

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

Appeal From Williamsburg County
John C. Hayes III, Circuit Court Judge

Opinion No.: 5381

S.C. Ct. App filed Feb. 17, 2016, Refiled May 25, 2016

The State

Respondent,

Vs.

Justin McBride

Petitioner.

Appellate Case No.: 2013-002391

PETITION FOR WRIT OF CERTIORARI

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- II. Due process and RUE 5 required exclusion of the photograph was provided to defense counsel as a black sheet of copy paper not a colored photograph introduced into evidence and where the actual color photograph was not even in the solicitor's file to be reviewed by defense counsel prior to trial.

- III. McBride's due process rights were violated when the court

instructed the jury that no corroboration was required to support the alleged victim's testimony where such instruction had the effect of impermissibly shifting the burden of proof, confusing the jury, and elevating the importance of one witness' testimony over others in contravention of McBride's right against self incrimination.

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QUESTIONS FOR REVIEW

- I. Did the Court of Appeals err in holding Law Enforcement losing key and exculpatory evidence without explanation and contrary to admitted investigatory norms, violating due process or at a minimum required that a spoliation charge be given to the jury.

- II. Did the Court of Appeals err in finding no reversible error in the trial Court's ruling regarding petitioner's Motion to Suppress the color photographs?

- III. Did the Court of Appeals err in affirming the trial court's charge that a victim's testimony need not be corroborated.

STATEMENT OF CASE

December 2010, the Williamsburg County Grand Jury indicted Petitioner Mr. McBride for one count of criminal sexual conduct (CSC) with a minor in the first degree and assault with intent to commit criminal sexual conduct with a minor in the first degree.

March 1, 2012, the Williamsburg County Grand Jury reindicted with the same charges: indictment no.: 2010-GS-45-0283.

October 28, 2013, Mr. McBride proceeded to jury trial before the Honorable John C. Hayes III. Attorney Derrick Mobley represented Mr. McBride at trial. Solicitor Kimberly Barr prosecuted the case for the state. The jury returned verdicts of guilty of criminal sexual conduct with a minor in the first degree and not guilty of assault with intent to commit criminal sexual conduct with a minor in the first degree.

A timely notice of appeal was served November 1, 2013, and direct appeal perfected. February 17, 2016, after arguments were heard on November 10, 2015, the South Carolina Court of Appeals affirmed the conviction and sentences. A petition for rehearing was timely filed February 17, 2016. The rehearing was granted, heard and affirmed on May 25, 2016, with substituted opinion.

This Petition for Writ of Certiorari follows:

STATEMENT OF FACTS

McBride is the cousin of the alleged victim in this case (Tr. 80) At the time of the alleged incident that gave rise to the charges, McBride was 16 years old; his cousin was 9. (Tr. 91)

After returning from school on the school bus, the alleged victim found her mother was not at home. (Tr. 91) She then either went to a neighbor's house, but did not stay because the neighbor had company, or went directly to McBride's house. (Tr. 91-93) In any event, she ended up at McBrides's house. (Tr. 93) They all lived in very close proximity to one another.

The testimony from this point gets very unclear and confusing as to actual events. What is clear is that at some point the alleged victim left to return home. (Tr. 101) At some point after returning home - again the timeline is not clear - she disclosed some incident with McBride, her cousin. (Tr. 103, 107) After some unspecified period of time, and with the alleged victim's mother wanting to wait until her husband (the alleged victim's father) got home, family members called the police. (Tr. 103, 259-260)

Several police officers arrived, including a female officer who was called in to speak with the female alleged victim. (Tr. 178-179) After getting the alleged victim's statement, the officer spoke with McBride. (Tr. 180) This conversation occurred in McBride's home. (Tr. 181) Two additional uniformed officers were also present during the questioning of McBride. (Tr. 181-182) And, testimony revealed that, though not technically under arrest, officers stood essentially between McBride and the door to his home, as well as outside McBride's home. (Tr. 35-36, 181-182) The police department no longer employs either the investigator or the two officers present during the questioning of McBride. (Tr. 37, 191)

