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 12/16/15)

12-GS-10-03191, 03192

THE STATE,

RESPONDENT,

V.

NATHANIEL WITHERSPOON,

PETITONER

APPELLATE CASE NO. NO. 2016-000306

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nathaniel Witherspoon, Appellant.

Appellate Case No. 2013-001440

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2015-UP-556
Heard October 16, 2015 – Filed December 16, 2015

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Nathaniel Witherspoon appeals his convictions of criminal sexual conduct (CSC) in the first degree and burglary in the first degree. He

contends the trial court erred by instructing the jury the victim's testimony did not have to be corroborated. He also maintains because assault and battery in the first degree was a lesser included offense of burglary in the first degree, the trial court erred in not instructing the jury on that offense. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred by instructing the jury the victim's testimony did not have to be corroborated: *State v. Gates*, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977) (holding the trial court is required to charge the law as determined from the evidence presented at trial); *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (noting if any evidence supports a charge, it should be given); *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004) ("A jury charge is correct if it contains the correct definition of the law when read as a whole."); *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002) (holding a trial court's "refusal to give a requested charge must be both erroneous and prejudicial" to warrant reversal); *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error."); S.C. Code Ann. § 16-3-657 (2003) ("The testimony of the victim need not be corroborated in prosecutions under [sections] 16-3-652 through 16-3-658."); *State v. Rayfield*, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006) ("[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 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."); *id.* at 117, 631 S.E.2d at 250 ("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 solely 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) ("[T]he trial court here properly charged the jury that the State had the burden of proving the defendant guilty beyond a reasonable doubt, that the jury had the duty to find the facts and determine the credibility of the witnesses, and that the jury should disregard any indication from the trial judge that he might believe a fact to be true or not. Thus, 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. Further, the *only* charge given by the trial court in regard to the corroboration of the victims' testimony was that 'in South Carolina the testimony of a victim need not be corroborated for prosecution

in a [CSC] case.' Thus, this single instruction was not unduly emphasized. Accordingly, there was no reversible error."); *State v. Hill*, 394 S.C. 280, 299, 715 S.E.2d 368, 379 (Ct. App. 2011) ("Here, the sole instruction the trial judge charged the jury on corroboration was as follows: 'The testimony of a victim in a [CSC] prosecution need not be corroborated by other testimony or evidence.' Notably, the judge immediately followed that statement with, 'Necessarily you must determine the credibility of witnesses who have testified in this case.' The judge also included in her charge several instructions regarding the State having the burden to prove [the defendant] guilty beyond a reasonable doubt, and further charged the jury that it was the exclusive judge of the facts and was not to infer that the trial judge had any opinion about the facts. Thus, this 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. 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.").

2. As to whether the trial court erred in not instructing the jury on assault and battery in the first degree as a lesser included offense of burglary in the first degree: *State v. Watson*, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002) ("The primary test for determining if a particular offense is a lesser included of the offense charged is the elements test."); *McKnight v. State*, 378 S.C. 33, 51, 661 S.E.2d 354, 363 (2008) ("If the lesser offense contains an element [that] is not included in the greater offense, it is not a lesser included offense of the greater offense."); *Knox v. State*, 340 S.C. 81, 85, 530 S.E.2d 887, 889 (2000) ("A lesser offense is included in the greater only if each of its elements is *always* a necessary element of the greater offense."), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Elliott*, 346 S.C. 603, 608, 552 S.E.2d 727, 730 (2001) (Pleicones, J., dissenting) (noting when determining whether a statutory offense is the lesser included offense of another statutory offense, "the determinative question is whether the offenses can meet the 'elements test'" and only when both offenses are common law offenses is "the critical issue . . . the historical relationship of the two offenses"), *overruled on other grounds by Gentry*, 363 S.C. at 106, 610 S.E.2d at 501; *State v. Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010) ("In determining whether the evidence requires a charge [on a lesser included offense], the trial court views the facts in a light most favorable to the defendant."); *State v. Tyndall*, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999) ("A lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge the

lesser included offense unless there is evidence tending to show the defendant was guilty only of the lesser offense.").

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

FEW, C.J., concurs in result only.

FEW, C.J., concurring: I concur in part 2 of the majority opinion. As to part 1, I concur in result only. The majority suggests there was no error in charging section 16-3-657 of the South Carolina Code (2003) to the jury. 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 117-18, 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 court's "refusal to give a requested charge must be both erroneous and prejudicial"); *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error."); *Rayfield*, 369 S.C. at 117-18, 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 . . . ."); *State v. Orozco*, 392 S.C. 212, 224, 708 S.E.2d 227, 233 (Ct. App. 2011) ("[T]he 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. Further, the *only* charge given by the trial court in regard to the corroboration of the victims' testimony was that 'in South Carolina the testimony of a victim need not be corroborated for prosecution in a criminal sexual conduct case.' Thus, this single instruction was not unduly emphasized. Accordingly, there was no reversible error."); *State v. Hill*, 394 S.C. 280, 299, 715 S.E.2d 368, 379 (Ct. App. 2011) ("[T]his 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. 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.").

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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

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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

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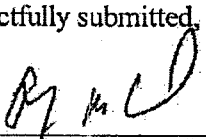
doubt, **not to determine what it thought happened here from these unusual facts** where the alleged victim – respectfully -- was a crack user, and a liar.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 29th day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE 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.

RM McD

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

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

Laura Hudock (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The South Carolina Court of Appeals

The State, Respondent,

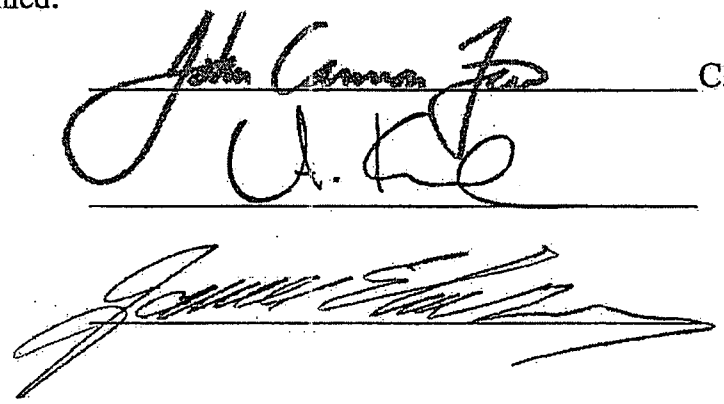
v.

Nathaniel Witherspoon, Appellant.

Appellate Case No. 2013-001440

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.

J.

J.

Columbia, South Carolina

FILED

January 21, 2016

cc:
Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Mark Reynolds Farthing, Esquire
Scarlett Anne Wilson, Esquire
The Honorable Deadra L. Jefferson