STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2014-001671

THE STATE, ...RESPONDENT

v.

MANUEL A. PACHECO, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Did the trial court err in charging the jury pursuant to § 16-3-657 that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence, where this single-sentence instruction was not unduly emphasized and where the instruction considered a whole comported with prevailing South Carolina law?

STATEMENT OF THE CASE

Manuel A. Pachecho was indicted at the May 2014 term of the grand jury for Greenville County for Criminal Sexual Conduct with a Minor, First Degree (2014-GS-23-2609). Pachecho proceeded to a trial by jury from July 14-15, 2014. At the conclusion of trial, Pachecho was found guilty as indicted. He was sentenced by the Honorable Robin B. Stillwell to imprisonment for a term of thirty years. Pachecho filed a notice of appeal and subsequently submitted a brief. This brief of Respondent follows.

RESPONDENT'S STATEMENT OF FACTS

In March of 2011, Victim disclosed to his mother ("Mother") that Appellant had touched him inappropriately. Tr. pp. 77; 82; 84. Appellant and Mother were in a relationship from 2005-2009. Tr. pp. 65-66. Appellant lived with Mother and Victim from 2006-2009. Tr. p. 66. The relationship ended in June 2009. Tr. p. 68. Upon telling Mother of the abuse, Victim started crying. Tr. p. 70. Mother did not ask him any further questions on the matter. Tr. p. 70. Mother is an undocumented citizen. Tr. pp. 73; 75. Mother discussed Victim's disclosure with her boyfriend at the time, Roger Flatus. Tr. p. 70. Mother and Flatus decided not contact the police, because they were planning on getting married. Tr. p. 70. They wanted to wait to disclose the abuse until after they were married because Flatus had a green card and Mother would then be given a green card upon their marriage. Tr. pp. 78-79. Mother and Flatus subsequently separated before getting married. Tr. p. 71.

On November 12, 2011, Victim began counseling sessions with Pastor Robert Taylor after Victim began exhibiting behavioral problems. Tr. p. 58; 71; 82-83. Taylor is a therapist, an episcopal priest, and a missionary. Tr. p. 57. Taylor described Victim as very guarded and reluctant to discuss anything during their initial counseling sessions. Tr. p. 60. During Taylor's third session with Victim, on December 4, 2011, Victim disclosed past sexual abuse to Taylor. Tr. p. 59. Victim told Taylor that the abuse had occurred years before at his residence. Tr. p. 59. Prior to the counseling sessions, Taylor referred Victim and Mother to the Julie Valentine center for a forensic evaluation. Tr. p. 59-60. Victim was interviewed at the Julie Valentine Center on March 1, 2012 by Christine Carlsberg, a forensic interviewer employed by the Greenville Department of Mental Health. Tr. pp. 114-115. Victim was ten years old at the time of the interview. Tr. pp. 114-115. A video recording of that interview was played for the jury. Tr. pp. 115-116; _____ [State's Exhibit #2 – CD of forensic interview].

The Greenville Police Department referred victim to Dr. Mary Fran Croswell for a physical examination. Tr. p. 106. Croswell is a child abuse pediatrician employed by the Greenville Health system. Tr. p. 103. Croswell physically examined Victim on March 26, 2012. Tr. p. 101. Victim was ten years old at the time of the examination. Tr. pp. 106-107. During the examination process, Victim disclosed the sexual abuse to Croswell. Tr. p. 108. Victim stated that the abuse occurred when he was six or seven years old. Tr. p. 108.

