

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2016-000306

THE STATE,

Respondent,

vs.

NATHANIEL WITHERSPOON,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals correctly affirmed the trial judge's decision to instruct the jury on S.C. Code Ann. § 16-3-657, which states the testimony of a victim does not need to be corroborated, because that statutory language constituted a correct statement of law in South Carolina, that language was not unduly emphasized during the trial judge's jury instructions, and those jury instructions as a whole correctly conveyed the relevant and applicable law to the jury.

STATEMENT OF THE CASE

Procedural History

In March of 2012, Petitioner Nathaniel Witherspoon was arrested following an investigation into a violent home invasion and sexual assault that occurred on October 24, 2011. In June of 2012, Witherspoon was indicted by the Charleston County Grand Jury for one count of first-degree criminal sexual conduct and one count of first-degree burglary. On June 19, 2013, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Deadra L. Jefferson, circuit court judge, presiding. At the conclusion of trial, the jury convicted Witherspoon as indicted. Following the verdict, the trial judge sentenced Witherspoon to concurrent terms of imprisonment of eighteen years for each of the convictions. Witherspoon then timely filed and perfected an appeal.

Subsequently, on appeal, the Court of Appeals issued an unpublished opinion unanimously affirming Witherspoon's convictions. State v. Witherspoon, Op. No. 2015-UP-556 (S.C. Ct. App. filed Dec. 16, 2015). Thereafter, Witherspoon petitioned the Court of Appeals for rehearing, and the petition was denied. Witherspoon then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

In the early morning hours of October 24, 2011, Sharon Rosenbaum ("Victim"), a sixty-four-year-old woman who lived alone in North Charleston, South Carolina, began resting on her couch and watching television after "New York," a friend she had been smoking crack cocaine with earlier, left her apartment. (R. p. 26; pp. 29-30). A little while later, Victim heard what she believed to be the sounds of her pet cat at the door to the apartment, and she went to the door to let the cat inside. (R. pp. 31-32). Upon

opening the door, Victim was unexpectedly greeted by an unfamiliar man, who informed her his car had broken down and asked to use her phone. (R. p. 32). In response, Victim told the man she would get him her phone, turned around, and started to retrieve her phone from inside her residence. (R. p. 32; pp. 35-36). At that point, the man suddenly rushed into Victim's apartment, grabbed Victim around the throat, and began to drag her towards her bedroom. (R. p. 32). Alarmed, Victim began struggling to break free from the man, and he responded by pulling her to the floor by her hair, repeatedly striking her in the face, and threatening her with a knife. (R. pp. 32-33). He then proceeded to rape her. (R. pp. 32-33).

After the rape, the man left Victim's home, and Victim unsuccessfully tried to find her phone to call for help. (R. p. 34). When she could not do so, Victim put on some pants, ran to the home of one of her neighbors, and advised her neighbor she had just been assaulted and raped in her apartment. (R. pp. 32-34; pp. 56-57; pp. 60-61). In response, Victim's neighbor immediately called the police, and officers with the North Charleston Police Department quickly responded to their location. (R. p. 33; pp. 56-59). Upon arriving, they spoke with Victim about the incident, and she told them what had occurred. (R. pp. 35-36). However, she was only able to provide a vague description of her assailant as she did not know him, did not see his face, and was not wearing her glasses at the time of the assault. (R. p. 35; p. 39; pp. 44-46). Victim was then taken to the hospital to receive treatment for her injuries. (R. p. 36; p. 38).

At the hospital, Victim was examined by Janet Ward, a sexual assault nurse examiner. (R. p. 38; p. 129). During the examination, Ward observed Victim had scratches and bruising on her neck, bruising on her forehead, scratches and bruising on her face and cheeks, redness and bruising on her chest, bruising on the bridge of her nose,

darkening of her eyes, carpet burns to her back, and injuries to her arm and shoulder. (R. pp. 140-141). However, Ward did not see any injuries to Victim's vaginal area.¹ (R. p. 146). Ward then collected evidence from Victim's body, including external swabs from Victim's genital area and internal swabs from Victim's vagina, and sealed that evidence so it could subsequently be analyzed. (R. pp. 142-143; pp. 150-151).

