

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

FEB 11 2016

Edward W. Miller, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WILLIAM DOUGLAS ZEIGLER,

APPELLANT

APPELLATE CASE NO. 2015-001351

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether, in this rape case, the trial judge committed plain error by not charging the jury on the defense of consent when such a charge was supported by the evidence, the defendant's testimony, and the defense's theory of the case as stated in its arguments to the jury?

STATEMENT OF THE CASE

On May 19, 2015, a Greenville County grand jury indicted appellant for first-degree criminal sexual conduct, kidnapping, and possession of crack cocaine. R. 356. On June 1, 2015, appellant was tried before the Honorable Edward W. Miller and a jury. R. 1. L. Mark Moyer represented the State. R. 1. Randall Lee Chambers represented appellant. R. 1. The jury convicted appellant on all three counts. R. 349, ll. 5 – 24. Judge Miller sentenced appellant to thirty years' imprisonment for CSC, thirty years' imprisonment for kidnapping, and three years' imprisonment for possession of crack. R. 354, ll. 2 – 4. This appeal follows.

ARGUMENT

In this rape case, the trial judge committed plain error by not charging the jury on the defense of consent when such a charge was supported by the evidence, the defendant's testimony, and the defense's theory of the case as stated in its arguments to the jury.

Factual Background

This rape case amounted to a credibility contest between the complainant, Brenda Stone ("Stone") and appellant, William Zeigler ("Zeigler"). Several important facts were not in dispute. Stone and her daughter both testified that they had an argument in the car after Stone's daughter picked her up from work. R. 80, ll. 1 – 20. Stone agreed with defense counsel that it was "quite an argument." R. 209, ll. 8 – 9. Stone made her daughter let her out of the car in a neighborhood near White Horse Road in Greenville. R. 208, l. 25 – 209, l. 15. Stone then bought a bottle of vodka and drank all of it on a bench in front of Walgreen's, chasing it with a Pepsi. R. 210, ll. 1 – 22. Stone admitted she was very intoxicated. R. 173, ll. 23 – 25.

Later that evening, Stone wound up at a Spinx gas station on White Horse Road. R. 174, ll. 19 – 23. She could not remember how she got there. R. 211, ll. 2 – 4. Stone could not recall seeing several friends in between drinking the vodka at Walgreen's and arriving at Spinx. R. 210, l. 23 – 213, l. 9. A surveillance video showed Stone in the parking lot of the Spinx getting into an altercation with a friend of hers who had given her a ride on his moped. R. 213, ll. 3 – 21. Stone's friend wanted her to wear a helmet but instead she threw it on the ground, breaking it. R. 213, ll. 3 – 22. Stone's friend "got mad and left me at Spinx." R. 176, ll. 4 – 8. Stone admitted that she was drunk and belligerent. R. 214, ll. 4 – 12.

Stone met Ziegler in the parking lot at Spinx. R. 215, l. 25 – 216, l. 3. Stone got a ride from Ziegler. R. 176, l. 9 – 178, l. 4. At this point, Stone's version of events diverges from Ziegler's. Stone claimed that she asked Ziegler to take her to her daughter's house. R. 178, ll. 2 – 4. Instead, Ziegler took her to his trailer and brutally raped her. R. 178, l. 19 – R. 189, l. 6. Photographs of scratches and bruises on Stone's body were introduced into evidence, which Stone claimed she received when she tried to fight Ziegler. R. 178, l. 19 – R. 189, l. 6.

Ziegler testified that Stone approached him at the Spinx and asked him for a ride. R. 264, ll. 1 – 5. After wandering around the gas station, Stone eventually "jumped inside" Ziegler's car and grabbed his neck, kissing him and scratching his face. R. 264, l. 17 – 265, l. 7. Stone played with his radio, turning up the volume. R. 265, ll. 14 – 23. Stone refused to tell Ziegler where she wanted to go. R. 265, ll. 14 – 23. Ziegler drove to Berea to pick up some money he was owed and continued to try to get Stone to tell him where to go. R. 265, l. 24 – 266, l. 15. Eventually Ziegler just went to his house, with no objection from Stone. R. 266, ll. 16 – 21.