McBride denied the actions described by the alleged victim. (Tr. 42,

183-184) His version of events was, at all times, different from the alleged victim and consisted of no wrongdoing. (Tr. 183-184) A portion of his statement - provided without being informed of his Fifth Amendment rights - was used against him at trial. (Tr. 330-333)

Only a handful of witnesses testified at trial, including the alleged victim. The alleged victim's own testimony was confusing and conflicting. (Tr. 95, 99, 102-104, 130-132, 149) She appears to assert that McBride attempted to force her to perform oral sex and attempted to penetrate her anally. (Tr. 95, 100-101) She indicated that semen ended up on the shirt she was wearing, as well as on a tissue she used to wipe it off. (Tr. 97-98)

Other witnesses included the alleged victim's mother and aunt and two of the police officers who responded to the original complaint. (Tr. 177, 223, 269) The only physical evidence introduced included a color photograph of the alleged victim on the day of the incident. (Tr. 153-155, 187, 271) The photograph purported to show a deodorant stain on the shoulder of the alleged victim's shirt. (Tr. 186)

Disturbingly, responding officers did not collect the shirt worn by the alleged victim. (Tr. 200, 247) Instead, after at least several days, the alleged victim's mother brought the shirt to the police department. (Tr. 247-248) The shirt was never tested to determine the presence either of semen or deodorant. (Tr. 80, 199-200, 270, 351) In fact, the shirt was never sent to SLED for any testing and was lost. (Tr. 275) At no time was the shirt available to the defense; nor was it tested and results of such testing provided. (Tr. 161, 276) The police also never tested any materials from McBride, such as his deodorant. (Tr. 213, 251) Even the police department's evidence sheet, completed with all evidence submissions, was missing. (Tr. 277)

Despite this lack of evidence, the jury returned a guilty verdict on

ARGUMENT

I. Did the Court of Appeals err in holding Law Enforcement's losing key and exculpatory evidence without explanation and contrary to admitted investigatory norms, violating due process or at a minimum required that a spoliation charge be given to the jury?

This case presents the disturbing situation of law enforcement's failure to investigate to the detriment of McBride's ability to defend himself. First, law enforcement, aware of the alleged victim's claims that semen ended up on the shirt she was wearing, failed to collect that shirt as evidence. (Tr. 199-200) Rather, they merely told the alleged victim's mother to bring this critical evidence with her several days later to a forensic interview. (Tr. 247-51, 260-64) At the forensic interview, the alleged victim's mother was then told to take the evidence to the police station, which she did. (Tr. 247-51, 260-64)

Somehow, with no explanation whatsoever, this evidence went missing. (Tr. 270-73) Also without explanation -- and, indeed, with the Court's sustaining an objection to defense counsel's questions about this issue -- the solitary officer in charge of evidence at the time was no longer employed by the Kingstree Police Department. (Tr. 270-73) A clear influence existed that this may not have been the first time evidence went missing under this officer's care. (Tr. 270-73) Where the alleged victim clearly states that physical evidence should be presented on a piece of clothing, the disappearance of that clothing, especially when no care was taken to preserve it by law enforcement, eliminates the defendant's ability to mount

a defense to the charges against him. This failure amounts to a violation of his Due Process rights under the United States and South Carolina Constitutions.

"To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value by other means." State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) (emphasis added). It is clear from the testimony that if the claims made by the alleged victim were true, semen would be found on the shirt the alleged victim was wearing at the time.

The value of the shirt to this case was obvious. Indeed, the Solicitor relied on a photograph of the shirt to show that deodorant appeared to be presented on one shoulder. No photographs show the presence of any other substance on the shirt.

Without access to the shirt, potentially exculpatory and key evidence, McBride could not properly cross-examine any of the State's witnesses. The exculpatory value the shirt presented would be obvious to anyone aware of the allegations and McBride's denials. Disputing the source, origination of, or existence of the visual markings was made impossible by only permitting photographs showing a single angle or view of the shirt. And, no other means exist to obtain this evidence.