At trial, Victim testified and personally recounted the abuse by Appellant. Tr. pp. 86-102. Victim was thirteen years old at the time of trial. Tr. p. 86. Victim stated that the reason he was testifying in a criminal proceeding was "because Manuel raped me." Tr. p. 81. Victim woke up one morning in his mother's bed and Appellant was on top of him. Tr. pp. 89- 90. Victim further elaborated that Appellant was behind him while Victim was "laying with my butt in the air on my knees." Tr. p. 90. Victim stated that Appellant "was putting his penis in my butt." Tr. p. 95. Appellant told Victim that they were playing a game. Tr. p. 91. Victim testified that the event was painful. Tr. pp. 91; 95. During the abuse, Appellant asked Victim whether he was enjoying it. Tr. p. 91. When it was over, Appellant told Victim to shower and then they would go to Chuck-E-Cheese. Tr. p. 92. When they returned from Chuck-E-Cheese, Appellant told Victim that he should keep the events of the day a secret. Tr. p. 93. The next day, Appellant sexually assaulted Victim again. Tr. p. 93. When this second instance of sexual abuse was over, Appellant told Victim to shower and then they would go to McDonald's. Tr. p. 93. Victim stated that Appellant sexually assaulted him a total of four times. Tr. p. 93.

Victim did not realize that what happened was wrong until he was around ten or eleven years old. Tr. p. 96. Victim began to realize that Appellant's actions were wrong during sexual

education at school. Tr. p. 96. Victim felt angry about what Appellant had done to him, and finally disclosed Appellant's abuse to Mother. Tr. p. 97.

At trial, the State requested that the judge charge the jury that the testimony of a victim need not be corroborated. Tr. p. 123. Appellant objected to the charge, stating:

> That is the case in every criminal case, the victim's testimony does not have to be corroborated. By highlighting that fact in this case-- there, essentially should be the burden from the State to us in a jury's mind. I think, and I believe that's improper. And also, in a way it's bolstering the victim's testimony just by highlighting that fact, in particular, in these CSC cases. It just seems to me it's going to cause all kinds of problems and, therefore, I would object to that particular charge.

Tr. p. 123.

The trial judge overruled the objection, stating:

> I understand. And I understand your objection. It makes perfect sense. And I think in a vacuum you may be right. I'd be concerned about burden shifting. But in the context of the entire charge and in the context of this case- and I've explained to the jury very clearly who has the burden of proof and what the burden is, I'm not concerned with burden shifting. The only thing I will say to them after I charge the actual law with respect to the first degree criminal sexual conduct with a minor is the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other evidence or testimony. That's all I'm going to day and I don't think that's prejudicial in any way, shape or form. And I think it is an accurate statement of the law.

Tr. pp. 123-124. The judge then included the statement "The testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony" in his charge to the jury to which Appellant renewed his objection. Tr. pp. 153; 155. The jury subsequently found Appellant guilty of criminal sexual conduct with a minor in the first degree.

ARGUMENT

The trial court did not err in charging the jury pursuant to § 16-3-657 that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence, where this single-sentence instruction was not unduly emphasized and where the charge as a whole comported with prevailing South Carolina law.

On appeal, Appellant contends that the trial judge erred in charging the jury that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence. At trial Appellant opposed the jury instruction in question on the ground the charge shifted the burden of proof, bolstered the testimony of the victim, and highlighted that fact that the testimony of a sexual assault victim need not be corroborated when a similar charge is not given in other cases. On appeal, he offers the additional grounds that the charge constituted an improper comment on the facts and confused or misled the jury.[1] (Tr. pp. 123; 155). The State submits that Appellant's argument is without merit, as South Carolina Courts have consistently found the jury charge is permissible. The arguments raised by Appellant have been considered and rejected by this Court and our supreme court.

