STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

Opinion No. 2016-UP-118 (S.C. Ct. App. filed 3/2/2016)

13-GS-32-02376-02378

THE STATE,

RESPONDENT,

V.

LYWONE S. CAPERS,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was filed in the case on March 17, 2016, but denied by the Court of Appeals on April 21, 2016.

QUESTION PRESENTED

The Court of Appeals erred in holding that the trial judge's "charges as a whole," (presumably the jury charges regarding reasonable doubt and the state's burden of proof) in effect cured the trial judge's improper opening instruction ordering the jurors to consider justice for the victims because such a requirement was condemned in Daniels[1] as error and furthermore, this error was not harmless as the state's evidence was underwhelming and conflicting, which further nullified the alleged "charges as a whole" cure in the case.

[1] State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).

STATEMENT OF THE CASE

Petitioner Lywone Shatete Capers was convicted of conspiracy, attempted murder, and possession of a weapon during the commission of a violent crime during the May 2014 term of the Lexington County General Sessions Court before Judge Thomas A. Russo. Petitioner was sentenced to imprisonment for an aggregate term of twelve years. Erik Drylie represented petitioner at trial, and Assistant Solicitors Kate W. Usry and Gil Bell appeared on behalf of the state.

Petitioner appealed his convictions and sentences. On March 2, 2016, the Court of Appeals issued an opinion affirming petitioner's convictions and sentences. See State v. Capers, Unpublished Opinion No. 2016–UP- 118 (S.C. Ct.App. filed March 2, 2016). App. 1- 2. A petition for rehearing was filed on March 17, 2016. App. 3 – 10. The Court of Appeals issued an Order dated April 21, 2016, denying the petition for rehearing. App. 11.

This petition for review of the Court of Appeals' decision in petitioner's case follows.

ARGUMENT

The Court of Appeals erred in holding that the trial judge's "charges as a whole," (presumably the jury charges regarding reasonable doubt and the state's burden of proof) in effect cured the trial judge's improper opening instruction ordering the jurors to consider justice for the victims because such a requirement was condemned in Daniels[2] as error and furthermore, the error was not harmless as the state's evidence was underwhelming and conflicting, which further nullified the alleged "charges as a whole" cure in the case.

Petitioner Lywone Shatete Capers was convicted of conspiracy, attempted murder, and possession of a weapon during the commission of a violent crime during the May 2014 term of the Lexington County General Sessions Court before Judge Thomas A. Russo. Petitioner was sentenced to imprisonment for an aggregate term of twelve years.

At trial, the trial judge made the following opening remarks:

> Now, during the course of this trial, while any one of those things may occur, what is important for you to understand and to keep in mind throughout the course of this trial is that this case is not for your entertainment...It is a search for the truth in an effort to make sure that justice is done between the parties that appear before the Court. Searching for the truth and making sure that justice is done oftentimes can be slow, deliberate, sometimes it can be repetitive...[This court] is dedicated to the protection and to the preservation of citizens rights through what many have called the greatest justice system ever created. The attorneys that appear before you are advocates for the parties that they represent. Tr. 73, l. 17 – p. 74, l. 9.

Trial counsel objected to the comments above regarding justice for all parties as improper per State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). Tr. 80, l. 24 – p. 83, l. 24.

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[2] State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).

On appeal, appellate counsel raised the following issue.

> The trial judge erred in instructing the jurors that their duty was to ensure "that justice is done between the parties that appear before the court" because such an order surely misled the jurors with respect to the state's burden of proving petitioner's guilt beyond a reasonable doubt and likely directed them to consider vindication for persons who were portrayed by the state as the alleged victims in the case.

The Court of Appeals issued an opinion affirming petitioner's case on appeal via the following authorities:

> State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003) ("In reviewing just charges for error, we must consider the [trial] court's jury charge as a whole....."); 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.").