When they arrived at the house, Ziegler and Stone sat in his car and Ziegler drank a beer, smoked a cigarette and smoked crack. R. 267, l. 17 – 268, l. 11. Ziegler told her that he needed to go to bed and "everything went crazy after that." R. 268, ll. 12 – 18. Stone jumped out of Ziegler's car, ran across his yard, and slipped, falling on an embankment. R. 268, ll. 19 – 24. After watching Stone run around, Ziegler told her that he would take her home, but she said nothing so he went into his trailer to go to sleep. R. 268, l. 25 – 269, l. 20. Stone eventually followed Ziegler into the trailer and they ended up having sex. R. 269, l. 13 – 271, l. 22. Ziegler testified the sex was consensual. R.

271, ll. 16 – 17. They fell asleep and when Ziegler awakened, Stone was in his bathroom vomiting. R. 270, ll. 14 – 21. When Stone finished in the bathroom, Ziegler took her home. R. 271, ll. 4 – 8.

Stone testified that after being raped, she passed out and woke up when it was daylight. R. 189, ll. 7 – 21. She went into the bathroom to throw up, partially because she was hungover. R. 189, l. 24 – 190, l. 5. Ziegler came in the bathroom and asked her if she was okay. R. 190, ll. 14 – 16. Stone admitted asking Ziegler – the man she claimed had just raped her – for a ride back to her house. R. 191, ll. 22 – 24. Ziegler took her near her daughter's house and acted "like nothing ever happened." R. 192, ll. 3 – 12. Ziegler also asked for her phone number. R. 192, ll. 15 – 18. When Stone was in the house, she told her daughter she had been raped, and then went to the hospital. R. 193, ll. 14 – 22.

After the defense rested, the trial judge asked if the parties had any specific requests to charge. R. 297, ll. 6 – 7. Defense counsel responded, "Not from me, Your Honor." R. 297, l. 8. The trial judge then told the parties what he planned to charge and asked the State whether they wanted a charge on voluntary intoxication not being a defense. R. 297, ll. 9 – 14. The solicitor said, "That's just what I was going to say." R. 297, l. 15. The trial judge did not charge the jury that consent was a defense to the criminal sexual conduct charge and that the State had the burden to disprove that Stone had consented to having sex with Ziegler. R. 339, ll. 13 – 348, l. 7.

Discussion

The trial judge did not charge the jury on the defense of consent. R. 339, ll. 13 – 348, l. 7. Appellant concedes that he did not request a charge on consent or obtain a ruling on the charge from the trial judge. R. 297, l. 8. R. 348, ll. 4 – 7. However, a trial judge has a duty to craft his charge to fit the facts of the case. State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989) (“In charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge.”).

“The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 394 (2001). “If there is any evidence to support a charge, the trial court should grant the request.” State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). “Consent on the part of the female being fundamentally inconsistent with the concept of rape, and indeed with its very definition, it is ordinarily an essential element of the crime that the act be committed without the consent of the female, or, as it is otherwise expressed, against her will.” State v. Whitener, 228 S.C. 244, 273, 89 S.E.2d 701, 716 (1955). Specific intent is an essential element and consent defeats this element. Id. Reasoning in Whitener that the victim was underage, the Court stated that it was not “**necessary for the State to prove force or want of consent.**” Id. (emphasis added). This statement from Whitener shows that it was the State’s burden to disprove that Stone consented to having sex with Zeigler.

The evidence entitled Zeigler to a charge on consent and the State’s burden of proof. Zeigler testified that their sex was consensual. R. 269, l. 13 – 271, l. 22. Defense counsel argued, “He says they had sex but it was consensual.” R. 299, l. 16. Defense counsel

argued that had the sex not been consensual, Stone would never have asked for a ride home the next morning. R. 311, ll. 6 – 11. The State argued, “Now, the defendant wants you to believe that this was a consensual encounter, that he did nothing wrong.” R. 325, ll. 4 – 9. Despite Zeigler’s testimony and the arguments of counsel on consent, the trial judge failed to charge the jury how to decide the case’s central issue. Under these facts, there is a “reasonable likelihood” that the jury understood the jury instructions to allow conviction based on proof insufficient to meet the In re Winship, 397 U.S. 358 (1970) standard—that the Due Process Clause mandates that the government prove every element of the charged offense beyond a reasonable doubt. Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000).