"In reviewing jury charges for error, [our appellate courts] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469,478, 697 S.E.2d 578, 583 (2010). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. A jury charge that is substantially correct and covers the law does not require reversal. A trial court is required to

[1] The arguments respecting whether the charge was an improper comment on the facts and confused or misled the jury were not raised to the trial court as grounds in support of the objection and may not be considered for the first time on appeal. State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) (a party may not argue one ground to the trial court and then argue another ground on appeal.

charge only the current and correct law of South Carolina." Id. at 478-479, 697 S.E.2d at 583. "The evidence presented at trial determines the charged jury instruction. The purpose of the 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.' If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." State v. Blurton, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002), internal citations omitted. "A jury charge that is substantially correct and covers the law does not require reversal." State v. Mattison, at 478, 607 S.E.2d 583. An appellate court will not reverse a trial judge's jury instruction unless there was an abuse of trial court discretion. State v. Franks, 376 S.C. 621, 658 S.E.2d 104 (Ct App. 2008). A jury charge must be erroneous and prejudicial to warrant reversal of the conviction. State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011).

S.C. Code Ann. § 16-3-657 provides that "[t]he testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." Appellant was charged in this case with criminal sexual conduct with a minor in the first degree in violation of S.C. Code Ann. §§ 16-3-655(A) (1). In 1993, in State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court found it was not error to charge § 16-3-657 as long as the charge as a whole comports with the law. Relying on Schumpert, our supreme court subsequently ruled:

> 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.

State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006).

Noting Rayfield, in State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), this Court reviewed a jury instruction on §16-3-657 identical to the one provided in this case. In Hill,

the trial court provided the jury with the instruction that, "The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence." Id. at 299. This Court, in Hill, concluded there was no reversible error in the trial court's "no corroboration" charge, as the single instruction was not unduly emphasized and the charge as a whole comported with the law. Id. This Court, in finding that the charge as a whole comported with the law, noted the "jury was thoroughly instructed on the State's burden of proof and the jury's duty to find facts and judge credibility of witnesses, as well as admonished not to infer that the trial judge had any opinion about the facts." Id.

Also, in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011), this Court found the single-sentence charge was proper and not unduly emphasized. In Orozco, the jury was charged "in South Carolina the testimony of a victim need not be corroborated for prosecution in a criminal sexual conduct case." Id. at 217. In finding the charge as a whole comported with the law, the Court also placed emphasis on the fact that the trial court thoroughly instructed the jury on the State's burden of proof and the jury's duty to determine the facts and judge the credibility of witnesses. Id. at 224.

In the instant case, the trial court instructed the jury: "The testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence." Tr. p. 153. As mentioned above, this instruction resembles the single sentence instructions in Hill and Orozco almost verbatim. As in Rayfield, Hill, and Orozco, the single instruction on corroboration was not unduly emphasized. The given instruction was a simple nondescript sentence the judge included in his usual charge to the jury. The corroboration issue and charge were not mentioned during the prosecutor's opening and closing arguments. Furthermore, the trial judge repeatedly provided the jury with detailed instructions regarding the State's burden of

proof and the jury's duty to determine the facts and assess the credibility of witnesses. Tr. p. 148-152.

Specifically, prior to the presentation of evidence and in its preliminary charge to the jury, the trial court instructed that Appellant was presumed innocent until proven guilty, that the State had the burden of proving each and every element of a criminal offense beyond a reasonable doubt, and that it was the jury's responsibility to determine whether the State met its burden of proving Appellant's guilt beyond a reasonable doubt. Tr. p. 16. The trial court, in its preliminary charge, also informed the jurors chosen for Appellant's trial that their role was to determine whether the State met its burden of proving Appellant's guilt beyond a reasonable doubt and, in doing so, the jury would function as the "finders of fact" based upon the evidence presented in the form of testimony or other evidence. Tr. pp. 35-36. The trial judge defined his role as the judge of the law in that he would provide the jury with the applicable law and the jury would apply the law to the facts as the jury found them to be and then determine whether the State has met its burden of proof. Tr. p. 36.