ERROR

In Daniels, the Court struck down the trial judge's jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case" as improper due to the following reasoning:

> [Requiring a jury to] return a verdict that is just or fair to all parties...could effectively alter the jury's perception of the burden of proof [by] substituting justice and fairness [in place of] the presumption of innocence and the state's burden to prove the defendant's guilt beyond a reasonable doubt... and [to] include the victim] as a party which they must consider Daniels, 737 S.E.2d at 475.

The Daniels Court's rationale was that informing the jury that all parties were entitled to justice violated the defendant's right to due process because this created a shifted burden or a lesser or diluted burden on the state to prove petitioner's guilt beyond a reasonable doubt. Similarly, petitioner's argument in this case is identical to the position presented by the defense in Daniels, i.e.,

that the trial judge's comment at issue was burden shifting and a lessened the reasonable doubt standard.

NOT HARMLESS ERROR

An unconstitutional burden shifting charge results in reversible error when the error is not harmless beyond a reasonable doubt. Daniels citing to Rose v. Clark, 478 U.S. 570 (1986); Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002). Furthermore, the jury charge on reasonable doubt at the close of this case did not cure the erroneous opening remark at the beginning of the case that set the tone throughout the trial, i.e., a dilution of the reasonable doubt principle, by advising the jurors to render justice to the victims in the case. In cases involving the issue of the efficacy of a reasonable doubt jury instruction, courts will examine whether there is a reasonable likelihood that the jury applied the instructions in a manner that would be inconsistent with the reasonable doubt standard and the state's burden of proof. State v. Daniels, supra. In this case, the trial judge issued the following reasonable doubt and burden of proof instructions:

> [T]he defendants have pled not guilty to the charges...A person charged with committing a criminal offense in South Carolina is never required to prove him or herself innocent. I charge you that it is an important rule of law that the defendant in a criminal trial, not matter what the seriousness of the charges may be, will always be presumed to be innocent of the crimes for which the indictment was issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.
>
> This presumption of innocence does not end when you begin your deliberations, but it accompanies the defendants throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is not a mere legal theory. It is not just a legal phrase, but it is a substantial right to which every defendant is entitled. Unless you, the jury, are satisfied by the evidence of the defendant's guilt beyond a reasonable doubt.

> Now, the State has the burden of proving a defendant's guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or the preponderance of the evidence. In criminal cases, the State's proof must be more powerful that that; it must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant's are guilty of the crimes charged, you must find the defendants are guilt of the crimes charged, you must find the defendants guilty. If, on the other hand, you think that there is a real possibility that the defendant's are not guilty, you must give the defendants are benefit of that doubt and find them not guilty.

Here, there was a reasonable likelihood that the jury applied the Daniels instruction in a manner that was burden shifting, i.e., inconsistent with the state's burden of proof and in contravention of the reasonable doubt standard. Clearly, the reasonable doubt instruction did not cure the misleading Daniels error, which sufficiently tainted the above reasonable doubt charge because the state's evidence was conflicting and not overwhelming. In other words, the impermissible opening instruction in question did not constitute harmless error in light of the conflicting and underwhelming facts of the case. An analysis of the facts of the case prove this.

For example, in this case, a feud on facebook between co-defendant Bilal Haynesworth and JayQuan Bell led to two drive-by shootings that occurred on January 3, 2013, at JayQuan Bell's Lexington County residence. The state accused petitioner and co-defendant Haynesworth of driving by the residence occupied by JayQuan Bell and firing gunshots into that residence. Both petitioner and co-defendant Haynesworth were tried jointly. The state presented the testimony of JaQuan Bell, who was an eyewitness to the shootings, at trial. State's witness Nehemiah Dixon claimed he

had been in the company of petitioner, co-defendant Haynesworth, and JayQuan Bell prior to the shootings and described the tension between the parties, but claimed he was not involved in the shootings. To the contrary, note that Bell testified that Dixon was a participant in the drive-by shootings.

Petitioner did not testify or present any witnesses at trial. However, co-defendant Haynesworth and his mother testified during the case for the co-defendant's defense.