A few days later, an officer with the North Charleston Police Department responded to a report of shots fired at a location not far from Victim's residence and located a phone on the ground while searching for evidence of the shooting. (R. pp. 77-79). Upon making that discovery, the officer collected the phone as evidence and observed Petitioner Nathaniel Witherspoon's name displayed on the phone's screen. (R. pp. 78-79). Subsequently, the officer learned the phone, which actually belonged to Victim, was connected to the investigation into the sexual assault of Victim, and he turned it over to Investigator Jill Farman, a detective with the North Charleston Police Department involved in that investigation. (R. p. 80; pp. 86-87; pp. 97-98). Thereafter, Investigator Farman examined the phone and discovered numerous calls had been made to and received from numbers Victim was not familiar with shortly after the sexual assault had occurred. (R. pp. 98-99). In response, Investigator Farman obtained records for one of the numbers frequently called from Victim's phone after the incident, spoke with the person associated with the number, and learned Witherspoon was involved with the calls from Victim's phone. (R. pp. 99-100).

Subsequently, Investigator Farman provided Witherspoon's name to S.L.E.D. as a possible suspect in the sexual assault of Victim, and an analyst with S.L.E.D. determined

¹ During trial, Ward explained a sexual assault does not always result in injuries to the vaginal area of a victim while noting hormones related to child-birth cause elasticity in a vagina. (R. p. 149). Notably, Victim had previously given birth to three children prior to the incident. (R. pp. 26-27).

Witherspoon's D.N.A. profile, which was maintained in South Carolina's D.N.A. database, matched the D.N.A. profile developed from the evidence collected during the sexual assault examination of Victim. (R. pp. 100-102). As a result, Witherspoon was arrested, and a new sample of his D.N.A. was submitted to S.L.E.D. for further analysis. (R. pp. 102-103; p. 109). Upon further analysis, a S.L.E.D. analyst confirmed the semen recovered from Victim's body following the sexual assault contained Witherspoon's D.N.A. (R. pp. 103-104; State's Ex. # 19 – D.N.A. Report). Witherspoon was then indicted for first-degree criminal sexual conduct and first-degree burglary, and he proceeded to trial. (R. p. 2; pp. 347-348; pp. 350-351).

During trial, Victim testified about the home invasion and sexual assault and indicated she could not remember the specific details of what occurred after her assailant threatened her with the knife.² (R. p. 32). However, she specifically testified she was raped by her assailant during the incident. (R. p. 33). Furthermore, Victim's neighbor confirmed Victim reported she had been raped after the incident, the officers involved in the investigation into the incident testified about the results of their investigation, and Ward testified about Victim's injuries and condition following the crimes, which Ward characterized as consistent with what Victim reported had transpired. (R. pp. 56-59; pp. 63-67; pp. 78-80; pp. 86-104; pp. 133-144).

Following that testimony, Catherine Leisy, a forensic analyst with S.L.E.D. and an expert in the field of D.N.A. analysis, testified about her analysis of the evidence collected during the investigation. (R. p. 153; pp. 155-157; pp. 159-161). Specifically,

² Prior to the beginning of the evidentiary phase of trial, the trial judge presented preliminary instructions to the jury. (R. pp. 5-14). Through those instructions, the trial judge explained to the jurors the State had the burden of proving Witherspoon's guilt beyond a reasonable doubt and instructed the jurors they were the sole judges of the facts and should disregard any remarks she made that could be construed as comments on the facts of the case. (R. p. 7).

Leisy confirmed she compared a D.N.A. profile developed from Witherspoon's D.N.A. to the D.N.A. profiles developed from the swabs collected during the sexual assault examination of Victim. (R. pp. 159-161). Based on that comparison, Leisy testified Witherspoon's D.N.A. profile conclusively matched the D.N.A. profile developed from the sperm found on the external genital swabs taken from Victim and the D.N.A. profiles developed from the sperm and semen found on the internal vaginal swab taken from Victim. (R. p. 160; pp. 192-193). However, Leisy indicated she also found a small amount of D.N.A. on one of the swabs collected during the sexual assault examination that could not have come from Witherspoon or Victim, but she noted the non-matching D.N.A. could have resulted from a "technical artifact" or "stutter" that occurred during the analysis. (R. pp. 160-161; pp. 164-166).

