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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
The Honorable DeAndrea Benjamin, Circuit Court Judge
Appellate Case No. 2012-212628

THE STATE,

Respondent,

v.

MELVIN P. STUKES,

Petitioner.

Opinion No. 27633 (Filed May 4, 2016)

PETITION FOR REHEARING

On May 4, 2016, this Court issued an opinion reversing Petitioner Melvin Stukes' conviction for Criminal Sexual Conduct ("CSC") 1st Degree and Burglary 1st Degree. State v. Stukes, Shearhouse Advance Sheets, Opinion No. 27633 (filed May 4, 2016). Respondent (the State) respectfully petitions the Court for rehearing pursuant to Rule 221(a), SCACR. The State hereby seeks rehearing on the grounds the Court may have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon this Court's ultimate conclusion the "no corroboration" jury instruction (a victim's testimony need not be corroborated with additional evidence) constitutes an impermissible charge on the facts that was not harmless error in this case. Specifically, the State submits this Court failed to address the significant public policy,

endorsed by the Legislature and necessitated by historical bias, which weighs heavily in favor of the no corroboration instruction in sexual assault cases because of the particular nature of the crime in which the credibility of the witnesses is often the only evidence available at trial. Further, in refusing to find the instruction in this case amounted to harmless error, the Court demonstrated the exact societal bias against a rape victim that the statute sought to remedy. At the very least, the Court should revisit its conclusion on harmless error and affirm Petitioner's conviction. The Court should then take the opportunity to craft a permissible instruction on corroboration of witness testimony, so that in the future, a conviction need not be overturned and a victim need not be traumatized while the Court provides further clarification of the instruction. For these reasons, the State respectfully asks this Court to grant this petition for rehearing, re-examine its conclusion on harmless error, clarify a permissible instruction consistent with the intent of Section 16-3-657, and issue an opinion affirming Appellant's convictions.

STATEMENT OF THE CASE

Melvin Stukes ("Appellant") was indicted in Richland County in August of 2010 for Criminal Sexual Conduct ("CSC") 1st Degree (2010-GS-40-2700) and Burglary 1st Degree (2010-GS-40-2701). Appellant was tried by a jury July 24-27, 2012, and was found guilty. On July 27, 2012, the Honorable DeAndrea Benjamin sentenced Appellant to concurrent terms of 25 years each. A Notice of Appeal was served on August 1, 2012, and the direct appeal perfected. The Court of Appeals affirmed the conviction and the sentence. State v. Stukes, Op. No. 2015-UP-014 (S.C. Ct. App. filed January 14, 2015). A petition for rehearing was filed January 29, 2015, and was denied March 19, 2015. The petition for writ of certiorari followed. This Court granted the petition for writ of

certiorari on July 23, 2015, and issued its opinion May 4, 2016, overturning Petitioner's convictions.

ARGUMENT

A. Public Policy Favors Righting a Past Wrong

Victims of sexual assault face a very real and persistent bias against believability in nearly every stage of our criminal justice process, from friends and family who first hear of the assault, to the police who take the reports, to the general public and jurors at trial. S.C. Code §16-3-657 operates against this backdrop. Cases involving sexual violence are particularly likely to be witnessed by only the victim and perpetrator, forensic evidence often is unavailable and inconclusive, and the abhorrent treatment of the victims of sexual assault derives from the societal bias against these victims.

Historically, the legal system supported the notion the victim of sexual assault was lying. The necessity for the no corroboration rule evolved from the previous requirements the alleged victims' accusation be corroborated. See generally Vitauts M. Gulbis, Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense, 31 A.L.R. 4th 120 (1984); Michelle Anderson, Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims, 13 New Crim. L. Rev. 644 (2010) (discussing evolution of rape law). Indeed, the "Lord Hale cautionary instruction" warned juries the rape charge was easily made and difficult to defend. See e.g. Turner v. State, 892 P.2d 579 (Nev. 1995). Juries were charged that the testimony of the victim should be scrutinized more so than that of any other witness. Essentially, the charge suggested that in the absence of corroborating evidence, the victim invited the sexual assault.

S.C. Code §16-3-657 codified the change from this historical view, informing both trial court and society that under the law the victim who survives a sexual assault without the “advantage” of physical injuries or corroborative evidence of the assault can still be believed. Further, the statute indicated the victim’s testimony alone was sufficient for conviction. As recognized in State v. Rayfield,

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.

Rayfield, 369 S.C. at 117, 631 S.E.2d at 250. [Emphasis supplied.] In adopting §16-3-657, our Legislature ensured both judge and jury understand such cases may proceed solely on the basis of the victim’s testimony despite long-standing beliefs to the contrary. It should be noted that the Legislature has not modified the language of § 16-3-657 since the decision in Rayfield, indicating the Legislature approved of the Court’s holding in that case and its progeny. See State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183 (2014) (finding the legislature’s inaction following decision demonstrated the decision was correct); see also McLeod v. Starnes, 396 S.C. 647, 655, 723 S.E.2d 198, 203 (2012) (“[T]he Legislature is free to correct us if we misinterpret its words.”)

