ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MELVIN P. STUKES,

PETITIONER

APPELLATE CASE NO. ~~2012-212628~~ 2015-000908

BRIEF OF PETITIONER

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

ISSUE PRESENTED

Did the trial judge err in charging the jury, over objection, S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658 when, under the facts of this particular case involving the defense of consent, the charge confused the jury, improperly bolstered the testimony of the prosecuting witness and constituted an impermissible comment on the facts?

STATEMENT

In August of 2010, the Richland County Grand Jury indicted Stukes for criminal sexual conduct first degree and burglary first degree, indictments #10-GS-40-2700-2701. On July 24, 2012, Stukes proceeded to jury trial before the Honorable DeAndrea G. Benjamin. Attorneys Tracy E. Pinnock, Brian R. Shealey and Alicia Dyar represented Stukes at trial. Attorneys Kathryn C. Ashton and Daniel R. Goldberg prosecuted the case on behalf of the State. On July 27, 2012, the jury returned verdicts of guilty and Judge Benjamin sentenced Stukes to twenty five years concurrent for each charge. A timely notice of intent to appeal was served on August 1, 2012, and the direct appeal perfected. On January 14, 2015, the South Carolina Court of Appeals affirmed the sentence and conviction. A petition for rehearing was filed on January 29, 2015. The petition for rehearing was denied on March 19, 2015. On April 20, 2015,a petition for writ of certiorari was filed. A return was filed on April 29, 2015. On July 23, 2015, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

STATEMENT OF FACTS

Sometime after 9:30 PM on May 10, 2004, Misty Shealy Millender drove from her apartment at the Park Apartments on Longcreek Drive off of Broad River Road to Jacqueline Bruton's house in Hopkins, an approximate thirty minute drive. (R. p. 139, line 24 – p. 140 lines 1-3; p. 184, line 6- p. 185, line 1). Millender told Bruton that she had been sexually assaulted that night. (R. p. 181, line 23 – p. 182, lines 1-19). Bruton convinced Millender to go to hospital. (R. p. 147, line 18 – p. 148, lines 1-9). Bruton and Millender then drove from Hopkins to the Lexington Medical Center where Millender was examined. (R. p. 148, lines 7-14).

Millender testified that about 9:30 PM on May 10, 2004, as she was getting ready for work her doorbell rang and without looking, she opened the door. (R. p. 142, line 1 – p. 143, lines 1-7). According to Millender a man forced his way in, she fell over the side of the couch, blacked out and when she awakened she was being sexually assaulted on the couch. (R. p. 143, line 22 – p. 144, lines 1-16). Sergeant Pearson with the Richland County Sheriff's Department testified that the only information Millender could provide was that the suspect was male. (R. p. 214, lines 4-24). Sergeant Pearson testified that Millender told Deputy Hicks that the assailant grabbed her by the throat with his left hand and hit her in the face with his right hand. (R. p. 216, lines 13- 20). In a written statement to Investigator Branham with the Richland County Sheriff's Department on May 14, 2004, Millender stated that the she believed the assailant grabbed her around the neck with his right hand and punched her with his left hand. (R. p. 325, line 21 – p. 326, lines 1-4). Donna Sharpe, an emergency room nurse a the Lexington Medical Center testified that there was no bleeding bruising or abrasions in the pelvic area but testified that Millender had "a red area surrounded by bruise to right cheek bone below right orbit, small red area to right lower eyelid, and

a red mark to the right side of the neck resembles a hand mark." (R. p. 248, lines 11-14). The report from Deputy Hicks lists no visible injuries to Millender. (R. p. 216, lines 21-25).

Investigator Brian Metz of the Richland County Sheriff's Department went to the Lexington Medical Center at 2:40 AM on May 11, 2004. (R. p. 200, line 2 – p. 201, line 1). Millender told Investigator Metz that she had been sexually assaulted in her apartment. (R. p. 202, lines 8-15). Investigator Stan Richards of the Richland County Sheriff's Department processed Millender's apartment for forensic evidence at 3:15 AM on May 11, 2004. (R. p. 283, lines 3-23). Based on information given to Investigator Richards about the location of the assault, his investigation focused on the door and the sofa. (R. p. 284, lines 6-10). Investigator Richards testified that he found no usable finger prints on the door and no seminal fluids on and around the couch. (R. p. 295, lines 2- 21) Investigator Richards admitted that he did not collect the sheets from inside the bedroom. (R. p. 296, lines 2-14).

