract.*** This is particularly true where, as here, the judge is called upon to answer a well-framed question following the initial charge. Quite often, the judge must tailor, mold and even sculpt the law in fashioning an answer to fit the question. In this respect, the judge must be an artist, not a mere technician.

Id. at 132; 403 S.E.2d at 164 (*emphasis added*).

The Court has the responsibility to answer the jury's question correctly and in a way that clarifies the issues for the jury. *State v. Huckabee*, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010). In answering a question from the jury, the trial court must also keep in mind the juror's reliance on the Court to instruct them on the applicable law and the great weight that jurors give to the judge's pronouncements. *State v. Campbell*, 297 S.C. 24, 26, 374 S.E.2d 668, 669 (1988). "It has long been recognized that even a slight remark, apparently innocent in its language, may, when uttered by the court have a decided weight in shaping the opinion of the jury" *Crenshaw v. Southern Railway Co.*, 214 S.C. 553, 53 S.E.2d 789 (1949).

In the present case, the trial judge committed a reversible error by giving the jury a non-responsive and overly suggestive answer which instructed the jury to review the direct and circumstantial evidence and probable cause charges. Immediately after beginning deliberations, the jury asked, "If we have to make an assumption on the facts given does that constitute reasonable doubt?" It is clearly inferable from the question that the jury was looking for guidance regarding reasonable doubt. The trial court appropriately referred the jurors to the section of the charge defining reasonable doubt. However, the trial court erred in also referring the jurors to the charge on direct and circumstantial evidence.

By referring the jurors to the direct and circumstantial evidence charges, the trial judge suggested to the jurors that they were not considering the evidence properly. There is nothing in the question that indicates the jury did not understand the role of direct and circumstantial evidence. Circumstantial evidence was defined in the charge as, "proof of a chain of facts and circumstances indicating the existence of a fact. *It is evidence which immediately establishes collateral facts from which the main fact may be inferred.*" R. 397, ll. 9-22.

Inference and assumption have substantially different meanings, and those differences are crucial in the context of a criminal case based on circumstantial evidence. An inferential fact is defined as "such [facts] as are established not directly by testimony or other evidence, ***but by inferences or conclusions drawn from the evidence.***" *Black's Law Dictionary*, p. 701 (5th. Ed., West Publishing Company, 1979) (*emphasis added*). By comparison, an assumed fact is defined as "facts concerning which ***no evidence has been introduced at trial***". *Id.* at 112 (*emphasis added*). The trial judge's non-responsive answer urged the jury to conflate the two words.

The jury was asking for guidance to help determine if the state had presented sufficient evidence to meet its burden of proof. Instead of getting a more detailed explanation of reasonable

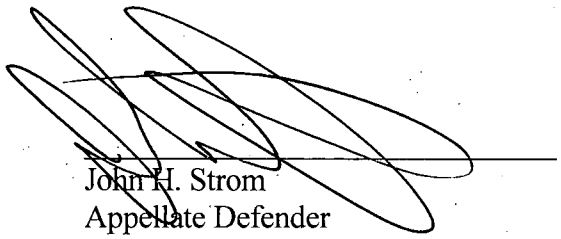
doubt or an example, the trial judge directed them to review the definition of circumstantial evidence. From this misleading response a jury would be very likely to conclude that having to make an assumption, rather indicating a potentially fatal weakness in the State's case, was instead merely the final link in a chain of circumstantial evidence inferring Appellant's guilt because this was the portion of the charge the trial judge directed their attention to.

Accordingly, the trial court committed reversible error by instructing the jury to review the direct and circumstantial evidence charges and the charge on probable cause, this response exceeded the scope of the question from the jury asking, "if we have to make an assumption on the facts given does that constitute reasonable doubt," and invaded the province of jury as the sole judge of the facts.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of May, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 13, 2015

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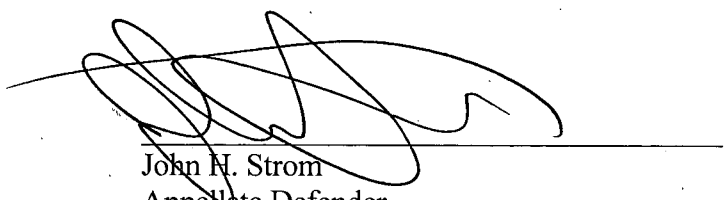
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina Catoe Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of May, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

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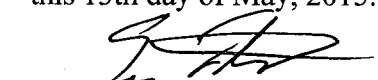
this 13th day of May, 2015.



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I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Christina Catoe Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 13th day of May, 2015.

Cruise Mitchell
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.