Despite the efforts of our Legislature in adopting § 16-3-657, the societal bias against victims of sexual assault exists today. See generally, Kent D. Streseman, Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991, 80 Cornell L. Rev. 1268, 1271 (1995). With the enactment of § 16-3-657, South Carolina was on the progressive side of this issue. This Court seemed to be, as well, finding in Rayfield that the no corroboration charge was appropriate given its historical context. In

its recent Opinion, however, the Court gave no explanation of why it chose to reverse the binding precedent of Rayfield, other than being persuaded by Rayfield's dissent. As noted earlier, the Legislature has not modified the statute in light of the Rayfield holding and there have been no other compelling extraneous reasons for this Court's departure from its precedent. Furthermore, the Constitution itself has not been changed or amended since Rayfield. Thus, the Court has failed to address the strong public policy favoring the no corroboration charge and should grant rehearing on this case.

**B. This Court Should Take the Opportunity Construct a Proper Instruction
Consistent with the Intent of §16-3-657**

At the very least, the State respectfully requests the Court to take the opportunity to provide some guidance on an acceptable no corroboration language so that future victims need not suffer through repeated trial and error while the courts resolve this issue. The Court should clarify a permissible instruction to juries who believe the victim's testimony but are unclear whether that testimony alone is sufficient to constitute proof beyond a reasonable doubt. As a result, the statute's remedial design will remain intact, while minimizing the perceived prejudice to the defendant.

S.C. Code §16-3-657 provides, "The testimony of the victim need not be **corroborated** in prosecutions under §§ 16-3-652 through 16-3-658." However, as given in this case, the standard credibility charge follows:

Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.

In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness.

You may believe a part of a – of the testimony of the witness and rejected the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety, are you may reject the testimony of a witness in its entirety.

You may consider whether any witness has exhibited to you and interest, bias, prejudice, or other motives in this case. You may also consider the appearance and manner of a witness while on the witness stand.

(R. p. 604, lines 7-22.) The credibility charge alone makes no mention of corroboration. While this Court makes much of the focus on the victim in the language of the impermissible no corroboration instruction, the Court fails to address the significance of the corroboration component. Upon being told the State must prove the elements of a crime beyond a reasonable doubt, the jury may question whether the testimony of a single witness is sufficient evidence to satisfy this burden of proof. The standard credibility charge, as it is commonly given now, fails to clarify any sufficiency of the evidence confusion.

The State respectfully asks the Court to modify the credibility charge above to comport with the language of the statute without appearing to impermissibly comment on the facts of the case. For all the reasons mentioned in Section A, the credibility charge does not adequately address the unique concerns of sexual assault cases. The Court should clarify the purpose of S.C. Code Ann. §16-3-657, if not for purposes of a jury instruction, and, further, add language to the credibility charge on the sufficiency of witness testimony. Such language could be something as simple as the following addition:

You may believe a part of a – of the testimony of the witness and rejected the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety, are you may reject the testimony of a

witness in its entirety. **Should you believe the testimony of a witness, that testimony need not be corroborated to prove guilt beyond a reasonable doubt.**

If this Court concludes, despite the years of jurisprudence to the contrary, that the no-corroboration charge impermissibly comments on the facts rather than states the law by singling out the victim's testimony, then the no corroboration charge could be easily tweaked so that the victim's testimony is not singled out.

C. Harmless Error

The most troublesome portion of this Court's opinion was the four sentence, superficial review of the record for its harmless analysis. The Court concluded, "this case hinged on credibility," and in a footnote explained that all the corroborating evidence pointed out in the dissent was derivative of the victim's credibility. In other words, the court refused to give any weight to the testimony of the victim's friends, the hospital nurse, and the investigating officers because they all formed their impressions based on the victim's behavior. The problem with this logic is that when the defense claims the sexual intrusion was consensual, all corroborating evidence is derivative of the victim's credibility. The Court's logic pigeon holes all the evidence into a he said/she said scenario, despite the overwhelming corroborating evidence supporting the victim's testimony.

This logic further perpetrates the bias against victims of sexual assault. To illustrate the point, suppose a person is driving his car and stops at a red light. A man approaches the car, reaches into the open window, unlocks the door, and forcibly pulls the driver out of the car. A scuffle ensues, and the victim is thrown to the ground. The suspect drives off with the car, and the victim calls the police and goes to the hospital to

be treated for his injuries. An observant officer later spots the stolen car in the suspect's driveway about a mile from the intersection. At trial, the victim testifies about what happened to him, the treating nurse at the hospital describes his injuries, and the officer describes the victim's shaken demeanor. Another officer testifies he asked the suspect about the car, and the suspect initially denied knowing anything about the car in his driveway. After the suspect's fingerprints are found in the car, and his DNA is found on the victim's clothing, the suspect then claims the victim actually loaned him the car, and they were engaging in a friendly wrestling match the middle of the road.