On October 27, 2004, Rhonda Fields, a DNA analyst at the South Carolina Law Enforcement Division developed an unidentified male profile from semen found on Millender's underwear. (R. pp. 404-405). Three years later, in 2007, the profile developed was found to match the Petitioner. (R. p. 406, lines 1-4). In 2010, Fields tested a buccal swab from Petitioner and confirmed that the developed male profile from Millender's underwear matched the Petitioner. (R. p. 406, lines 5-25).

On March 23, 2010, Investigator Godfrey with the Richland County Sheriff's Department found Millender in the Orangeburg County Detention Center. (R. pp. 414-415). On May 5, 2010, Sergeant Caldwell with the Richland County Sheriff's Department arrested Petitioner at his sister's apartment on Marlboro Street. (R. p. 377, lines 1-10). According to Sergeant Caldwell, when he read the arrest warrant for criminal sexual conduct against Misty Shealy [Millender], Petitioner

replied that the warrant was a mistake because he did not know Shealy [Millender]. (R. p. 372, lines 16-24).

The same day he was arrested, Petitioner voluntarily gave a DNA sample and statement to Investigator Godfrey. (R. p. 429, line 17 – p. 430, 431, lines 1-11; pp. 436-446). Petitioner admitted having lived at the Ashton Apartments with his son's mother Quantina Brown. (R. p. 439, line 23 – p. 440, lines 1-4). Investigator Godfrey testified that the Ashton Apartments were close to the Park Apartments where Millender lived in 2004. Investigator Godfrey testified that Petitioner lived at the Ashton Apartments in 2004. (R. p. 433, line 21 – p. 434, lines 1-7). Investigator Godfrey showed Petitioner a driver's license photo of Millender and Petitioner denied knowing her. (R. p. 440, line 15 – p. 441, lines 1-11). Petitioner admitted knowing a college student named Christopher who lived in the Park Apartments and a man named Louis who worked at the Exxon on Broad River Road. (R. p. 440, lines 7-14). When asked if he had consensual sex with Misty Shealy [Millender] Petitioner responded, "Not to my knowledge." (R. p. 443, lines 8-10). Petitioner denied breaking into Misty Shealy's apartment and he denied raping her. (R. p. 443, lines 3-7). When asked why his semen would be located inside Ms. Shealy's body[1], Petitioner answered, "It couldn't be no other option. I had sex with her, sir." (R. p. 443, lines 19-22).

At trial Petitioner testified that he met Misty Shealy [Millender] at his friend Louis' house. (R. p. 506, lines 1-2). Petitioner testified that he and Millender went back to her apartment, she invited him in, they went into her bedroom and had consensual sex on her bed. (R. p. 506, lines 2 – p. 507, lines 1-25). Petitioner testified that when police questioned him he did not recognize the photo of Millender and did not know her name. (R. p. 513, line 18 – p. 514, lines 1-11). Petitioner

[1] The semen was actually found on Millender's underwear. While semen was identified from the vaginal swab submitted from Millender, the DNA analyst was unable to identify the contributor. (Tr. pp. 453-454).

testified that after he was arrested and talked with police in 2010, he had time to think back to 2004, and he remembered having sex with Millender. (R. p. 514, line 12 – p. 515, lines 1-6). Petitioner again denied knowing Millender's name. (R. p. 515, lines 2-6).

ARGUMENT

The trial judge erred in charging the jury, over objection, S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658 when, under the facts of this particular case involving the defense of consent, the charge confused the jury and improperly bolstered the testimony of the prosecuting witness and constituted an impermissible comment on the facts.

