

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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NOV 17 2016

S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2016-000306

THE STATE,

Respondent,

vs.

NATHANIEL WITHERSPOON,

Petitioner.

RESPONDENT'S PETITION FOR REHEARING

On November 2, 2016, this Court issued a published opinion in which it reversed Petitioner Nathaniel Witherspoon's convictions for first-degree criminal sexual conduct and first-degree burglary. State v. Witherspoon, Op. No. 27675 (S.C. Sup. Ct. filed Nov. 2, 2016). In reversing, this Court concluded the trial judge erred in instructing the jury on the statutory non-corroboration language from S.C. Code Ann. § 16-3-657 in light of its recent decision in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), and further determined the error was prejudicial to Witherspoon based on "the centrality of the issue of credibility in [his] case" along with "the absence of other overwhelming evidence of [his] guilt[.]" Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because, although the State is not challenging this Court's determination the trial judge's jury instructions were erroneous in light of the Stukes decision, the State believes this Court misapprehended the significance of the

unrebutted evidence of guilt presented during Witherspoon's trial and the corroborated nature of the victim's testimony in concluding the jury instruction on the statutory non-corroboration language was prejudicial to Witherspoon. Moreover, further supporting the need for the petition for rehearing to be granted in Witherspoon's case, the State notes the Stukes decision upon which this Court relied in reversing Witherspoon's convictions was not decided until nearly two months **after** Witherspoon's petition for a writ of certiorari was filed and approximately one month after the State's return to that petition was filed, which means the parties have not yet had an opportunity to address the significance that decision or factually distinguish it in the context of Witherspoon's case.

Importantly, after an error is discovered, an appellate court must determine whether the error was harmless before reaching a decision in a criminal appeal. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). An error is considered to be harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010). Critically, appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991); see State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be

reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.”).

In the case sub judice, any error resulting from the trial judge’s decision to instruct the jury on the statutory non-corroboration language was not prejudicial to Witherspoon because it could not have had any impact on the verdict in light of the evidence of Witherspoon’s guilt presented during trial. Specifically, looking to the evidence offered by the State during trial, the victim, who was sixty-four years old at the time of the sexual assault, testified an **unknown** assailant entered her home after asking to use her phone, grabbed her around the throat, struck her repeatedly, and raped her. (R. p. 26; pp. 29-33). She further testified her phone was taken at the time of the sexual assault. (R. p. 34). Importantly, that testimony was corroborated by the victim’s neighbor, who confirmed to the jury the victim disclosed she had been raped and appeared to be disoriented and in a state of shock on the night of the incident. (R. pp. 56-58). Additionally, the victim’s testimony was corroborated by the testimony of Sergeant John Reynolds, who indicated the victim’s apartment was disheveled after the crime was reported and the underwear the victim was wearing at the time of the sexual assault was recovered from the home. (R. pp. 63-65; p. 71). Further corroborating the victim’s testimony, testimony was presented establishing her phone was found shortly after the crime at a location not far from her residence during the course of an entirely unrelated criminal investigation with Witherspoon’s name displayed on its screen. (R. pp. 77-79). Likewise, testimony was presented establishing the victim had multiple injuries to her face, eyes, nose, head, neck, shoulder, and back along with signs of strangulation across her neck after the crime, which was consistent with what she had reported occurred. (R. pp. 29-33; pp. 88-89; pp. 91-92; pp. 140-141; p. 144). Furthermore, testimony and evidence was introduced establishing semen was recovered from the victim’s

body both externally and internally after the sexual assault, and the jury was informed the D.N.A. profile developed from that semen had been determined to conclusively match Witherspoon's D.N.A. profile. (R. pp. 102-104; p. 142; p. 160; pp. 192-193).

Aside from the testimony and evidence presented by the State, Witherspoon – unlike the defendant in Stukes – elected **not** to testify in his own defense during his trial, did not refute the victim's testimony about what had occurred, and did not offer any explanation or theory in regard to why the victim would fabricate a claim of a sexual assault without identifying her assailant if she, in fact, knew his identity. Instead, the defense presented the testimony of several witnesses who were not present on the night of the incident to testify on Witherspoon's behalf. (R. p. 200; p. 215; p. 225; p. 232). Specifically, one of the witnesses – Witherspoon's brother-in-law – testified he had never seen Witherspoon use drugs, did not know the victim, and never saw Witherspoon in the victim's company. (R. pp. 203-205). Likewise, another of the defense witnesses – an individual who was incarcerated for trespassing at the time of Witherspoon's trial – testified she had been to the victim's apartment regularly over three years ago, almost always saw Witherspoon there, and believed Witherspoon and the victim were involved in a sexual relationship at that distant time because the victim told her she was having sexual intercourse with Witherspoon. (R. pp. 215-219; p. 221). Similarly, the next defense witness – an individual who was incarcerated for burglary at the time of Witherspoon's trial and who had previously been convicted of a crime of dishonesty – testified he knew Witherspoon and the victim and had seen Witherspoon at the victim's apartment a few times at some point in time in the past. (R. pp. 225-229). Finally, the last defense witness – a self-professed long-time friend of Witherspoon's – testified he had been to the victim's apartment before to have his palms read, saw Witherspoon