When the defense rested, the trial court reiterated that it is the State's burden to prove every element of the offense beyond a reasonable doubt. Tr. pp. 127-128; see also Tr. p. 45-46; 50. In closing argument, the prosecutor informed the jury that "proof beyond a reasonable doubt is the entire foundation of the American criminal justice system" and invited the jurors to assess the credibility of the witnesses. Tr. p. 130-131; 138; see also Tr. p. 145-146. The prosecutor did not reference the statute or charge in question. On the other hand, in his closing argument, Appellant challenged the credibility of the victim through the State's failure to present witnesses or other evidence to corroborate the victim's testimony. Tr. pp. 142- 144.

In its charge on the law, the trial court instructed the jury again on its role as the "finders of facts" and its responsibility to accept the law as given. The trial court charged the jury that Appellant is presumed innocent, that the State had the burden of proving every element of the offense beyond a reasonable doubt, and that the jury must determine whether the State met its burden of proof. Tr. pp. 147 - 148. The trial court explained reasonable doubt and informed the jury that it must review and attach weight and value to all of the evidence presented, that the trial court had no opinion about the facts or weight of the evidence but that it was the jury's function to determine the weight of the evidence and the facts based upon the evidence presented and value attached by the jury. Tr. pp. 147 – 149; 154. The trial court charged the jury that it must determine the credibility of witness testimony and may accept testimony as credible or reject it as not credible in whole or part. The court instructed the jury to assess credibility by using its common sense, assessing body language, facial expressions and bias. Tr. p. 150.

Appellant avers that courts should invalidate "no corroboration" instructions because South Carolina courts have limited jury instructions in situations of flight and actual knowledge of the presence of a drug. Comparisons to charges that guilt may be inferred from flight or presence of a drug are inapposite. The instruction at issue does not state that the jury is required to believe the victim's testimony or that such testimony, if believed, necessarily establishes the defendant's guilt – those determinations are still left to the jury. Section 16-3-657 imparts no instruction that the victim's testimony necessarily establishes guilt.

S.C. Code §16-3-657 also operates in a unique backdrop. Cases involving sexual violence are unique in some aspects. These crimes are particularly likely to be without witnesses other than the victim and perpetrator. For a variety of reasons, forensic evidence often is unavailable. The necessity for the "no corroboration" rule evolved from the historical legal requirements that

the alleged victims' accusation *be* corroborated. See generally Vitauts M. Gulbis, Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense, 31 A.L.R. 4th 120 (1984); Michelle Anderson, Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims, 13 New Crim. L. Rev. 644 (2010) (discussing evolution of rape law). S.C. Code §16-3-657 codified the change from this historical view, clearly delineating that corroborative evidence is no longer mandated. As noted in Rayfield, the instruction serves an important purpose during the jury trial:

> It is not always necessary, of course, to charge the contents of a current statute. Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical and forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear – **not only to the judge but also to the jury** – that a defendant may be convicted solely on the basis of a victim's testimony.

Rayfield, 369 S.C. at 117, 631 S.E.2d at 250 (emphasis added).

In adopting §16-3-657, our Legislature ensured that both judge and jury understand that such cases may proceed solely on the basis of the victim's testimony despite long-standing beliefs to the contrary.[2] The single sentence instruction in question in this case was not unduly emphasized and the charge, taken as a whole, was permissible under a strong line of South

[2] The Legislature also took further measures for the protection of victims of sexual violence in that same legislative session. S.C. Code Ann. § 16-3-657 and S.C. Code Ann. § 16-3-659.1, South Carolina's "rape shield" law, were both originally enacted during the 1977 legislative term. The inception of S.C. Code Ann. § 16-3-659 was 1977 Act No. 157, § 10. The inception of S.C. Code Ann. § 16-3-657 was 1977 Act No. 157 § 7.

Carolina precedent. Therefore, the trial judge did not err in charging the jury on S.C. Code §16-3-657, as it was correct law.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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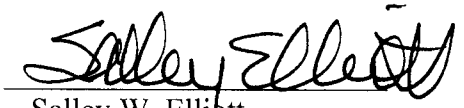
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated October 7, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certified that all parties required by Rule to be served have been served. This 7th, day of October, 2015.

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