The defense in this case was consent. The credibility of the witnesses was a key determination for the jury. Prior to trial Petitioner Stukes moved to prevent any reference to S.C. Code §16-3-657 providing that "[t]he testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." (R. p. 74, lines 7-16). Petitioner 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 State agreed not to reference the statute in opening statements and 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, Petitioner 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). Petitioner argued that the State should be barred from mentioning the law in closing argument. (R. p. 547, lines 10-11). In the alternative, Petitioner 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). Petitioner specifically argued that charging the jury that the testimony of the victim need not be corroborated constituted an impermissible comment on the facts by the judge. (R. p. 545, lines 1-3). Additionally, Petitioner argued that the charge improperly bolstered the testimony of the prosecuting witness, Misty Shealy Millender. (R. p. 546, line 10 – p. 547, lines 1-7). The judge

overruled Petitioner'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). Petitioner 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).

Jury deliberations began at 12:05 PM. (R. p. 618, line 8). The jury returned to the courtroom at 1:25 PM requesting a copy of the law. (R. p. 619, lines 1-4; Court's Exhibit #3, R. p. 688). The judge declined to provide a copy of the charge to the jury but told them if they would like a specific part re-charged, she would do that. (R. p. 619, lines 5-12). The jury requested a recharge on criminal sexual misconduct. (R. p. 619, lines 22-24; Court's Exhibit #5, R. p. 703). The jury returned at 1:30 PM and the judge re-charged the jury in regard to criminal sexual conduct in the first degree. (R. p. 620, line 3 – p. 621 lines 1-3). Shortly after the re-

charge the judge realized she had omitted the portion of the charge stating that "If you find that a sexual battery did occur, you must then decide whether the state has proved beyond a reasonable doubt that – it's 1) the defendant used aggravated force to accomplish the sexual battery. Aggravated force means the use of physical force or violence of a high and aggravated nature to overcome the victim, this includes the use of a deadly weapon." (R. p. 622, lines 2-10). The judge omitted this portion in both the initial charge and the re-charge. (R. p. 611, line 21 – p. 612, lines 1-13; p. 620, line 9 – p. 621, lines 1-3). Petitioner moved for a mistrial based on the erroneous instruction. (R. p. 624, lines 2-7). The judge denied the motion and at 2:06 PM re-charged the jury with the full law on criminal sexual conduct first degree. (R. p. 627, line 6 – p. 628, 629, lines 1-10). Petitioner renewed the motion for a mistrial and the motion was again denied. (R. p. 629, lines 16-25).

The jury then asked for a definition of aggravated battery. (R. p. 630, lines 4-7; Court's Exhibit 6, R. p. 704). Petitioner again asked for a mistrial. (R. pp. 630 – 634). The judge denied the motion and at 2:48 PM re-charged the jury with the full law of criminal sexual conduct first degree. (R. p. 635, lines 7 – p. 636, lines 1-19).

The jury then asked two more questions. The jury first requested to see a transcript of the defendant's testimony. Second, the jury 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 told counsel that she would replay the defendant's testimony. (R. p. 637, lines 3-7). In regard to the second question, the judge proposed re-charging the general credibility of **witnesses** charge. (R. p. 637, lines 14-22). Petitioner again moved for a mistrial. (R. p. 638, lines 4-7). The judge

denied the motion stating, "Well, I think that – I'll just deny the motion. I think the answer will clarify their question, and if there was ever a question as to whether or not the jurors thought they had to only consider her testimony, I think by them asking this question that it will definitely be clear that the answer to that is no once I read it to them. So, I will deny the motion for a mistrial." (R. p. 638, lines 8-15). At 4:56 PM the jury returned to the courtroom and the defendant's testimony was replayed. (R. p. 638, line 21 – p. 639, lines 1-11). In response to the jury's second question, the judge failed to instruct the jury that the law does not imply that the victim's testimony must be accepted as being true. Instead, the judge 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, emphasis added). The jury then returned with verdicts of guilty.

Petitioner renewed the objection to charging the jury with S.C. Code §16-3-657. (R. pp. 645 – 648). Again, Petitioner 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 **witnesses,**" 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 and as referenced by the jury, 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. Lack of corroboration is an evidentiary issue and goes to credibility, a factual determination to be made by the jury.