In the scenario above, the suspect's version of events is completely implausible, and the victim's testimony is corroborated by an abundance of evidence supporting his claim. It would not occur to anyone to call this a he said/he said scenario, in which a conviction hinged on credibility, because we do not easily believe a man would consent to loaning his car to someone he does not know. His lack of consent is further corroborated his demeanor after the crime and the injuries he suffered.

In the example above, would this Court find the testimony evenly distributed between the victim and the suspect, and would the outcome hinge on the victim's credibility? This same fact pattern presented in the case at hand; only the crime was sexual assault. However, the injuries to the victim's neck, her testimony, the nurse's testimony, the officer's testimony, her friend's testimony are considered derivative of the victim's credibility and therefore not considered as corroboration. This degradation of the evidence is illustrative of the societal bias against the victims. The bias explains why the defense of consent, which is not unique to a sexual crime, is the go-to defense for these defendants at trial for criminal sexual conduct.

What this Court says in its “perception of the Victim” language is that all corroborating evidence does not really corroborate the crime at all if you believe Victim was faking it. Taken to its logical conclusion, this Court would find all rapes a he said/ she said scenario. In refusing to find harmless error, this Court decided the victim’s credibility, with all its considerable derivative testimony, was not enough to uphold the conviction. After all, the Court concluded, it was reasonable for the jury to believe the victim met the defendant, flirted with him, and had sex in such a rough and vigorous manner it made marks on her face and neck-- all within thirty minutes, as the defendant claimed. This Court says it is reasonable that the Victim immediately regretted that decision, made up an elaborate story and act to deceive her friend, the hospital nurse, and the police. The Court also concluded it was perfectly plausible the defendant would deny knowing the victim, and then change his story because he was innocent.

This Court reached the opposite conclusion of a harmless error analysis in State v. Jenkins, 412 S.C. 643, 651-53, 773 S.E.2d 906, 910 (2015). In that case, the Court of Appeals found the case was a credibility contest between the victim and the respondent, who first claimed the victim’s ex-boyfriend assaulted her and then claimed it was consensual. This Court overruled the Court of Appeals. This Court said the following about the corroborating evidence

Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found Respondent guilty. For example, the victim testified at length, giving a detailed account of the assault and the events that followed. Moreover, the State presented physical evidence regarding the results of the rape examination conducted on the victim, including the extensive nature of the victim's injuries, the defensive wounds on the victim's body, and the presence of semen. The State likewise presented testimony from the nurse who performed the rape examination that the victim's wounds

were consistent with sexual assault. Other testimony revealed that the responding officers described the victim as “roughed up pretty good,” and the rape examination nurse described the victim's face as “quite bruised.” Additionally, the investigation of the alleged crime scene at the victim's apartment uncovered the victim's ripped underwear and blood and fingerprint evidence corroborating the victim's version of events. Finally, the responding police officers independently connected Respondent to the crime by his nickname “Black” due to their previous dealings with him. Further, after the officers searched for Respondent and found him naked and asleep a short distance away from the scene of the crime, the victim positively identified Respondent as her attacker within thirty minutes of the assault.

Accordingly, contrary to the court of appeals' assertion, this case was not dependent on the credibility of the victim and Respondent, with the DNA evidence serving as the only physical evidence that Respondent committed the assault...

State v. Jenkins, 412 S.C. 643, 651-53, 773 S.E.2d 906, 910 (2015) (citation omitted). In Jenkins, this Court clearly weighed the corroborating evidence of the assault independently of the victim's testimony and gave that evidence its due consideration. Indeed, the Jenkins court corrected the derivative evidence analysis performed by the Court of Appeals in overturning the court's reversal.

Consistent with its holding in Jenkins and contrary to the Court's statement in footnote 4 of its Opinion, the State submits the evidence against Stukes is overwhelming. The Court's perception is exactly the kind of conclusion the rape reform laws sought to combat. If S.C. Code Ann. § 16-3-657 was not written for the juries to hear, then surely it was meant for the judiciary, which despite its wisdom remain susceptible to the same societal bias as the jurors at trial.

Conclusion

For all of these reasons, the State submits this Court may have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon this Court's ultimate conclusion the trial court impermissibly commented on the facts by charging Section 16-3-657 and that the error was not harmless. The State respectfully asks this Court to reconsider its position considering the unique facts of Appellant's case in rehearing this matter and affirming Appellant's convictions.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Appellant's convictions and sentence.

Respectfully submitted,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 18th day of May, 2016.



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