State's witness JayQuan Bell testified that he and his grandmother went to Swansea High School on the morning of January 3, 2013, to enroll him as a student there, and that as they made their exit from the school to their car in the school parking lot, they both encountered co-defendant Haynesworth and Haynesworth's mother Tammy Coleman, and Haynesworth's brother Lywone Capers, i.e. petitioner, and Nehemiah Dixon; and that they (Bell and his grandmother) heard death threats uttered from co-defendant Haynesworth and company.

Bell then stated that he and his grandmother drove away from the school parking lot and went to an Exxon gas station located nearby. Bell explained that while at the Exxon station, he and his grandmother again encountered co-defendant Haynesworth, co-defendant Haynesworth's brother, who is the petitioner, Haynesworth's mother Tammy Coleman, and Dixon; and that words and hand gestures were communicated to him by petitioner and co-defendant Haynesworth. Bell stated that afterwards, he and his grandmother went to his home, but that as soon as they were inside, he looked out of the door and saw a green Camaro and a grey Mercedes SUV drive by firing gunshots. Bell claimed that co-defendant Haynesworth sat in the driver's seat of the Camero and that he had "his arms hanging out the window with his gun." Bell claimed further that Dixon and petitioner were inside the grey Mercedes that followed the green Camero, and that Dixon was in the driver's seat and petitioner was hanging over the top holding and shooting a gun. Bell also testified

that a third car, which was a tan Nissan, was part of the caravan. Tr. 133, l. 3 – p. 154, l. 25; Tr. 197, l. 18 – p. 198, l. 3; Tr. 194, l. 7 – p. 195, l. 6.

State's witness Nehemiah Dixon testified that on the morning in question, he and petitioner and Tammy Coleman (mother) went to Swansea High school to pull Haynesworth out of school, and then when they saw JayQuan in the school parking lot also, words were exchanged about settling things. Dixon stated that they all went home thereafter and then they drove back out to the Exxon Station in separate cars. Dixon stated that he was in his Nissan and that co-defendant Haynesworth was in his green Camero, and that petitioner and Tammy Coleman (mother of petitioner and co-defendant Haynesworth) were in her Mercedes-Benz. While at the Exxon station, Dixon claimed that he heard JayQuan and co-defendant Haynesworth exchanging heated words. Then, when they all departed from the gas station, Dixon stated that he heard gunshots as he was driving off and that he responded by continuing to drive away until he arrived home. Tr. 198, l. 12 – Tr. 222, l. 9. Dixon gave a statement describing the events as follows:

> "I drove back to the Exxon and drove back to the bottom looking for a car, spotted the car and then two shots were fired and two more shots and we drove home." Tr. 219, lines 10-12.

Co-defendant Haynesworth testified and explained that prior to the shootings, he and his friends and relatives had been receiving threatening text and facebook messages from JayQuan Bell; and as a result, his family members (brother petitioner, mother Tammy Coleman and Dixon) followed him to school on the day in question. Then shortly thereafter on that same day, mother Tammy Coleman pulled him out of school very early on. Co-defendant Haynesworth stated that he got in his green Camero and went to the Exxon station and that he saw JayQuan there also. Haynesworth admitted that he and JayQuan exchanged heated communications at the gas station. Haynesworth also stated that his mother and brother (petitioner) were in his mother's Mercedes at

the gas station and that Mr. Dixon was at the gas station. Haynesworth added however, that neither he nor his mother, nor petitioner nor Dixon departed from the Exxon station and drove to Bell's home and shot at Bell's home. Haynesworth explained that he and his mother and petitioner simply went to their own home after leaving the Exxon station. Tr. 285, l. 12 – p. 297, l. 4.