The Court of Appeals affirmed Stukes' conviction 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)(App. pp. 1-2). The Court of Appeals erred. The present case is distinguished from Rayfied 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.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), Schumpert argued that charging the jury with S.C. Code §16-3-657 was error as an improper charge on the facts. This Court disagreed writing:

> The trial judge properly charged the jury it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt. Taking the charge as a whole, we find no reversible error. Accord Lottie v. State, 273 Ind. 529, 406 N.E.2d 632 (1980). Id. 312 S.C. at 509, 435 S.E.2d at 863.
>
> The dissent in Schumpert noted:
>
> I would also hold that the "no corroboration" charge based on S.C.Code Ann. § 16–3–657 (1985) was reversible error. It is axiomatic that a trial judge must not indicate an opinion or express a view reasonably calculated to influence the jury in deciding a material issue of fact because such comment is forbidden by S.C. Const. art. V, § 21. State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947). Since the charge specified only that the victim's testimony need not be corroborated, it appears to express an opinion on her credibility. In State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244 (1943), this Court rejected a similar "no corroboration charge" in the context of accomplice testimony. The law found in Section 16–3–657 should not be charged to the jury. S.C. Const. art. V, § 21.
>
> The majority does not discuss the propriety of the "no corroboration" charge itself, but instead holds that the jury charge as a whole did not constitute reversible error. I disagree. We have rejected such analysis in State v. Bagwell, supra. Further, the charge was especially prejudicial in this case because it was the victim's word against the defendant's. I would hold that the giving of this charge was reversible error. Accord, Cox v. State, 44 S.W. 157 (Tex.Crim.Ct.App.1898).

Id. 312 S.C. at 510, 435 S.E.2d at 864.

In State v. Weldon, 89 S.C. 308, 71 S.E.2d 828, 828 (1911), this Court approved the following charge: "The law in this state for a long number of years was declared by our Supreme Court to be that it was unsafe to convict upon the uncorroborated testimony of an accomplice.

But our Supreme Court has recently changed that doctrine, and it is not the law now. The law in regard to the testimony of an accomplice is just like it is as to the testimony of any other witness in a case. That is to say, that you are the sole judges of the weight you should give to such testimony." As noted by the dissent in Schumpert, in the same way that it is improper to instruct the jury that it is unsafe to convict based on the uncorroborated testimony of an accomplice, it is improper to instruct the jury that the prosecuting witness' testimony need not be corroborated because in giving such a charge it appears that the judge is commenting on the credibility of the witness.

In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), Rayfield argued that charging the jury with S.C. Code §16-3-657 constitutes an impermissible comment on the facts of the case, improperly emphasizes the testimony of one witness, and carries a strong possibility of unfairly biasing the jury against the defendant. This Court disagreed and wrote:

> A trial judge is not required to charge § 16–3–657, but when the judge 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. The jury in this case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses. The trial judge in this case, as shown in the above portions of the charge, fully and properly instructed the jury on these principles.

Id. 369 S.C at 117-118, 631 S.E.2d at 250. The dissent in Rayfield noted:

> In general, the trial court is required to charge only the current and correct law of South Carolina. ... A jury charge is correct if it contains the correct definition of the law when read as a whole." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462,472 (2004) (citations omitted). Some principles of law, however, are not to be charged to a jury. See, e.g., State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (holding that although evidence of a defendant's flight is admissible as circumstantial evidence of guilt, it is improper for the trial judge to instruct the jury on the law of flight, because such an instruction "oftentimes has the potential for creating more problems than solutions," as it "places undue emphasis upon that part of circumstantial evidence").

Contrary to the majority opinion, we did not hold in Schumpert that this no-corroboration charge was proper. Rather, "[t]aking the charge as a whole, we [found] no reversible error." 312 S.C. at 509, 435 S.E.2d at 863. We observed that the trial judge, in addition to charging the jury under section 16–3–657, had charged "the jury it could believe any single witness over several, it was the sole judge of the facts, [the trial judge] had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt." Id.