The Circuit Court erred in its attempt to distinguish this case from Cheeseboro by inventing the concept that exculpatory or inculpatory value cannot be determined without some forensic

test. (Tr. 315) No dispute can exist that testing the shirt for the presence of semen likely would have provided a definitive answer to whether the victim's allegations were true.

To require some forensic test unfairly places the burden on the defendant to establish the exculpatory nature of evidence to which the defendant can never gain access because law enforcement lose or destroyed it. Such a test creates an incentive for the spoliation of evidence. Here, forensic investigation of the shirt could have revealed no semen on it at all, raising serious doubts about the alleged victim's credibility.

Moreover, the Court's refusal to allow defense counsel to question law enforcement as to the reason for the evidence officer's separation from employment to determine if his handling of evidence played a role, (Tr. 274), denied McBride even the ability to attempt to show bad faith in the handling of this evidence. This line of questioning, contrary to the Solicitor's sustained objection, was clearly relevant to the circumstances surrounding the disappearances of key evidence.

In an attempt to address this serious evidentiary issue, defense counsel requested a jury charge on spoliation of evidence intended to allow the jury properly to consider the significance of the missing evidence. The requested charge explained that the state had 'the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt'. (Defense Request to Charge #1 Spoliation). The charge further would have explained

to the jury that if the jurors found the evidence "could help establish the innocence of the defendant or create doubt about whether or not he is guilty", they could consider those facts in determining whether the State met its burden. (Id). The Court refused the requested instructions and did not provide any instruction on spoliation. (Tr. 311-316)

"To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial". State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). Under the circumstances of this case, the refusal to instruct the jury on the spoliation issue was erroneous. Moreover, the failure to properly instruct the jury on this issue was prejudicial. The State's case rested entirely on the assertions of the alleged victim. The loss of physical evidence to clearly determine the veracity of those assertions prejudicial McBride.

Unlike State v. Breeze, this case does not involve evidence (narcotics) that the defendant admitted existed. See State v. Breeze, 379 S.C. 538, 546, 665 S.E.2d 247 (Ct. App. 2008). And, contrary to most cases involving the unavailability of evidence to the defendant, the evidence, here, was not disposed of in the ordinary course of the relevant law enforcement department's policies. See, e.g., Breeze. In addition, these cases involve evidence that was not clearly crucial to the case. See, e.g., State v. Adams, 304 S.C. 302, 304, 403 S.E.2d 678, 680 (Ct. App. 1991) (where defendant claimed a due process violation based on lost breathalyzer results that deprived him of the ability to challenge the validity -- not the results -- of the

test).

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right to a trial by jury. U.S. Const. amend. VI. "[T]rial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ". Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (emphasis in Apprendi).

Where the missing evidence reasonably could be expected either to prove or disprove the events reported by the alleged victim, there can be no clearer deprivation of Due Process and the Sixth Amendment right to a jury trial where such evidence is lost. Due to the loss of the shirt, McBride was deprived of the opportunity to have the truth of every accusation determined by the jury. At a minimum, a jury charge permitting a negative inference against the State would have been required.

Under circumstances such as these, the State simply cannot be permitted to mishandle evidence so egregiously and then claim no Due Process violation because the defendant cannot prove the exculpatory character of that evidence. Prosecutors have a constitutional duty, even absent a request by the defendant, "to give the defendant evidence which would raise a reasonable doubt about his guilt." State v. Jackson, 302 S.C. 313, 314-15, 396 S.E.2d 101 (1990) (citing United States v. Agurs, 427

U.S. 97 (1976)).

This duty is completely ignored and elusive if the State can simply choose not to determine or to ignore the exculpatory nature of evidence that obviously carries a strong likelihood of physical evidence - or lack of evidence that would be exculpatory - lose that evidence and then proceed to trial against the defendant. To permit this verdict to stand, would simply encourage law enforcement to act recklessly or in bad faith to the detriment of the jury trial system and the constitutional protections afforded criminal defendants.