Tammy Coleman, mother of petitioner and co-defendant Haynesworth, was called as a defense witness by co-defendant Haynesworth's attorney. Tammy Coleman explained that she and petitioner (also her son), and Dixon were inside her Mercedes following co-defendant Haynesworth to school on January 3, 2013, after she received a threatening call on that day regarding co-defendant Bilal Haynesworth. Then, when she received another death threat call against him, she went back to the school to withdraw him from the school. Coleman stated that they met JayQuan Bell at the Exxon station after leaving the school where she advised the boys to stop arguing. Then, after making their exit from the Exxon station, she (petitioner was in the Mercedes with her) and co-defendant Haynesworth (who was in the Camero) subsequently drove to their own home, and that they did not drive by Bell's home or shoot into Bell's residence on that day. Tr. 309, l. 2 – Tr. 316, l. 9.

Hence, this case boiled down to a swearing contest between Bell and the remaining witnesses, which landed in favor of petitioner's defense. For example, Bell stated that Haynesworth fired gunshots from a green Camero and that petitioner fired shots from the grey Mercedes while Dixon drove the grey Mercedes. However, Dixon stated that after they departed from the Exxon Station, he was in his tan Nissan, and was not in line of cars Bell claimed drove by his (Bell's) residence. In addition, Dixon claimed that he did not see or have knowledge of what happened after leaving the Exxon gas station because he continued in his Nissan on the path that took him home in another direction by the time gunshots were being fired. Moreover, Bell was not a credible witness

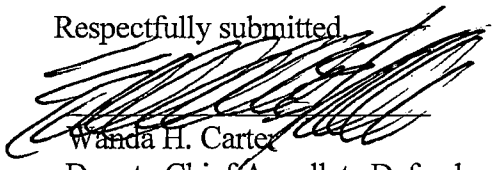
as he admitted to his role in perpetrating the feud with co-defendant Haynesworth. Also, not only did Dixon's testimony fail to corroborate Bell's testimony, Dixon's version of the events conflicted with Bell's summary in that he (Dixon) did not place petitioner and Haynesworth at the crime scene. Furthermore, defense witnesses Haynesworth and Coleman (mother) both testified that they went home after leaving the Exxon Station and never drove to or past Bell's residence on the day in question.

In summary, the lone eyewitness who could testify in the case was Bell. Dixon, who was the only other state's witness present at the Exxon station that testified for the state, denied any participation in the shootings and gave testimony that conflicted with Bell's testimony about the shootings. Thus, the conflicting and underwhelming state's evidence, coupled with the improper burden lessening/shifting jury instructions emanating from the opening instructions to the jury ordering them to concern themselves with the plight of the victims, all meant that the trial judge's improper opening comment in question was not cured by the "charges as a whole" to the extent that the law on reasonable doubt and the burden of proof had been explained satisfactorily; and the error was not harmless as the same certainly contributed to the jurors' guilty verdicts in the case. The trial judge's improper opening instruction requiring the jury to render justice to the victims resulted in a burden shifting and lessening of the reasonable doubt standard that was not cured by the "charges as a whole" in the case.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and full briefing on the above-raised issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of May, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
MAY 18 2016
SC Court of Appeals

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

Opinion No. 2016-UP-118 (S.C. Ct. App. filed 3/2/2016)
13-GS-32-02376-02378

THE STATE,

RESPONDENT,

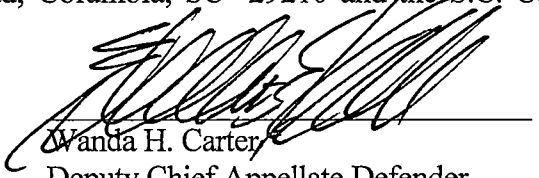
V.

LYWONE S. CAPERS,

PETITIONER

CERTIFICATE OF SERVICE

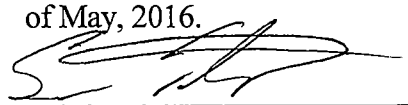
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Lywone S. Capers #360079, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210 and the S.C. Court of Appeals this 18th day of May, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of May, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022

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Robert M. Dudek, Chief Appellate Defender
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May 18, 2016

David Spencer, Esquire
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Lywone S. Capers

Dear David:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/smf

Enclosures

cc: Court of Appeals