I would hold that it is error for a trial court to charge the jury that an alleged victim's testimony needs no corroboration. 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). Charging this rule does not assist the jury in fulfilling its function of deciding the facts and determing whether the state has proved the charged offense beyond a reasonable doubt. In fact, it "has the potential for creating more problems than solutions," for it might cause confusion when read with the general charge on witness credibility.

More important, charging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need be corroborated. By specifically charging that the alleged victim's testimony need not be corroborated, the trial court singles out the alleged victim and "appears to express an opinion on her credibility." State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting); see also S.C. Const. art. V, § 17 (providing that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law"). I would therefore hold that charging a jury on the contents of section 16–3–657 constitutes error.

Further, I would overrule the holding in Schumpert that the charge as a whole can render this no-corroboration charge harmless. Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony.

Furthermore, this case is different from Ludy, supra, in which the Supreme Court of Indiana held that although the trial court had erred in giving the no-corroboration charge, the error was harmless because: "[T]he testimony of the victim was not uncorroborated.... [A]side from the victim's testimony there was substantial probative evidence establishing the elements of the charged offenses." 784 N.E.2d at 463. Here, the only evidence of Petitioner's committing CSC was the testimony of

> the alleged victims. The jury had to determine whether it believed the purported victims or Petitioner.
>
> For these reasons, I would hold that the circuit court committed reversible error in charging the jury. I would therefore reverse the decision of the Court of Appeals and remand the case to the circuit court for a new trial.

Id., 369 S.C. at 119-121, 631 S.E.2d at 251 - 252 (footnotes omitted).

In State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct.App. 2011), Hill argued that the judge erred in allowing the prosecution to unduly emphasize the no-corroboration rule found in S.C. Code §16-3-657 and then the judge further erred in choosing to instruct the jury on the no corroboration rule. The South Carolina Court of Appeals disagreed and wrote, "Accordingly, the single instruction on 'no corroboration,' was not unduly emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the 'no corroboration' charge." Id. 394 S.C. at 299, 715 S.E.2d at 379.

The present case can be distinguished from Schumpert, 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)).

An additional distinction from Schumpert, Rayfield and Hill is that those cases involved minor witnesses where consent could not be a defense. Under the facts of this case, involving a determination of credibility in regard to the defense of consent between two adults, the jury question and the inadequate response from the judge rendered the charge "as a whole" an improper comment on the facts in violation of Article V, §21 of the South Carolina Constitution. The South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. Art. V, § 21.

In Grant this Court wrote:

> The charge on flight oftentimes has the potential for creating more problems than solutions. While we no longer sanction this charge by the judge, we recognize that evidence of flight remains proper. We also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight. However, we believe that the "law of flight" in a judge's charge places undue emphasis upon that part of circumstantial evidence and it should not be charged hereafter.

Id. 275 S.C. at 408-409, 272 S.E.2d 171-172. The present case demonstrates the confusion created by instructing the jury that the victim's testimony need not be corroborated, especially in a case where credibility of the witnesses is crucial, such as this case involving the defense of consent with no corroborating evidence or a case involving a minor with no corroborating evidence. The present case presents an opportunity for the Court to re-visit the holdings in Schumpert, Rayfield and Hill as this case demonstrates that the instruction, despite the charge as a whole, 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. As the Court did in Grant

in reference to the instruction on flight evidence, this Court should find that judges should not instruct the jury that the testimony of the victim need not be corroborated.

As noted by the dissent in Rayfied in footnote 4, in Ludy, the Supreme Court of Indiana overturned Lottie v. State, 273, Ind. 529, 406 N.E.2d 632 (1980), the decision relied upon by the Schumpert majority. Ludy 784 N.E.2d 459, 462 and n.2 (Ind. 2003). The Court found that giving the following instruction was an error despite a long history of appellate approval: "A conviction may be solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." Id. at 61. The Ludy court reasoned that "To expressly direct a jury that it may find guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligation to consider all the evidence." Id. at 462. The court also commented on the potential harms that may occur when a jury attributes meaning to the legal term "uncorroborated":

> Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness's testimony, and ignore evidence that conflicts with the witness's version of the events. Use of the word "uncorroborated" without a definition renders this instruction confusing, misleading, and of dubious efficacy.

Id. at 462.