Subsequently, the State rested its case, and Witherspoon elected not to testify in his own defense. (R. p. 195; p. 197). However, several witnesses offered testimony on Witherspoon's behalf. (R. p. 200; p. 215; p. 225; p. 232). Initially, Clary Samuels, Witherspoon's brother-in-law, testified he had never seen Witherspoon use drugs, did not know Victim, and never saw Witherspoon in Victim's company. (R. pp. 203-205). Samuels further opined Witherspoon was not a violent person and indicated Witherspoon had only committed "small" crimes in the past.³ (R. pp. 206-208). Next, Tammy Stiles, who was incarcerated for trespassing at the time of Witherspoon's trial, testified she had been to Victim's apartment regularly in the past, almost always saw Witherspoon there, and believed Witherspoon and Victim were involved in a sexual relationship because Victim told her she was having sexual intercourse with Witherspoon. (R. pp. 215-219).

³ During the sentencing proceedings at the end of Witherspoon's trial, the trial judge noted Witherspoon had previously been convicted of criminal offenses over forty times, including for criminal domestic violence, possession of crack cocaine, pointing and presenting a firearm, and grand larceny. (R. p. 336).

However, Stiles acknowledged she had not been to Victim's apartment in roughly three years. (R. p. 221). Similarly, Derrick Felder, who was incarcerated for burglary at the time of Witherspoon's trial and who had previously been convicted of providing false information to the police, testified he knew Witherspoon and Victim and had seen Witherspoon at Victim's apartment a few times in the past. (R. pp. 225-229). Finally, Joseph Mazyck testified he was a long-time friend of Witherspoon's, had been to Victim's apartment before to have his palms read, saw Witherspoon there once or twice, and believed Witherspoon was an acquaintance of Victim's.⁴ (R. pp. 232-234).

Thereafter, at the close of the evidentiary phase of trial, the trial judge conducted a charge conference with the solicitor and defense counsel. (R. p. 241). During the charge conference, defense counsel asked the trial judge not to instruct the jury on the statutory language indicating a victim's testimony need not be corroborated because he alleged it would constitute an improper comment on the facts. (R. p. 251). However, the trial judge indicated she intended to present the non-corroboration charge to the jury because it constituted a proper statement of law in South Carolina. (R. pp. 251-254).

Following the charge conference, the solicitor and defense counsel presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 277-331). During the jury charge, the trial judge instructed the jurors:

In every case tried in this Court before a jury, the jury becomes the sole and exclusive judges of the facts in a case. You, the jury, are the judges of the facts in this case. This Court is the judge of the law. The constitution of our state has declared that a trial judge shall not intimate, state, comment upon, or make any statement to a trial jury about the facts in a case. Since you, the jury, are the sole judges of the facts in this case, you are not to infer anything that I've said during the progress of this trial, in ruling upon the admissibility of evidence or otherwise, or anything that I

⁴ During his cross-examination of Victim, defense counsel asked her if she knew Stiles, Felder, and Mazyck, and she denied that she did. (R. p. 49).

now state to you during the course of this instruction, that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case. This is a matter solely for you, the jury, to determine.

(R. p. 317). Additionally, the trial judge explained to the jurors the State had the burden of proving Witherspoon's guilt beyond a reasonable doubt, thoroughly defined reasonable doubt for the jurors, instructed the jurors on evaluating the credibility of the witnesses, and advised the jurors they could accept the testimony of a single witness over several witnesses or the testimony of several witnesses over a single witness.⁵ (R. pp. 317-318; pp. 321-324). Furthermore, the trial judge explained the elements of the indicted offenses to the jurors and instructed "code section . . . 16-3-657 . . . provides that the testimony of the victim need not be corroborated." (R. pp. 325-328).

Subsequently, at the conclusion of trial, the jury convicted Witherspoon as indicted. (R. p. 334). Following the verdict, the trial judge sentenced Witherspoon to concurrent eighteen-year terms of imprisonment for the first-degree burglary and first-degree criminal sexual conduct convictions. (R. pp. 345-346). Witherspoon then timely appealed. (App'x pp. 1-2).

