

 ORIGINAL

RECEIVED

DEC 29 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

THE STATE,

RESPONDENT,

V.

NATHANIEL WITHERSPOON,

PETITIONER,

APPELLATE CASE NO. 2013-001440

---

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

---

Opinion No. 2015-UP-556

---

PETITION FOR REHEARING

---

Pursuant to Rule 221(a), SCACR, Petitioner Witherspoon respectfully petitions this Court for rehearing because petitioner submits the concurring opinion of the Chief Judge is correct in stating that it is error to instruct the jury that the alleged victim's testimony need not be corroborated. Petitioner disagrees that the error was harmless here where the trial judge also erroneously instructed the jury that its function was "to seek the truth."

As discussed at the oral argument, the Attorney General incorrectly asserted in its brief that the jury was correctly charged on the law, and therefore it erroneously contended any error in instructing the jury that the alleged victim's testimony need not be corroborated was harmless

pursuant to State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006). Our Supreme Court in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), warned trial judges to avoid using any “seek” language because such language is unnecessary and it runs the risk of unconstitutionally shifting the burden of proof to a defendant. Therefore, petitioner’s jury was given horribly misleading instructions as to its core purpose and function, and instructing it that the alleged victim’s testimony need not be corroborated cannot, respectfully, be dismissed as harmless error.

The trial judge unequivocally told the jury: “Throughout this process, ladies and gentleman, **you have but one objective: to seek the truth, regardless of its source.**” R. 318, ll.23-25. The jury was also instructed that “the testimony of the victim need not be corroborated.” R. 326, ll. 9-14. Petitioner understands that jury instructions are viewed as a whole. However, this jury was instructed that its **one objective** was to seek the truth, **and** the victim’s word standing alone was sufficient. That was extremely prejudicial, and it respectfully was not harmless error. While the Attorney General also argues the reasonable doubt instruction was not error, that does not change the fact it was not the preferable State v. Manning, 305 S.C. 413, 417, 409 S.E.2d 372, 375 (1991) “a reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act,” instruction. R. 322, l. 24 – 323, l. 16.

The alleged victim, Sharon R., was sixty-four years old at the time of the incident on October 24, 2011. R. p. 26, ll. 9-12. She was legally blind because of cataracts. R. p. 28, ll. 1-9. She admitted that she regularly used crack cocaine. A man came to her door, and he asked to use the phone claiming his car had “broken down.” While she walked to get the phone “he grabbed me around the throat and started dragging me to the bedroom .... I was doing everything I could to get help, to get away from him. And he grabbed me by my hair, pulled me down, and he started beating me in the face. And I kept hollering, you know, for somebody to help me. And finally he looked at

me very soft-spoken, and he says, I have a knife. *I don't remember anything after that. Except looking around and looking for something to put on.*" She stated she then went to her neighbor's house across the street and the neighbor called 911. I told her I'd been attacked and raped. I mean, I was raped." R. p. 30, l. 17 – 33, l. 6. (emphasis added). *Ms. R. admitted she had no idea who the person was that assaulted her.* She told a detective she thought it could either be a dark-skinned white guy or a black man. R. p. 45, l. 15 – 46, l. 9. She also said it could have been "maybe an Italian guy." R. p. 46, ll. 21-22. This Court can take judicial notice that petitioner, on the Department of Corrections Incarcerated Inmate Website clearly does not meet this description.

She admitted she had friends who came over to her apartment to "get me high" on crack cocaine. R. p. 52, ll. 15-20. She named "Cooper, a guy named New York, and ...a friend of mine named Pam" as recent partakers. R. p. 52, ll. 15-20.

Jill Farman was an investigator with the North Charleston Police Department. R. p. 86, l. 21- 87, l. 14. Sharon R. told Farman that she thought a dark-skinned white male or an Italian or maybe light-skinned black male may have been her attacker. R. p. 90, l. 3 – 92, l.1. Ms. R. also told Farman that "New York" had been there the night before and they were smoking crack. R. p. 92, l. 13 – 93, l. 24.

Farman admitted that petitioner having a consensual sexual relationship with the alleged victim would be "an option to explain why his [petitioner's DNA] was there, yes." R. p. 104, l. 20 – 105, l. 16. However, Farman refused to admit that that a consensual sexual relationship would have changed her evaluation of this case – evidentially that she thought petitioner was guilty. R. p. 111, l. 23 - 112, l. 2. Farman admitted that she understood petitioner was very cooperative with the police. R. p. 126, ll. 2-5.

Janet Ward was a sexual assault nurse at MUSC. R. p. 129, ll. 11-19. She remembered that Sharon R. reported to the emergency room with injuries. R. p. 138, l. 25 – 140, l. 2. Ward acknowledged that she was told by Ms. R. that she had not done drugs or drank alcohol within the last seventy-two hours. That obviously was not true. R. p. 145, l. 23 – 146, l. 1.

One DNA swab revealed that petitioner could not be excluded as a possible “contributor.” R. p. 153, ll. 16-24; 160, l. 3 – 161, l. 17.

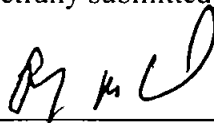
Officer Matt Lawless of the North Charleston Police Department was responding to a “shots fired” call unrelated to this case when he found a cell phone with the name “N. Witherspoon on the screen. The phone no longer had service.” Lawless estimated this was “about a mile away” from the alleged victim’s apartment. R. p. 77, l. 10 – 80, l. 21. The import of this was the phone Lawless found that it was the alleged victim’s phone stolen by her attacker. R. p. 34, l. 23 – 35, l. 1; R. p. 79, ll. 20-25.

During the defense case, Tammy Stiles testified that she had often seen petitioner, whom she had known for over twenty years, at the alleged victim’s apartment. She said he was there “just about every time I went there.” Stiles testified that petitioner and Ms. R. were doing sexual favors “for one another.” She said the alleged victim readily admitted her sexual relationship with petitioner. R. p. 215, l. 6 – 219, l. 7.

Derrick Felder also testified that he knew that petitioner and the alleged victim did drugs together at her apartment, and that they were having an ongoing sexual relationship. R. p. 228, ll. 7-25. These respectfully are not facts that from which a finding of harmless error should be found given the constitutional dimension to the improper jury instruction on “seeking the truth.” The jury’s function was to determine whether the state had proved petitioner’s guilt beyond a reasonable

doubt, **not to determine what it thought happened here from these unusual facts** where the alleged victim – respectfully -- was a crack user, and a liar.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

This 29th day of December, 2015.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED  
DEC 29 2015  
SC Court of Appeals

\_\_\_\_\_  
Appeal from Charleston County  
Deadra L. Jefferson, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

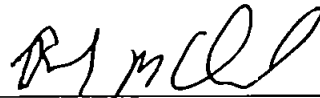
NATHANIEL WITHERSPOON,

PETITIONER

APPELLATE CASE NO. 2013-001440

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

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



\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

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

Robert M. Dudek (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.