The present case is an example of the harms discussed in Ludy, especially in light of the trial judge's refusal to correctly instruct the jury, when they specifically asked, that S.C. Code §16-3-657 does **not** imply that the alleged victim's testimony must be accepted as being true. In Ludy v. State, 784 N.E.2d 459 (Ind. 2003) the Indiana Court found that instructing the jury that a conviction may be based solely on the uncorroborated testimony of the alleged victim constituted error, but found the error did not require reversal because there was substantial probative evidence establishing the elements of the charged offenses.

In Anderson v. State, 790 N.E.2d 146 (Ind. Ct. App. 2003), the Indiana Court of Appeals found that the error in instructing the jury that a conviction may be based solely on the uncorroborated testimony of the alleged victim required reversal. The Indiana Court of Appeals wrote, "Aside from the testimony of M.H. and that of others who simply recounted or repeated the incident as M.H. had reported to them, we cannot say that there was substantial evidence of probative value establishing the elements of the charged offense. Thus, we can only conclude that the instruction error here affected Anderson's substantial rights to the extent that reversal is warranted. Thus, we grant the petition for rehearing, set aside Anderson's conviction and remand this cause to the trial court for a new trial." Id. 790 N.E. 2d at 148.

In Brown v. State, 11 So. 3d 428, 430 (Fla. Dist. Ct. App. 2009) approved sub nom. Gutierrez v. State, No. SC14-799, 2015 WL 3887354 (Fla. June 25, 2015) the Florida appellate court found that instructing the jury in accordance with section 794.022(1) that the testimony of the victim need not be corroborated in a prosecution for sexual battery is misleading and constitutes an improper comment on the evidence by the trial court. The court wrote:

> We also conclude that the special instruction is likely to confuse and to mislead the jury. Granted, the requested instruction is a correct statement of the law. However, the history of section 794.022(1) reveals that the statute was directed at the appellate review of the sufficiency of the evidence in sexual battery cases. This consideration is entirely separate from the question of whether a jury should accept the uncorroborated testimony of the victim in the trial of a sexual battery prosecution. It follows that reading the statute to the jury is unwarranted and unnecessary. Finally, we agree with the Ludy court that telling the jury that a particular witness's testimony does not need to be corroborated without further explanation is likely to mislead the jury.

Brown v. State, 11 So. 3d 428, 439 (Fla. Dist. Ct. App. 2009) approved sub nom. Gutierrez v. State, No. SC14-799, 2015 WL 3887354 (Fla. June 25, 2015). The Court in Brown reversed finding that the error in instructing the jury with the statute providing that the testimony of the

victim need not be corroborated in a sexual battery case was not harmless because the testimony was uncorroborated. This Court should find that the judge erred in instructing the jury that the victim's testimony need not be corroborated and reverse because the testimony of the alleged victim was uncorroborated.

In State v. Zimmerman, 130 Wash.App. 170, 121 P.3d 1216 (2005), petition for review granted and remanded for reconsideration on other grounds, 157 Wash.2d 1012, 138 P.3d 113 (2006), the Washington Court of Appeals, bound by controlling precedent from the Supreme Court of Washington found that instructing the jury that the testimony of an alleged victim of child molestation need not be corroborated, pursuant to statute, was a correct statement of the law and not an improper comment on the evidence. The Washington Court of Appeals, however, observed that the Washington Pattern Criminal Jury Instructions do not contain the challenged corroboration instruction. The court also noted that the Washington Supreme Court Committee on Jury Instructions "recommends *against* such an instruction." Id. The court quoted the Committee's recommendation:

> The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

Id. at 1222-23. Although the Washington Court of Appeals shared the Committee's misgivings about a corroboration instruction, the Court of Appeals was bound by controlling precedent to hold that it was not reversible error to give such an instruction. Id. at 1223. This Court, unlike the South Carolina Court of Appeals, can and should overturn the precedent established by Schumpert, Rayfield and Hill.