⁵ Specifically, regarding witness credibility, the trial judge instructed the jury: "Necessarily, you must assess the credibility of witnesses who have testified. Credibility is simply a legalistic term meaning believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine that evidence which convinces you of its truth. Some of the things you may consider as you decide whether or not to believe a witness' testimony about a particular matter include: what was the manner and appearance of the witness who testified; was he or [she] straightforward or hesitant in answering; was the testimony of the witness consistent or inconsistent; how did the witness come to know the facts that he or she testified to or what was her or his ability to know these facts; is there some reason a witness would want to give testimony which would help or hurt one side [or] the other, in other words, was the witness biased or prejudiced; and was the testimony of a witness strengthened or weakened by other testimony or evidence. Also, in evaluating the testimony of the witnesses, you may believe one witness as against several witnesses or several witnesses as against one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. If you have a good and sound reason, you may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider the demeanor of a witness from the witness stand. You can believe as much or as little of each witness' testimony as you think proper. Throughout this process, ladies and gentlemen, you have but one objective: to seek the truth, regardless of its source." (R. pp. 317-318).

In challenging his convictions on appeal, Witherspoon argued the trial judge erred by instructing the jury a victim's testimony does not have to be corroborated while contending the presentation of such an instruction to the jury constituted an impermissible comment on the facts. (App. Final Br. pp. 5-10). However, the Court of Appeals rejected Witherspoon's appellate contentions and affirmed his convictions. (App'x p. 1). In affirming, a majority of the court relied upon a number of earlier appellate court decisions, including this Court's decision in State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006), to uphold the trial judge's decisions while a single member of the Court of Appeals concurred in result only due to the fact he believed the giving of an instruction on the statutory non-corroboration language always constituted error but was nonetheless harmless under the circumstances of Witherspoon's case. (App'x pp. 2-5).

ARGUMENT

The Court of Appeals correctly affirmed the trial judge's decision to instruct the jury on S.C. Code Ann. § 16-3-657, which states the testimony of a victim does not need to be corroborated, because that statutory language constituted a correct statement of law in South Carolina, that language was not unduly emphasized during the trial judge's jury instructions, and those jury instructions as a whole correctly conveyed the relevant and applicable law to the jury.

Witherspoon contends the Court of Appeals erred by affirming his convictions on appeal. In support of that contention, Witherspoon maintains his convictions should have been reversed because the trial judge committed reversible error and impermissibly commented on the facts by instructing the jury on the statutory non-corroboration language of S.C. Code Ann. § 16-3-657.⁶ Contrary to Witherspoon's contentions, the

⁶ Although Witherspoon has not raised such an argument in the argument portion of his petition for a writ of certiorari, Witherspoon's statement of the case in his petition contains reference to the fact he argued during oral argument before the Court of Appeals and on rehearing the trial judge's jury instructions as a whole were allegedly improper in light of the trial judge's use of "seek the truth" language at one point during her charge and in light of the trial judge's decision not to instruct the jury on "preferable" language regarding the reasonable doubt standard. (Pet. for Cert. pp. 8-9). Significantly though, during trial, Witherspoon did **not** raise any objections to the trial judge's use of "seek the truth" language and did **not** make any requests of any kind in regard to instructing the jury on reasonable doubt. (R. pp. 237-274; pp. 331-332). Furthermore, Witherspoon did **not** raise any challenges to the propriety of the trial judge's jury instructions as a whole on appeal until oral argument before the Court of Appeals, which he appears to readily acknowledge in his petition for a writ of certiorari. (Pet. for Cert. pp. 8-9). As a result, Witherspoon cannot properly pursue such an argument in his petition for a writ of certiorari, and such an argument cannot now be considered or addressed for the first time on appeal. See Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A] party may not raise an issue for the first time in a petition for rehearing."); State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief."); Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) ("An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal."); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); see generally State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"). However, even assuming such an argument could somehow be raised and considered for the first time beginning at the oral argument stage of the appeal, Witherspoon's appellate contention the trial judge's jury instructions as a whole were rendered erroneous based on the trial judge's use of "seek the truth" language and manner of instructing the jury on reasonable doubt is entirely without merit because, when viewed in their totality, the trial judge's jury instructions properly and correctly conveyed the State's burden of proving Witherspoon's guilt beyond a reasonable doubt and the trial judge's single reference to "seek the truth" language in a portion of her instructions not related to the State's burden of proof did not create a

trial judge's presentation of the statutory non-corroboration language, which was only referenced a single time during the jury instructions, did not constitute a comment on the facts and, instead, was a proper statement of the applicable South Carolina law relevant to Witherspoon's case. Furthermore, the trial judge properly and completely instructed the jurors on the State's burden of proof, their duties in evaluating the credibility of the witnesses, and their duties to act as the sole judges of the facts while specifically cautioning the jurors they should not interpret any of her remarks as a comment on the facts of the case. Under those circumstances, the trial judge's decision to instruct the jury on Section 16-3-657, which provides the testimony of a victim does not need to be corroborated, was not improper and did not constitute reversible error in Witherspoon's case, and, as a result, the Court of Appeals correctly affirmed Witherspoon's convictions. Witherspoon's petition for a writ of certiorari should be denied.