Based on the conduct of the State, McBride is entitled to have his conviction vacated and this charge dismissed. In the alternative, McBride is entitled to a new trial during which he can be permitted a proper opportunity to mount a defense through full cross-examination (as required by the Sixth Amendment to the U.S. Constitution, U.S. Const. amend. VI) of the State's witnesses and with an appropriate jury instruction as to the jury's ability to consider this missing evidence or, at a minimum, complete exclusion of any reference to the shirt or anything that may or may not have been present on it.

The South Carolina Court of Appeals affirmed writing "As to whether the shirt possessed exculpatory value, we agree with the State that "it is speculative at best that the shirt contained exculpatory value." See Breeze 346 S.C. at 546, 665 S.E.2d at 251-52 (finding the evidence was inculpatory rather than exculpatory because it field tested for marijuana, an officer opined it was marijuana, and an

expert tested it prior to its destruction and testified it was marijuana). Because McBride failed to meet either prong necessary to establish a due process violation arising from evidence lost by the State, we find no due process violation in the lost shirt."

"Adverse inference charges are rarely permitted in criminal cases. See Reaves, 414 S.C. at 128 n.5, 777 S.E.2d at 218 n.5 (noting "adverse inference charge[s] based on missing evidence... ha[ve] been limited to civil cases in South Carolina"); State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) (entertaining "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness"); *id.* (stating "a charge of this proposition to a jury on... behalf of either the State or the defense is not warranted except under most unusual circumstances"). We find no error by the trial court in denying the request for the jury charge.

The Court of Appeals erred. There are substantial factual differences between the present case and the Breeze case relied upon by the Court of Appeals. The reliance on Breeze on the facts of the present case constitutes an error of law. In Breeze, the evidence was found inculpatory rather than exculpatory because it tested for marijuana, an officer opined it was marijuana, and an expert tested it prior to its destruction and testified it was marijuana. In McBride's case, no substance on the shirt had the ability to be tested once it was lost. A picture was taken as evidence of what

appeared to be deodorant on the shirt. Had a picture of what appeared to be semen was enter as evidence also, it would be speculative at it's best that the lost evidence is inculpatory. Law Enforcement photographed a stain that appears to be deodorant. If anything appeared to be a semen stain as alleged victim claims got on her shirt, law enforcement would have no reason not to photograph the apparent stain also. Due to the allegations and the lost shirt, petitioner could not effectively present a defense. Had the shirt been confiscated and tested as admitted procedural norms it is speculative at it's best, the results could have completely exonerated petitioner. If the shirt was tested then lost, the Breeze case could have been correctly applied. The South Carolina Court of Appeals also erred in finding there was no error by the trial court in declining the charge. The refusal to give the requested charge was both erroneous and prejudicial because of the circumstances of this case.

The alleged victim made claims that semen got on her shirt. Law Enforcement only took photograph of a stain that is claimed to be deodorant. The State then loses this shirt which is exculpatory evidence.

The evidence is exculpatory because unlike what appeared to be a deodorant stain, there are no substances that resembles a semen stain. The petitioner abrasively denies the allegations are true and can not prove that these allegations are untrue by any comparable means. Had the shirt been preserved and tested, the results would indicate why there

was not a photograph taken of an alleged semen stain; because there was not one, ultimately raising a serious question about the credibility of the alleged victim. For the above reasons this case should be reversed and remanded to the lower courts.

II. Did the Court of Appeals err in finding no reversible error in the Trial Court's ruling regarding petitioner's motion to suppress the color photographs?

In addition to completely losing the shirt itself, the State also came to trial with a color photograph purportedly of the alleged victim wearing the missing shirt. (Tr. 160-61.) That photo, according to the contentions of the witnesses and the Solicitor, showed deodorant stains (presumably from McBride) on the shoulder. Defense counsel did not see this photograph until the first day of trial. (Tr. 157-158, 161.) Indeed, the Solicitor stated that she "got the color photographs this morning." (Tr. 161, lines 11-19.) Not only did permitting use of this photo violate McBride's due process rights, the failure to produce it until trial violated South Carolina Rules of Criminal Procedure 5(a) and 5(c). SCRCrimP 5.