Additional courts from other jurisdictions have also found that instructing the jury that the testimony of the alleged victim need not be corroborated is improper. In State v. Johnson, 679 N.W.2d 378, 388 (Minn. Ct. App. 2004), the Minnesota Court of Appeals wrote:

> Although the testimony of a victim of criminal sexual conduct need not be corroborated, Minn.Stat. § 609.347, subd. 1, it is improper to instruct the jury that corroboration is not required because the lack of corroboration is an evidentiary matter, rather than a substantive matter. State v. Williams, 363 N.W.2d 911, 914 (Minn.App.1985), review denied (Minn. May 1, 1985). But where the jury is properly instructed on the burden of proof and the state's need to prove its case beyond a reasonable doubt, we have held that the erroneous instruction was not prejudicial. Id.
>
> Here, the court instructed the jury as follows: "The testimony of an alleged victim need not be corroborated but a lack of corroboration may be a relevant consideration in determining believability." The state contends favors Johnson and offsets the error. We agree. Moreover, the record establishes that corroboration was abundant here. When the challenged instruction is considered in conjunction with the district court's proper instruction of the jury on the state's burden of proving its case beyond a reasonable doubt, we do not find prejudicial error. See id.

This Court should find, as the Indiana, Florida and Minnesota Courts have found, that it is improper to charge the jury that testimony of an alleged victim need not be corroborated. Lack of corroboration is an evidentiary issue. Unlike Ludy and Johnson, the charge in the present case was prejudicial. The charge in the present case did not include the additional language "but a lack of corroboration may be a relevant consideration in determining believability" from Johnson. Additionally, in both Ludy and Johnson the prosecution introduced substantive evidence in addition to the testimony of the alleged victim. In contrast, in the present case the State's case was based solely on the testimony of the prosecuting witness. Because the present case involves adults and the defense of consent, the presence of semen or facial marks noted by the nurse are not substantive evidence of a crime.

In State v. Schmidt, 276 Neb. 723, 728, 757 N.W.2d 291, 295 (2008), the Nebraska Supreme Court addressed jury instruction No. 14, which provides, "The testimony of a person who is the victim of a sexual assault, as charged in this case, does not require corroboration. It is for you to decide what weight to give the testimony of [M.C. and K.S.]." Finding the instruction improper but harmless in Schmidt the Nebraska Supreme Court held:

> It is undisputed that the challenged jury instruction is a correct statement of the law as set forth in Neb.Rev.Stat. § 29–2028 (Cum. Supp. 2006). We agree with the Court of Appeals that the giving of the instruction in this case was not prejudicial and did not constitute reversible error, because when read as a whole, the jury instructions fairly presented the law and were not misleading. We also agree with the concurrence that while it was not prejudicial, this instruction was redundant and unnecessary, and that in the absence of special circumstances in a particular case, an instruction similar to instruction No. 14 should not be given.

State v. Schmidt, 276 Neb. 723, 730, 757 N.W.2d 291, 297 (2008). As the Court in Schmidt found, this Court should find that the "no corroboration" instruction, while a correct statement of S.C. Code §16-3-657, should not be given. Unlike the charge in Schmidt, the charge in the present case was prejudicial. The charge in the present case was not followed by the instruction, "It is for you to decide what weight to give the testimony of [the witness]." Additionally, the jury's question and the judge's refusal to correctly answer the question in the present case demonstrates that the instruction, as a whole, was misleading.

In Garza v. State, 2010 WY 64, ¶ 20, 231 P.3d 884, 890 (Wyo. 2010), the Wyoming Supreme Court addressed jury instruction No. 17, which provides that, "Corroboration of a victim's testimony is not necessary to obtain a conviction for sexual assault." The instruction constitutes a correct statement of law, as it mirrors the language of Wyo. Stat. Ann. § 6–2–311 (LexisNexis 2009). Despite being a correct statement of the law, the Wyoming Supreme Court found the instruction was improper but harmless as the testimony of the victim was corroborated

by other evidence. The witness's testimony in the present case was not corroborated by other evidence. The instruction was improper and prejudicial in the present case.