reasonable likelihood the jury decided Witherspoon's case in an unconstitutional or improper manner. See Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, . . . the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." (citations omitted)); State v. Aleksey, 343 S.C. 20, 28, n. 2, 538 S.E.2d 248, 252 (2000) ("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional."); State v. Adams, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) (finding no error in the trial judge's refusal to define reasonable doubt when instructing the jury on the law); State v. Johnson, 315 S.C. 485, 487, 445 S.E.2d 637, 637-638 (1994) (recognizing a trial judge is not required to define reasonable doubt to the jury); State v. Hoffman, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994) (holding a reasonable doubt jury charge that included "in seeking the truth" language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant); see also State v. Rabon, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980) ("The Constitution of this State requires that the trial judge declare the law, but no particular verbiage is necessary. It is sufficient if the precepts stated to the jury adequately cover that law which is applicable."); see generally Portuondo v. Agard, 529 U.S. 61, 73 (2000) (stating "the central function of [a] trial . . . is to discover the truth"); Burr v. Florida, 474 U.S. 879, 880 (1985) ("[T]he beacon of the truth-seeking process in criminal cases is not absolute certainty, but the 'reasonable doubt' standard[.]"); State v. Young, 238 S.C. 115, 139, 119 S.E.2d 504, 517 (1961) ("To arrive at the truth is the ultimate goal of every case. There are many rules governing the manner in which this must be done, but they are designed to aid in arriving at a verdict which speaks the truth."), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]").

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

In reviewing a trial judge's jury instructions for error, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). When reviewing the trial judge's jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial

court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.”).

One particular provision of law enacted by the legislature in South Carolina is Section 16-3-657, which states “[t]he testimony of the victim need not be corroborated in prosecutions under [Sections] 16-3-652 through 16-3-658.” S.C. Code Ann. § 16-3-657. In enacting that provision, the legislature recognized “crimes involving criminal sexual conduct fall within a unique category of offenses against the person” in which the only evidence that can frequently be presented due to the lack of eyewitnesses or other evidence is the uncorroborated testimony of the victim or the assailant. State v. Rayfield, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006). For that reason, the legislature “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.”⁷ Id. (emphasis added).

In the case sub judice, the trial judge committed no error in instructing the jury on the non-corroboration language from Section 16-3-657, which unquestionably constituted a correct statement of the law in South Carolina, because that instruction was not unduly emphasized during the trial judge’s jury charge and the jury charge as a whole correctly relayed the relevant and applicable law to the jury. See id. at 117-118, 631 S.E.2d at 250

⁷ Notably, in South Carolina, the testimony of a female victim has **not** always been sufficient to serve as a basis for a criminal conviction when not independently corroborated. See State v. Parsons, 171 S.C. 449, 453-454 172 S.E. 424, 425 (1934) (recognizing the testimony of a female victim must as a matter of law be corroborated in some manner in order for the jury to be able to properly convict a defendant for a violation of a statute criminalizing abortion); State v. Teal, 108 S.C. 455, 469, 95 S.E. 69, 72 (1918) (recognizing the testimony of a female victim must as a matter of law be corroborated by independent evidence in order for a defendant to be convicted of the offense of seduction); State v. Turner, 82 S.C. 278, 280, 64 S.E. 424, 425 (1909) (“Save for the testimony of the prosecutrix, there was no evidence whatever of ‘any means of deception and promise of marriage’ on the part of the defendant. In order to establish the crime of seduction, the state must prove beyond a reasonable doubt, **with evidence corroborative of the testimony of the prosecutrix**, that she was induced to have unlawful sexual intercourse with the accused by means of his deception and promise of marriage. There being no corroborative evidence on this material issue, the defendant was entitled to a direction of a verdict of acquittal.” (emphasis added and citations omitted)).

