STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge

THE STATE,

Respondent,

vs.

LYWONE S. CAPERS,

Appellant.

APPELLATE CASE NO. 2014-001174

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court's comments prior to trial, advising the jury the importance of their duties in determining the truth and ensuring justice is done, did not lessen the State's burden of proof, especially in light of the trial court's extensive instructions at the close of the case on reasonable doubt and the State's burden of proof.

STATEMENT OF THE CASE

Appellant Lywone Shatete Capers and his brother, co-defendant Bilal Sincere Haynesworth, were jointly tried and convicted of conspiracy, attempted murder, and possession of a weapon during the commission of a violent crime during a jury trial on May 19-21, 2014, before the Honorable Thomas A. Russo. Judge Russo sentenced Capers to an aggregate sentence of twelve years imprisonment.

STATEMENT OF FACTS

Lywone Capers and his brother, Bilal Haynesworth, fired into the residence where JayQuan Bell lived as retribution for a series of disrespectful communications between Bell and Haynesorth. Fortunately, no one was hurt.

On January 3, 2013, Clara Williams, Bell's grandmother, picked up Bell from his aunt's house to enroll at Swansea High School. Williams drove him to school in her Ford Focus. They were unable to complete the enrollment without Bell's mother, so they headed back to the car. Williams testified that two young men and a woman roughly in her thirties approached and threatened them. Williams did not know any of these people. Williams testified she felt threatened. Bell told Williams they should just go back to the car and leave, which they did. Williams and Bell drove back to the aunt's house briefly and then to an Exxon station to fill the car up with gas. ROA. pp. 36-40.

While Williams pumped gas, a Camaro pulled into the station, and one of the men from the incident at the school exited the Camaro and started to point at Bell and Williams. Bell said, "Let's go." They left and returned to the aunt's house. Williams was in the bathroom when she heard gunshots. Williams went into the laundry room and bent down. She heard "lots" of shots. She confirmed that a total of five people were in the house when the shots were fired. ROA. pp. 43-44.

Jennie Childs, Bell's aunt, testified she let Bell live with her while Bell went to school at Swansea. Williams picked Bell up to enroll him at school and was going to also take him grocery shopping. When Bell returned, Childs noticed he was upset. Then she

heard gunshots. Everyone got down on the floor. She confirmed that one of the shots entered her daughter's room. ROA. pp. 50-56.

Bell explained he was raised by Williams but was living with his aunt, Childs, for residency purposes because he wanted to enroll for his last semester of high school in Swansea, where he originally started high school. While trying to enroll in the school, Bell and Williams were approached by Haynesworth, Capers, and their mother, Princess. Capers threatened them. Capers said, "All you niggas are dead" and looked at Williams and told her, "Bitch, you dead." ROA. pp. 68-76.

Bell and Williams left the school and returned to Childs' house briefly before they went to the Exxon station. While at Exxon, he saw Princess' Mercedes-Benz truck and Haynesworth's green Camaro. Haynesworth came out of the Camaro and began gesturing for Bell to turn around as Williams and Bell pulled away. Capers exited the truck and made gestures too. ROA. pp. 76-82.

Bell and Williams went back to the house again, and while inside the house, Bell heard engines outside. He opened the door and saw Haynesworth with his arm hanging out of the window holding a gun. Bell told everyone to get down and then two shots were fired. ROA. pp. 84-85.

Bell looked out the door and saw Nehemiah Dixon (who he also saw at the school) and Capers, who was holding a gun, in the Mercedes-Benz truck. More shots were fired. Bell also saw a muddy tan Nissan. ROA. pp. 85-86.

The motive apparently was an argument between Bell and Haynesworth over the mother of Bell's child. However, according to Bell, the argument was over. Cross-

examination elicited testimony about threatening Facebook messages that suggested an active dispute and helped prove the defendants' motive for the drive-by shooting. This evidence included threats Bell made to Haynesworth over Christmas break. ROA. pp. 95; pp. 102-105; pp. 106-107. No evidence suggesting self-defense was presented to the jury. After the shooting, Bell sent Haynesworth a message complaining they should have fought instead of Haynesworth bringing guns into the dispute. ROA. p. 107. Bell testified he does not own a gun. ROA. p. 120.

Nehemiah Dixon was obviously a reluctant witness for the State. Dixon dates Capers' sister, and he was with them on January 3, 2013. Dixon, Princess, and Capers took Haynesworth to school. Afterwards, they received a text that Haynesworth felt uncomfortable there, so they went back to sign him out of school. Dixon testified he did not see Bell at the school because he stayed in the truck. Dixon admitted he overheard Capers say something about settling some things. They left Princess at the school, perhaps to complete paperwork, and Haynesworth, Capers, and Dixon went back to the house. Dixon did not recall how they ended up in separate cars, but Dixon recalls he drove the Nissan to Exxon. Haynesworth was in the Camaro. Capers in the Mercedes-Benz truck. Princess was also with them. They saw Bell there with a lady. Bell left the station and Dixon followed him. ROA. pp. 124-134.