While Zeigler did not ask for a consent charge, the need for it was plain from the evidence and the arguments of counsel and the trial court should have given the charge. While “the plain error rule does not apply in South Carolina state courts,” this rule is in conflict with the rule from Fuller that judges must fashion fact-specific charges on defenses. State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). Only a handful of states have refused to adopt any form of plain error review. See Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 222 (2012) (noting that “[v]irtually all of the states have adopted a plain error type default standard for unpreserved contentions at least in criminal cases with only about eight (8) states refusing to adopt such an exception or otherwise limiting any plain error review to death penalty cases or erroneous jury instruction claims.”).

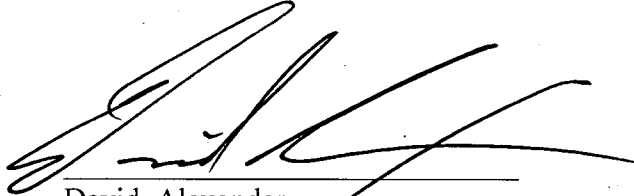
South Carolina's adherence to strict error preservation rules is inconsistent with the modern trend, even compared to our sister states in the deep South. In 2011, the Georgia Supreme Court adopted plain error review in non-capital cases "whenever an appealing party properly asserts an error in jury instructions." State v. Kelly, 718 S.E.2d 232, 235 (Ga. 2011). In 2012, the North Carolina Supreme Court issued an opinion providing what it called "a doctrinal statement regarding the plain error standard." State v. Lawrence, 723 S.E.2d 326, 330 (N.C. 2012). In explaining how it would apply plain error, the court noted that such review "is normally limited to instructional and evidentiary error." Id. at 333. The court reviews unpreserved jury instruction errors for whether the error is "fundamental" and "had a probable impact on the jury verdict." Id. at 334.

If this Court adopted the North Carolina standard, this case should be reversed. The failure to charge the jury on consent was fundamental. The jury was not instructed on how to apply the law and the burden of proof on the central contested issue in the case. Had the jury been charged on consent and that the State had the burden of proof, the jury would have reviewed Stone's testimony with a more critical eye and likely would have acquitted Zeigler. Appellant urges the Court to take up this issue under the North Carolina plain error standard and reverse.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

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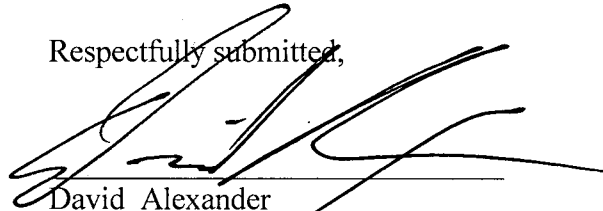
PETITION TO BE RELIEVED AS COUNSEL

Counsel for William Douglas Zeigler states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Edward W. Miller, which was held on June 2, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for William Douglas Zeigler.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2016.

STATE OF SOUTH CAROLINA

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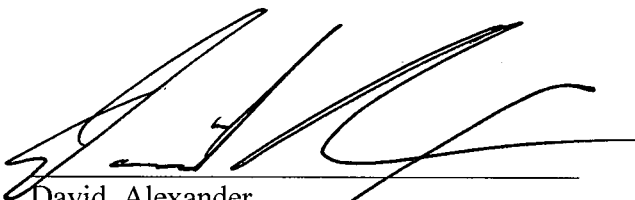
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial Transcript dated June 1-2, 2015.

I certify that this designation contains no matter which is irrelevant to this appeal.

February 11th, 2016



David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 11, 2016



David Alexander
Appellate Defender

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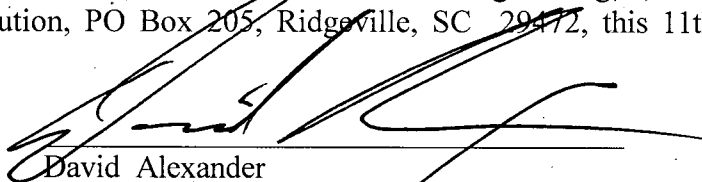
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APPELLANT

APPELLATE CASE NO. 2015-001351

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on William Douglas Zeigler, # 154981 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of February, 2016.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of February, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.