During arguments on McBride's motion to exclude the photo, it became clear that when the State copied and provided its file materials to the defense, this photo appeared merely as a black sheet of paper with no photo visible. (Tr. 160-61.) The Solicitor responded to this motion by stating that defense counsel could have come to review the file, but later acknowledged that she did not even have the photograph in her file until that morning. (Tr. 161) And, the Circuit Court correctly

understood the situation:

The bottom line is, the defense was provided with, they had the opportunity to inspect. But at the time you gave them the right to inspect, all you had were two black sheets of paper. (Tr. 165-66)

The Circuit Court described a duty to weigh the prosecutor's duty to produce against the defense's duty to inspect. Here, McBride contends that not only should that balancing have come out in his favor, but that at any time prior to the first day of trial, the prosecution had nothing to inspect, just "two black sheets of paper."

The Circuit Court admitted that things like the previously undisclosed photograph "brother judges immensely." (Tr. 173.) The judge elaborated as follows: "I want to make the record to clear that these irritate me to no end where law enforcement pops up with stuff at the last minute." (Tr. 174.) Nonetheless, the judge allowed the photo. (Tr. 173.)

The United States Supreme Court recognizes a defendant's "area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

"[D]efendants have the right to request and obtain from the prosecution evidence that is material to guilt of the defendant or relevant to the punishment to be imposed." State v. Jackson, 315,396 S.E.2d 101 (1990) (citing Brady v. Maryland, 373 U.S. 83 (1963) (emphasis added)). Here, the Solicitor introduced, over the objection of defense counsel, a photograph that was not provided to McBride prior to trial. Used to corroborate at least part of the alleged victim's testimony, this evidence was clearly material to the guilt of the defendant. Having not

been provided at any point to trial, it should have been excluded.

Moreover, the State was permitted to use this photograph showing only a portion of the shirt the alleged victim was wearing. Without the availability of the shirt, or at least photographs showing the entire shirt, allowing this evidence is akin to permitting one side to play selected parts of a recording or read selected parts of a statement or transcript into the record without the ability of the defendant to demand the entirety of the evidence be included in order to provide the jury completeness and context. See, e.g., S.C. Rule of Evidence 106. The State simply cannot be permitted to select a portion of an item of evidence to introduce in an attempt to bolster one of its witness' credibility while denying to the defendant access to the rest of that item to determine if it actually supports or contradicts the witness.

The State used this surprise evidence selectively to bolster the alleged victim's testimony. This use was improper and violated McBride's rights. (Tr. 168.) Rule 5(g), however, expressly addresses this evaluation and permits waiver of the rule's production requirements only upon a showing of good cause. SCRCrimP 5(g): see also Hyman v.State, 397 S.C. 35, 723 S.E.2d 375 (2012). No good cause was argued or shown. The Circuit Court erred in permitting the introduction of this photograph prejudicing McBride, and requiring a new trial. The South Carolina Court of Appeals Affirmed by saying "We find

no reversible error in the trial court's ruling regarding McBride's motion to suppress the color photographs because the solicitor notified McBride that there were pictures and a disk available for inspection. See State v Newell, 303 S.C. 471, 475-76, 401 S.E.2d 420, 423 (Ct. App. 1991) (finding the State substantially complied with Rule 5 by making its file available for inspection by the defendant); see also State v Davis, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of a motion to suppress following the late disclosure of defendant's statements where defendant "was permitted to view and copy the State's file" and defendant "never requested a continuance or recess in order to review the file")."