Dixon testified he lost sight of Bell's car. Dixon drove back to the Exxon. The others were still there. Dixon claimed more memory problems in describing whether he spoke with the defendants at the gas station. Dixon claimed he pulled away from the gas station and then heard two shots while driving down the road, followed by two more shots.

ROA. pp. 134-136.

Dixon was impeached by the State with his prior statement provided on January 7, 2013. ROA. pp. 141-142. Dixon's statement stated, in part, the following: "I drove back to the Exxon and drove back to the bottom looking for a car, spotted the car and then two shots were fired and two more shots and we drove home." ROA. p. 145, lines 10-12.

Clifton Hayes, the Swansea Chief of Police, testified he responded to the scene of the shooting. Bell was in an excited state. ROA. pp. 151-152. Chief Hayes recovered a freshly discharged shell casing in the driveway. ROA. p. 155. He found a bullet hole in the glass of a window, the bullet went through the walls and rested in the bathroom. ROA. p. 158. No firearm was recovered. ROA. p. 159.

Haynesworth testified on his own behalf. Helping prove an apparent motive for his actions, Haynesworth testified about a nasty, threatening Facebook communication sent to him by Bell. ROA. pp. 192-194. He confirmed that he, Princess, Dixon, and Capers went to Swansea High School. He confirmed that Princess took him out of school. They went to the Exxon station where, Haynesworth maintained, Bell yelled at him. ROA. pp. 195-198. Hayneswoth claimed they then went to pick up his friend from an alternative school. ROA. p. 200. Haynesworth's "alibi" fell apart with this testimony, because Haynesworth was claiming he picked up his friend from the alternative school at the extremely early hour of 9:00 a.m. – 9:30 a.m. ROA. p. 207.

Tammy "Princess" Coleman nonetheless joined in this absurd story, testifying that when they arrived at the alternative school, Haynesworth blew his horn, and when the friend did not come out, Haynesworth told Princess, "Mom, it's too early to get [Haynesworth's

friend]." ROA. p. 219, lines 11-14. When asked by defense counsel if she realized it was too early to pick up the friend, Princess testified, "No. With everything that was going on, I didn't even pay it no mind. He used to picking [the friend] up every day." ROA. p. 219, lines 15-18.

During closing argument, the prosecutor pointed out the absurdity that they accidently forgot it was only 9 a.m. and school was not over when they went to pick up this friend. ROA. p. 248, lines 9-21.

ARGUMENT

The trial court's comments prior to trial, advising the jury the importance of their duties in determining the truth and ensuring justice is done did not lessen the State's burden of proof, especially in light of the trial court's extensive instructions at the close of the case on reasonable doubt and the State's burden of proof.

Capers complains about the trial court's comments to the jury, prior to swearing the jury, that a trial "is a search for the truth in an effort to make sure that justice is done between the parties that appear before the Court." The comments were proper instructions made prior to trial and designed to impart to the jury the gravity of its duty. The comments created no likelihood the jury would misunderstand the State's burden of proving the defendants guilty beyond a reasonable doubt, and any defect was cured by the trial court's extensive instructions on the State's burden of proof at the end of trial. Further, any conceivable error is harmless beyond a reasonable doubt.

The full context of this comment is as follows:

> Most folks' experience with regards to jury trials are what they've seen on television or read in books or what they've seen in the movies. And as we all know, those trials are always filled with intense action, riveting circumstances, and a lot of drama. That's Hollywood.
>
> Now, during the course of this trial, while any one of those things may occur, what is important for you to understand and to keep in your mind throughout the course of this trial is that this case is not for your entertainment. This trial is a fundamental part of our democracy. **It is a search for the truth in an effort to make sure that justice is done between the parties that appear before the Court.** Searching for the truth and making sure that justice is done oftentimes can be slow, deliberate, sometimes it can be repetitive. In other words, it's very different from what you may have seen in the movies, read in books, or seen on

> television. **This Courtroom is a place of honor. It is dedicated to the protection and to the preservation of citizens' rights** through what many have called the greatest justice system ever created.