("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."); see also Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 ("A jury charge is correct if it contains the correct definition of the law when read as a whole."). Critically, in instructing the jury on the law in Witherspoon's case, the trial judge only instructed the jury on the statutory non-corroboration language a single time during the course of the entire jury charge. See State v. Orozco, 392 S.C. 212, 224, 708 S.E.2d 227, 233 (Ct. App. 2011) ("[T]he *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." (italics in original)). Furthermore, the trial judge correctly explained the State's burden of proof to the jurors, thoroughly identified the factors relevant to the assessment of a witness' credibility to the jurors, specifically informed the jurors they could accept a single witness' testimony over the testimony of multiple witnesses or the testimony of multiple witnesses over a single witness' testimony, and directly cautioned the jurors she had no opinion on the facts of the case and they should not consider anything she said as a comment on the facts. Cf. State v. Schumpert, 312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993) (finding the trial judge committed no reversible error in instructing the jury on the non-corroboration language when "[t]he trial judge properly charged the jury it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt"). Under those circumstances, the trial judge's jury instructions provided the jury with the correct legal

basis upon which to render a decision in Witherspoon's case and did not constitute reversible error. See Burkhart, 350 S.C. at 263, 565 S.E.2d at 304 (instructing there is no reversible error when the jury instructions given "afford the proper test for determining the issues").

In arguing the trial judge's jury instructions warrant the reversal of his convictions, Witherspoon contends the trial judge's presentation of the non-corroboration language to the jury constituted an impermissible comment on the facts of his case and improperly "favor[ed] the testimony of a single witness over all others."⁸ (Pet. for Cert. pp. 10-11). However, in instructing the jury on the non-corroboration language, the trial judge prefaced her remarks by specifically stating the non-corroboration language was derived from Section 16-3-657, which clearly conveyed to the jury the non-corroboration language was a legal principle taken from a statute and was not a personal statement of the trial judge's views on the facts or the weight of the evidence. See generally State v. Bell, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991) ("The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean."). Thus, contrary to Witherspoon's contentions, the trial judge did not impermissibly comment on the facts by instructing the jury on Section 16-3-657, which

⁸ In seeking a reversal of his convictions on appeal, Witherspoon also contends: "The purpose of the [non-corroboration] statute was to change the law that a trial judge when ruling a directed verdict motion understood that that a rape charge need not be corroborated. It is **not a proper jury charge**." (Pet. for Cert. p. 11) (emphasis in original). However, as this Court has previously explained, the legislature intended for the non-corroboration language of Section 16-3-657 to do "much more" than prevent trial courts or appellate courts from finding the testimony of a sexual assault victim to be insufficient to support a conviction simply because the testimony was not corroborated. See Rayfield, 369 S.C. at 117, 631 S.E.2d at 250 ("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 or 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." (emphasis added)).

correctly states the testimony of a victim does not need to be corroborated. However, even assuming that instruction could have somehow been misconstrued as a statement of the trial judge's beliefs on the facts of Witherspoon's case, the trial judge's instructions both at the beginning of trial and during the jury charge clearly dispelled any such misconception because the trial judge specifically explained to the jurors she had no opinion on the facts and any statement she made that could be construed as a comment on the facts had to be disregarded. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (“[J]urors are presumed to follow the law as instructed to them.”); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) (“It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so.”). Because the trial judge's jury instructions constituted a correct and complete statement of the law in South Carolina without impermissibly commenting on the facts of Witherspoon's case or unduly emphasizing the statutory non-corroboration language, the trial judge committed no reversible error in instructing the jury on the law, and the Court of Appeals correctly affirmed Witherspoon's convictions. Cf. State v. Hill, 394 S.C. 280, 299, 715 S.E.2d 368, 379 (Ct. App. 2011) (“[T]he 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.”); Orozco, 392 S.C. at 224, 708 S.E.2d at 233 (holding the trial judge committed no reversible error in instructing the jury on the non-corroboration language where that language was not unduly emphasized and the trial judge's jury charge as a whole properly instructed the jury on the law). Witherspoon's petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BY: _____

A large, stylized handwritten signature in black ink, appearing to read 'Mark R. Farthing', is written over a horizontal line. The signature is highly cursive and extends significantly to the right of the line.

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April 4, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2016-000306

THE STATE,

Respondent,

vs.

NATHANIEL WITHERSPOON,

Petitioner.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by delivering two copies of the same to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 4th day of April, 2016.


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