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**SC SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

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Opinion No. 2016-UP-118 (S.C. Ct. App. filed March 2, 2016)

2013-GS-32-02376-02378

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THE STATE,

RESPONDENT,

V.

LYWONE S. CAPERS,

PETITIONER

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APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Lywone S. Capers, Appellant

Appellate Case No. 2014-001174

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Appeal From Lexington County  
Thomas A. Russo, Circuit Court Judge

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Unpublished Opinion No. 2016-UP-118  
Submitted February 1, 2016 – Filed March 2, 2016

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**AFFIRMED**

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Deputy Chief Appellate Defender Wanda H. Carter, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior  
Assistant Deputy Attorney General David A. Spencer,  
both of Columbia; and Solicitor Donald V. Myers, of  
Lexington, for Respondent.

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**PER CURIAM:** Affirmed pursuant to Rule 220(b), SCACR, and the following  
authorities: *State v. Nesbitt*, 411 S.C. 194, 199, 768 S.E.2d 67, 70 (2015) ("In  
criminal cases, the appellate court sits to review errors of law only." (quoting *State*

*v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)); *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003) ("In reviewing jury 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.").

**AFFIRMED.**<sup>1</sup>

**SHORT, THOMAS, and KONDUROS, JJ., concur.**

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<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA  
 IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

LYWONE S. CAPERS,

APPELLANT

APPELLATE CASE NO. 2014-001174

---

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

---

Opinion No. 2016-UP-118

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PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, appellate counsel would petition for rehearing in the above titled appeal regarding this Court's holding that the trial judge's reasonable doubt jury charge at the close of the case in effect cured the judge's opening remarks which instructed the jury to consider justice for the victims when such a request to take the victims' rights into account was struck down in Daniels<sup>1</sup> as erroneous because it diluted the state's burden of proof and improperly shifted the burden of proof on reasonable doubt. The following points support this petition.

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<sup>1</sup> State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).

1.) Appellant 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. Appellant was sentenced to imprisonment for an aggregate term of twelve years.

2.) 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.

3.) 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 appellant’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.

4.) This Court issued an opinion affirming petitioner 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.”).

5.) In Daniels, the Court struck down the trial judge's jury instructions 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 after 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 rationale was that informing the jury that all parties were entitled to justice in the case 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 appellant's guilt beyond a reasonable doubt. Similarly, appellant'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 constituted an improper burden shifting jury charge.

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 telling them to render justice to the victims in the case. Moreover, the impermissible opening instruction in question did not constitute harmless error because the state's evidence was not overwhelming and clearly conflicting in and of itself.

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 appellant and co-defendant Haynesworth of driving by the residence occupied by JayQuan Bell and firing gunshots into that residence. Both appellant 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 appellant, 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.

Appellant 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. appellant, 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 appellant, Haynesworth's mother Tammy Coleman, and Dixon; and that words and hand gestures were communicated to him by appellant 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 appellant were inside the grey Mercedes that followed the green Camero, and that Dixon was in the driver's seat and appellant 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 appellant 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 appellant and Tammy Coleman (mother of appellant 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 appellant, 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 (appellant) 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 appellant 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 appellant simply went to their own home after leaving the Exxon station. Tr. 285, l. 12 – p. 297, l. 4.

Tammy Coleman, mother of appellant and co-defendant Haynesworth, was called as a defense witness by co-defendant Haynesworth's attorney. Tammy Coleman explained that she and appellant (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 (appellant 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 appellant's defense. For example, Bell stated that Haynesworth fired gunshots from a green Camero and that appellant 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 appellant 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 eyewitnesses who could testify as such 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 lack of overwhelming state's evidence, coupled with the improper burden lessening/shifting jury instructions emanating from instructions to the jury to concern themselves with the plight of the victims, all meant that the trial judge's improper comment constituted error and not harmless error as the same certainly contributed to the jurors' guilty verdicts. The trial judge's improper **opening** remark requiring the jury to render justice to the victims contradicted the reasonable doubt standard and was not cured by the reasonable doubt jury charge given to the jury at the close of the case. This error violated the Fourteenth Amendment.

WHEREFORE, based on the foregoing points, appellate counsel would request a rehearing on the Daniels error that occurred in the case.

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender

This 17<sup>th</sup> day of March, 2016

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge  
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THE STATE,

RESPONDENT,

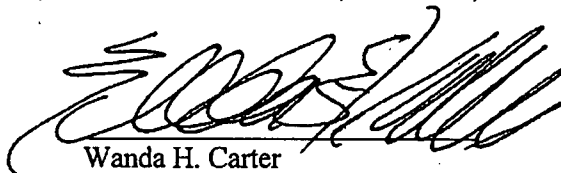
v.

LYWONE S. CAPERS,

APPELLANT

\_\_\_\_\_  
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 David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Lywone S. Capers #360079, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210 this 17th day of March, 2016.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 17th day  
of March, 2016.



(L.S.)

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

# The South Carolina Court of Appeals

The State, Respondent,

v.

Lywone S. Capers, Appellant

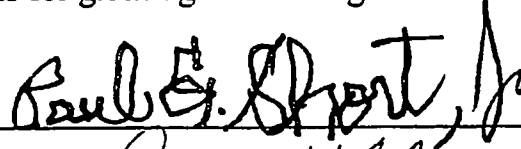
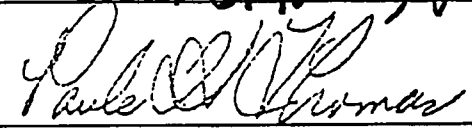

Appellate Case No. 2014-001174

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ORDER

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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.

	J.
	J.
	J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire  
Wanda H. Carter, Esquire  
David A. Spencer, Esquire  
Donald V. Myers, Esquire

**FILED**

4/21/16