In Veteto v. State, 8 S.W.3d 805 (Tex.Ct.App.2000), other grounds abrogated on by State v. Crook, 248 S.W.3d 172 (Tex.Crim.App.2008), a Texas appellate court considered the following jury instruction pursuant to a Texas statute:

> The law provides the testimony of the victim alone, if believed by you beyond a reasonable doubt, need not be supported by other evidence before a finding of guilt can be returned. That is to say, the testimony of [A.L.], standing alone, if believed by you beyond a reasonable doubt, is sufficient proof to support a finding of guilt.

Id. at 816. The Texas court wrote:

> Although an accurate statement of the law, we agree with Veteto that the charge still had the force and effect of an instruction that a conviction could be had only on A.L.'s testimony; it singled out her testimony. The Court of Criminal Appeals has previously held that even though the legislature provides for convictions based on uncorroborated evidence, a charge based on that evidence is an improper comment on the weight of the evidence. Lemasters v. State, 164 Tex.Crim. 108, 297 S.W.2d 170, 171 (1956). As was in Lemasters, the jury charge here is a comment on the weight of the evidence which is improper. Tex.Code Crim. Proc. Ann. art 36.14 (Vernon Supp.2000).

The court in Veteto did not conduct a harmless error analysis as the case was reversed on other grounds. As in Veteto, the jury instruction in the present case was an improper comment on the weight of the evidence.

In State v. Blurton, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002) this Court wrote, "The purpose of a jury instruction is 'to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)." The charge in the present case pursuant to S.C. Code §16-3-657 that the testimony of the victim need not be corroborated confused and mislead the jury into believing that they had to accept the prosecuting witness's

testimony as true. The charge improperly bolstered the testimony of the prosecuting witness. The error was particularly prejudicial under the facts of this case where the defense was consent and the credibility of the witnesses was a critical determination for the jury.

In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480, (2013), this Court found that instructing the jury that actual knowledge of the presence of a drug is strong evidence of intent to control its disposition and use was improper as an expression of the judge's view of the weight of certain evidence. In Cheeks this Court wrote:

> Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts. For example, it is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt, and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places "undue emphasis" on that piece of circumstantial evidence. E.g., State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980). Similarly, charging a jury that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence.

Id. 401 S.C. at 328-329, 737 S.E.2d at 484.

Instructing the jury that the victim's testimony need not be corroborated improperly emphasizes that testimony in the same way the charges in both Grant and Cheeks improperly emphasized certain evidence. The improper instruction was particularly harmful in the present case where the defense was consent and the credibility of the witnesses was a critical determination for the jury. The error was further 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 and the failure to clarify that the prosecuting witness, or **victim** as referenced in the statute

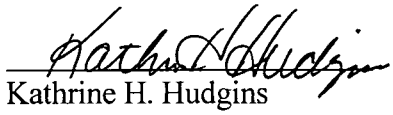
and by the jury, is a **witness** for purposes of determining credibility. Unlike Cheeks, the Petitioner in the present case was prejudiced by the error in the instruction. This Court should find that instructing the jury that the victim's testimony need not be corroborated is no longer proper and reverse Petitioner's conviction and sentence.

Based on the fact that the Schumpert majority relied on Lottie v. State, 273 Ind. 529, 406 N.E.2d 632 (1980), a case later overturned by Ludy v. State, 784 N.E.2d 459 (Ind. 2003), and based on the persuasive findings of courts in Indiana, Florida, Minnesota, Nebraska, Wyoming and even Texas with statutes similar to S.C. Code §16-3-657, this Court should overturn Schumpert, Rayfield and Hill and rule that instructing the jury the testimony of the victim need not be corroborated is improper as an improper comment on the facts of the case by bolstering the testimony of the prosecuting witness and confusing and misleading the jury. In the present case the error was not harmless. The judge's failure to properly answer the jurors' question implied that the jury instruction required the jury to accept the victim's uncorroborated testimony as true.

CONCLUSION

Based on the above argument, this Court should reversed the conviction and sentence and remand for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 21st day of August, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MELVIN P. STUKES,

PETITIONER

APPELLATE CASE NO. 2012-212628

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Mary W. Leddon, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Melvin Stukes # 267991, at Perry Correctional Institution, this 21st day of August, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of August, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021

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Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of August, 2015.

Bailey Wolfe (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021