ROA. p. 14, line 12 – p. 15, line 7 (emphasis added). The trial court then advised the jury "in just a moment you're going to take an oath to try this case and to reach a fair and a just verdict. And so you are also expected to be professional, reasonable, and ethical in the performance of your duty." ROA. p. 15, lines 15-18. The jury was sworn, and the trial court advised the sworn jurors that the indictments are simply charges and not evidence. The trial court then advised the jury the State bore the burden of "proving each of the elements of the indictments beyond a reasonable doubt." ROA. p. 15, lines 14-23.

Co-defendant's counsel objected to the comment, and Capers' attorney, who did not initially object, joined in the objection after the trial court denied co-defendant's motion. The trial court noted the language in the trial court's instruction was the one recommended by the Chief Justice Commission on the Profession. ROA. pp. 22-24.

Capers relies on State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). In Daniels, the trial court instructed the jury, prior to its deliberations and after the jury was instructed on reasonable doubt and the State's burden of proof, "You and I are acting for the community" and "This court is of the confirmed opinion that whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Id. at 254, 737 S.E.2d at 474. The Supreme Court instructed trial judge to "remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all the parties" out of concern that the instruction would change the jury's perception of the

burden of proof. Id. at 256, 737 S.E.2d at 475. Three other justices joined Chief Justice Toal's concurring opinion which found the adequacy of the entire overall instruction cured any possible constitutional error and the instruction was harmless in light of the overwhelming evidence of guilt. Id.

Unlike Daniels, the trial court did not suggest the jury was acting for the community. Further, the timing of the comment, prior to trial and not immediately before deliberations, makes the likelihood of any burden-shifting effect even more remote. Further, as in Daniels, any conceivable error was cured by the trial court's specific instructions two days later, made immediately prior to the jury's deliberations, on the State's burden of proving guilt beyond a reasonable doubt. The trial court instructed the jury as follows on the State's burden:

> Now, the defendants have pled not guilty to the charges in these indictments, and that plea puts the burden on the State to prove the defendants guilty. A person charged with committing a criminal offense in South Carolina is never required to prove him or herself innocent. I charge you that it is an important rule of law that the defendant in a criminal trial, no matter what the seriousness of the charges may be, will always be presumed to be innocent of the crimes for which the indictment was issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.
>
> This presumption of innocence does not end when you begin your deliberations, but it accompanies the defendants throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is not a mere legal theory. It is not just a legal phrase, but it is a substantial right to which every defendant is entitled. Unless you, the jury, are satisfied by the evidence of the defendant's guilt beyond a reasonable doubt.
>
> Now, the State has the burden of proving a defendant's guilty [sic] beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were

> told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or the preponderance of the evidence. In criminal cases, the State's proof must be more powerful than that; it must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. . . .

ROA. p. 256, line 18 – p. 257, line 23.

The trial court further instructed the jury to only consider the competent evidence presented to them. ROA. p. 258, lines 8-17. The trial judge advised the jury it is the exclusive judge of facts. ROA. p. 259, lines 2-16. When informing the jury it could not draw any conclusions from Capers' decision to not testify, the trial court also reminded the jury again the State has the burden of proof and the defendant does not have to prove his innocence. ROA. p. 262, lines 2-9.

In discussing the specific offenses, the trial court informed the jury the State needed to prove the defendants attempted to murder another person with malice aforethought. ROA. p. 263, lines 15-22. The trial court advised the jury if the jury found the State failed to prove attempted murder beyond a reasonable doubt, then the jury could consider if the State proved Assault and Battery in the First Degree beyond a reasonable doubt. ROA. p. 265, lines 21-25.

The trial court further instructed the jury the State was required to prove beyond a reasonable doubt that the defendants were in possession of a firearm for the jury to convict the defendants of Possession of a Weapon During the Commission of a Violent Crime. ROA. p. 266, lines 9-14. Likewise, the trial court advised the jury the State must prove beyond a reasonable doubt the elements of Conspiracy. ROA. p. 266, line 24 – p. 267, line 3.

The trial court instructed the jury on alibi as follows:

> There is no burden on the defendant to prove an alibi. The burden is on the State to prove beyond a reasonable doubt that the defendant was actually present at the scene of the crime, actually participated in it, and was not somewhere else. In other words, the State has the burden of disproving the defendants' alibi defense.

ROA. p. 268, lines 11-16.

Put in context, the trial court's comments prior to the jury being sworn merely imparted the gravity of the jurors' responsibility to ensure justice is done and citizens' rights are protected. The comments did not create any real danger that two days later the jurors would not follow the trial courts' extensive pre-deliberation instructions on the State's burden of proving the charges beyond a reasonable doubt. See State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) ("Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error."). Additionally, any error was harmless beyond a reasonable doubt as the evidence was more than sufficient to convict and the defense managed to succeed only at helping prove motive for the violent crime. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Wanda H. Carter, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 30th day of October, 2015.

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