ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2015-UP-556 (S.C. Ct. App. filed 12/16/2015)

12-GS-10-03191, 03192

THE STATE,

RESPONDENT,

V.

NATHANIEL WITHERSPOON,

PETITONER

APPELLATE CASE NO. NO. 2016-000306

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/21/2016.

QUESTION PRESENTED

Whether the Court of Appeals erred in finding the trial court did not abuse its discretion by instructing the jury that the alleged victim's testimony did not have to be corroborated since this was an impermissible charge on the facts and prejudicial?

STATEMENT OF THE CASE

The state's main witness and alleged victim, Sharon R., was legally blind and sixty-four years old at the time of the incident on October 24, 2011. R. p. 26, l. 9- 28, l. 9. Ms. R. admitted that she regularly used crack cocaine. She lived in an apartment in North Charleston. R. p. 27, ll. 7-9.

One of the men who often came by her apartment to do crack cocaine was nicknamed "New York". R. p. 29, l. 11 – 30, l. 13. Ms. R. remembered that New York had come by the night before or the night of the incident. R. p. 29, ll. 8 -16.

She testified that she was laying down watching television because she could not sleep. She thought she heard her cat scratching at the door to be let into the apartment. She went to the door to let the cat in, and there was a man standing there. He was "very soft-spoken." R. p. 30, l. 17 – 33, l. 6.

The man asked to use the phone alleging his car had "broken down." She agreed to let him use the phone. 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.

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. She remembered that Sharon R. had been in the emergency room and had dried blood on her and she had other injuries as well. R. p. 88, l. 17 – 89, l. 2. The included a scratch around her neck, and "some redness there." R. p. 89, ll. 8-14. Farman described her as "exhausted."

Farman also related that Sharon R. 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.

Consensual sex and DNA evidence

Significantly, later in the case, defense witness Tammy Stiles testified that she had often seen petitioner, whom she had known for over twenty years, at Sharon'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.

Similarly, Derrick Felder also testified that he knew that petitioner and the alleged victim did drugs together at her apartment. R. p. 228, ll. 7-25. Given the Stiles testimony, and the failure of Sharon to claim to recognize petitioner's voice that night or otherwise rationally claim she thought he may have been her attacker, petitioner's DNA being found in her, as will be seen infra,

was not the critical evidence the state tried to claim it was.

Investigator Farman admitted that if petitioner was having a consensual sexual relationship with the alleged victim that would be "an option to explain why his [petitioner 's DNA] was there, yes." R. p. 104, l. 20 – 105, l. 16. Yet, 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.

Other evidence

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.

Catherine Leisy of SLED testified that petitioner had a DNA match on the external genital swabs of Sharon R. On another swab 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 Sharon's apartment. R. p. 77, l. 10 – 80, l. 21. The state wanted the jury to conclude the cell phone Lawless found was the alleged victim's phone stolen by her attacker. R. p. 34, l. 23 – 35, l. 1; R. p. 79, ll. 20-25.

Charge Conference and instruction

Defense counsel Grimes objected to the judge's intention to instruct the jury that "the victim's testimony does not need to be corroborated; [it] is a comment on the facts." The judge said the Legislature had decided "in its province that a CSC victim's testimony does not have to be corroborated. And that is the law . . ." R. p. 251, ll. 10-20.

Grimes said that if the judge was going to charge it he was preserving the issue for appeal. The judge responded: "Knock yourself out." R. p. 251, l. 13 – 252, l. 5. Defense counsel cited the dissent in State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), for his contention that this jury instruction was not proper, and was a charge on the facts. R. p. 251, l. 14 – 254, l. 12; R. p. 275, l. 2 – 276, l. 11. Over objection the judge charged that pursuant to the statute "the testimony of the victim need not be corroborated." R. p. 326, ll. 9-14.

Court of Appeals

The majority of the panel of the Court of Appeals in a summary opinion wrote, inter alia, that "[W]hen the [trial court] chooses to [include section 16-3-657 in its jury charge], 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 legislature has decided it is reasonable and appropriate in [CSC] cases to make abundantly clear - not only to the judge but also to the jury – that a defendant may be convicted soley on the basis of a victim's testimony.") *State v. Orozco*, 392 S.C. 212, 224, 708 S.E.2d 227, 233 (Ct.App. 2011)

Chief Judge Few concurring wrote, inter alia, "As I read the supreme court's opinion in *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006), it is error to charge the section to the jury, but it will almost always be harmless error. *See* 369 S.C. at 117-118, 631 S.E.2d at 250 ("[W]hen the [trial court] chooses to [charge section 16-3-657], giving the charge does not constitute *reversible* error when this single instruction is not unduly emphasized ..." (emphasis added)). Here,

I would find the error harmless and thus not reversible. *See State v. Burkhart,* 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002) (holding that to warrant reversal, a trial prejudicial")...