The South Court of Appeals erred. Indeed the solicitor notified petitioner's trial counsel that there were pictures available for inspection, but the color photographs introduced into evidence were not the photographs available for inspection. Petitioner's trial counsel admitted at trial that he did not specifically ask for pictures when he specifically inspected a disk that was a part of the discovery but he did specifically ask for anything he could acquire pertaining to the case. (Tr. 158) Had trial counsel inspected the photographs he still would not have been permitted to view and copy the photographs introduced as evidence at trial, solely because the solicitor admitted she received color photographs that morning of trial. Which means the trial court would have ruled in petitioner's favor. Trial Counsel's failure to specifically seek or inspect

photographs does not mean the solicitor complied with Rule 5 because she did not make available the particular files introduced at trial as evidence. For the above reasons, this case should be reversed and remanded to the lower courts.

III. Did the Court of Appeals err in affirming the trial court's charge that a victim's testimony need not be corroborated?

It is correct that the current law of South Carolina provides that "[t]he testimony of the victim need not be corroborated in prosecutions" for criminal sexual conduct. S.C. Code § 16-3-657. The common law previously recognized this principle. Including this concept in instructions to the jury in this case, however, unconstitutionally shifts the burden of proof away from the State and to the defendant. Given the totality of the circumstances, prior case law considering similar instructions but lacking the other issues present in this case, is not dispositive. See generally, State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

As the Court in Rayfield noted, at least one purpose of the no corroboration statute was to recognize

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...

Rayfield, 631 S.E.2d at 249 (emphasis added). Here, however physical evidence should have provided an answer to whether the crime was committed as described by the victim. In light of the admission of some evidence (e.g., photographs of the missing shirt), and the exclusion of other evidence (e.g., lack by investigators of their full set of investigatory tools), adding on the no corroboration instruction virtually ensured confusion of the jury. Given the lack of other evidence, repetition of the no corroboration charge, and the lack of other safeguards, the Circuit Court violated McBride's Due Process Rights by including this jury charge.

Even if facially constitutional to the extent that juries in determining credibility are rarely required to find corroborating evidence in order to believe a witness' testimony, that the law provides this no-corroboration rule does not mean that instructing the jury of this legal standard is proper under these circumstances. See S.C. Const. Art. V §21; see also State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947).

The jury charges, as given were confusing to a reasonable juror in terms of the jury's assessment of the alleged victim's testimony. The Supreme Court of Indiana perhaps described the problem with such instructions best:

The challenged instruction is problematic for at least three reasons. First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder. Third, using the

technical term "uncorroborated," the instruction may mislead or confuse the jury.

Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). In Ludy, the jury was instructed that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." Id. at 460. Similarly, the jury in McBride's case was charged that "[t]he testimony of victims in criminal sexual cases need not be corroborated under the laws of this State." (Tr. pp. 367-68.)

"A jury instruction must be viewed in the context of the overall charge." State v Hughey, 339 S.C. 439, 458, 529 S.E.2d 721, 730 (2000) (overuled on other grounds)(citations omitted).

"The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." Id. Where one witness' testimony is highlighted as not requiring corroboration, a reasonable juror would be confused and have difficulty determining what that means for evaluation of the other witnesses and the evidence as a whole. Moreover, it seems to infer a greater credibility for the victim witness, a presumed credibility, that is counter to the general law regarding the jury's role in assessing witness credibility and to confuse the State's burden of proof.

"[C]harging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need not be corroborated, the trial court singles out the alleged victim and 'appears to express an opinion on her credibility.'"

Rayfield, 631 S.E.2d at 251-252 (Pleicones, concurring in part, dissenting in part) (citing State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting)).

When the giving of this instruction is viewed in the light of the related ruling that did not permit defense counsel to cross-examine law enforcement on the statutorily permitted use of a polygraph, it becomes even more constitutionally troubling. The case now presents a situation where a number of methods of corroboration existed - the shirt, the polygraph - but McBride could point to none of them, or their absence. Clearly, this type of information is relevant, having the potential of creating reasonable doubt in the minds of the jurors and should have been available to be considered by them. Exclusion particularly when paired with this instruction to the jury, was highly prejudicial to McBride.

Providing an instruction that no corroboration was necessary also casts a shadow on McBride's right not to testify. See U.S. Const. amend. V. The instruction suggests that nothing more than an allegation by a victim is necessary. This inference easily creates a perception on the part of reasonable jurors that unless that testimony is contradicted it is enough. To contradict what allegedly happened in the home when only the alleged victim and McBride were present would require McBride himself to testify. A jury provided this instruction may, indeed require a defendant's testimonial denial to reach a verdict of not guilty.

The no-corroboration instruction improperly emphasizes

one witness. Such an instruction is not required accurately to charge the jury on the law, given the more general instruction concerning the jury's ability to consider the credibility of all witnesses and to rely on their testimony to establish the facts in a case, As recognized by various judges, the continued use of no-corroboration instructions in cases involving judges, the continued use of no-corroboration instructions in cases involving sexual crimes provides no legitimate benefit and serves only to confuse jurors. See People v. Gammage, 828 P.2d 682, 702-704 (Cal. 1992) (Mosk, J., concurring).

The South Carolina Court of Appeals affirmed writing "McBride also argued the trial court erred in charging section [16-3-657] of the South Carolina Code, maintaining the jury charge shifted the burden of proof and violated his due process rights. At the pre-trial hearing, the court found the statute was not unconstitutional or in violation of McBride's due process rights. McBride also included the issue in his motion for a mistrial, which the court denied. The court charged the jury, stating "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of this state." In light of our supreme court's recent opinion in State v. Stukes, Op. No. 27633 (S.C. Sup. Ct. filed May 4, 2016) (Shearouse Adv. Sh. No. 18 at 25), we agree the charge was erroneous, However, we find the error was harmless. In Stukes, the victim testified she had been sexually assaulted and a DNA profile matched Stukes. Id. at 26. Stukes claimed

he had consensual sex with the victim. Id. at 27; see S. Code Ann. § 16-3-657 (2015) ("The testimony of the [criminal sexual conduct] victim need not be corroborated..."). On appeal, our supreme court found the "charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." Id. at 29. The court found the error was not harmless beyond a reasonable doubt because the case "hinged on credibility. Victim said it was rape; [Stukes] said it was consensual." Id. at 30.

Here, although we find the jury charge was error, we find it was harmless beyond a reasonable doubt. Unlike the situation in *Stukes*, there was corroborating evidence in this case, The victim's mother testified she smelled men's cologne and saw the stain on the victim's shirt. The mother's sister testified she confronted McBride and he said he did not mean to do it, and "tr[ie]d to compromised with [her]." The sister described it as McBride's confession. Thus, although the jury was erroneously charged section 16-3-657, we find the error was harmless beyond a reasonable doubt."

The South Carolina Court of Appeals erred. Petitioner's case is also amenable to a harmless error analysis such as Stukes. The South Carolina Supreme Court review of the record in Stukes indicates Stuke's case hinged on credibility. [According to The South Carolina Court of Appeals], the "corroborated" evidence in petitioner's case was the testimonies of the witnesses that testifies at trial.

These particular testimonies, including the victim's, are

the sole reason petitioner's case is also hinged on credibility. The evidence in this case is not overwhelming, there's testimonies which boils down to he-say she-say and there's a photograph of a shirt which appears to have a stain not tested present on the shoulder claimed to be deodorant. The testimonies in this case resulted in the witnesses perception of alleged victim.

Therefore, the error in charging section 16-3-657 can not be saved by the witness credibility instruction or the charge as a whole. For the above reasons, this case should be reversed and remanded to the lower courts.

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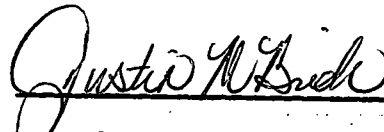
CONCLUSION

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For the above reasons, petitioner's Writ of Certiorari should be granted and his sentence and conviction should be reversed and remanded to the lower court.

This 22 day of June, 2016.



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PETITIONER, Pro Se.

APPENDIX

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SC Court of Appeals

- (A) Copy of Record of Appeal.
- (B) Copy of the decision of the court of appeals on which Certiorari is sought.
- (C) A copy of the Petition for rehearing filed in the court of appeals and the court's ruling on that petition.