Rehearing

On rehearing, petitioner wrote that the concurring opinion of the Chief Judge was 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.

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."

ARGUMENT

The Court of Appeals erred in finding the trial court did not abuse its discretion by instructing the jury that the alleged victim's testimony did not have to be corroborated since this was an impermissible charge on the facts and prejudicial.

As seen, the alleged victim in this case could not identify her attacker. The state's case against the petitioner was circumstantial. Petitioner presented evidence that he had an ongoing sexual relationship with the alleged victim. The DNA evidence therefore proved little or nothing: "And how do we know the DNA did not come from the assailant," Defense counsel asked the jury, "The assailant didn't ejaculate in her . . . Just brushed up against and it might be touch be touch DNA that's left there. That might be why it's weaker than Mr. Witherspoon's. R. p. 291, l. 8 – 294, l. 14. The other circumstantial evidence involved the alleged victim's cell phone.

It is apparent that the alleged victim lied at the emergency about her crack cocaine use. It is clear that the use of crack cocaine can strongly alter a person's perceptions and their ability to reason.

The jury instruction that the alleged victim's testimony did not need to be corroborated was especially prejudicial in this case given the alleged description of her attacker as being an Italian man, "a dark-skinned white guy or a black man." Petitioner was a black man. "Doesn't that rule out Nathaniel by itself?," defense counsel asked.

The jury instruction in this case on the alleged victim's testimony *does not need to be corroborated* **gives special status to an alleged victim of a criminal sexual assault that the victim of no other crime receives.** Defense counsel correctly argued this jury instruction was an impermissible charge on the facts.

In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), this Court held that a judge could, but was not required to, charge South Carolina Code Section 16-3-657 that the alleged victim's

testimony need not be corroborated. In Rayfield the defendant argued the jury instruction was a charge on the facts and it carried the strong possibility of unfairly biasing the jury against the defendant. It further improperly, and obviously, emphasized the testimony of one witness, the alleged victim, against others. See State v. Hill, 394 S.C. 280, 298, 715 S.E.2d 368, 378 (Ct. App. 2011).

The dissenters in State v. Rayfield noted this jury instruction did not assist the jury in fulfilling its function of deciding whether the state had proven the charges beyond a reasonable doubt. It created more problems than it solved, and the jury instruction was confusing as a whole.

As stated above, petitioner is not aware of any other jury instruction that favors the testimony of a single witness over all others. Defense counsel correctly argued the instruction was a charge on the facts. See State v. Bagwell, 201 S.C. 387, 392, 23 S.E.2d 244, 249 (1942) (similar instruction on "uncorroborated" statements of accomplices should be received with caution and scrutinized by the jury with great caution was a charge on the facts which violated the State Constitution).

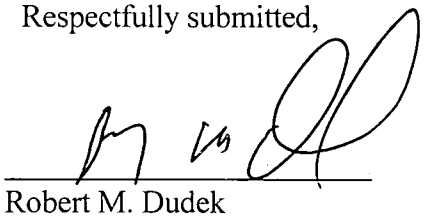
The purpose of the statute was to change the law that a trial judge when ruling on a directed verdict motion understood that that a rape charge need not be corroborated. It is **not a proper jury charge.**

The alleged victim in this case, as stated above, did not recognize her attacker, and her drug use, and her failure to be honest about her drug use at times, made her testimony very suspect. Petitioner presented evidence that he was often at the appellant's apartment, where they did drugs together, and that were having an ongoing consensual sexual relationship. The state's case against petitioner was circumstantial. The jury instruction that the shaky testimony of the alleged victim did not need to be corroborated was highly prejudicial in this case, and it constituted reversible error.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 14th day of March, 2016

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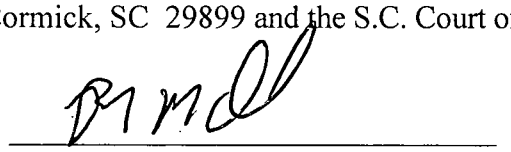
PETITONER

CERTIFICATE OF SERVICE

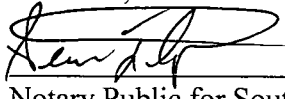
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Nathaniel Witherspoon #170928, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899 and the S.C. Court of Appeals this 14th day of March, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of March, 2016.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.