there once or twice, and believed Witherspoon was an acquaintance of the victim. (R. pp. 232-234).

Thus, the State's theory of the case was the victim was physically and sexually assaulted by an unknown assailant, and the victim's testimony in that regard was corroborated by the substantial evidence presented regarding her otherwise unexplained physical injuries and the discovery of Witherspoon's semen inside and outside of her body. Significantly, pursuant to that well-supported theory, Witherspoon's guilt did **not** hinge on the credibility of the victim's testimony as she did **not** – and was not able to – identify her assailant, whose identity was determined only through the fortuitous discovery of the victim's cell phone shortly after the crime, which ultimately led to the discovery Witherspoon's D.N.A. profile matched the D.N.A. profile developed from the physical evidence that had been collected from the victim's body. Conversely, the defense did **not** present any evidence directly refuting any of the victim's testimony regarding the events of the night of the incident and, instead, presented somewhat contradictory testimony from several witnesses who knew Witherspoon suggesting he either did or did not know the victim at some point in time in the past. Furthermore, the defense focused its attacks on the fact the victim admittedly had used crack cocaine on the night of the incident, which was a fact that in no way rebutted her testimony or cast doubt on her claim she was physically and sexually assaulted.

Based on the evidence and testimony presented by both the State and the defense, Witherspoon's case, which involved the victim's corroborated claims of being raped offered up against Witherspoon's decision to hold the State to its burden of proof without testifying, was far different than Stukes's case, which involved the victim's claims of being raped being offered up against Stukes's competing and contradictory claims the two engaged in consensual sex. Cf.

State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (“Our review of the record indicates this case hinged on credibility. **Victim said it was rape; he said it was consensual.** The jury was clearly confused as to whether it was required to accept Victim’s testimony as truth.” (emphasis added)). Under those circumstances, the presentation of the non-corroboration charge to the jury in Witherspoon’s case could not have had any impact on the jury’s verdict, which was particularly true in light of the fact the State’s evidence overwhelmingly established Witherspoon’s guilt for the charged crimes while the defense offered by Witherspoon left the vast majority of the testimony and evidence presented by the State entirely unrefuted and offered no explanation as to why the sixty-four-year-old victim would fabricate and directly report a claim of a home invasion, physical assault, and rape against an individual she purportedly knew yet did not identify her assailant to the authorities for unexplained – and inexplicable – reasons. See State v. Key, 256 S.C. 90, 97, 180 S.E.2d 888, 891 (1971) (“[U]ndisputed testimony is more conclusive than testimony which is in dispute, and it is less difficult for this court to reason that guilt is conclusively proven when there is no denial, than when an accused person disputes the truthfulness of the State’s evidence.”).

Accordingly, in light of the fact Witherspoon’s guilt did not hinge on the credibility of the victim’s testimony, which was **not** uncorroborated, coupled with the fact compelling and overwhelming evidence of Witherspoon’s guilt was presented during the trial, which included D.N.A. evidence, testimony regarding the recovery of the victim’s phone, and testimony about the numerous physical injuries the victim had sustained that directly corroborated the victim’s version of events, the trial judge’s presentation of a jury instruction on the statutory non-corroboration language could not have had any impact on the outcome of Witherspoon’s case. See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 (“Error is harmless beyond a reasonable doubt

where it did not contribute to the verdict obtained.”); see also State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) (“Given the abundant evidence of Tench’s guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt.”); cf. State v. Jenkins, 412 S.C. 643, 651-653, 773 S.E.2d 906, 910-911 (2015) (concluding any error resulting from the admission of DNA evidence linking Jenkins’s to a sexual assault to be entirely harmless and rejecting a conclusion “the case boiled down to a credibility contest” in light of the fact the victim’s account of the sexual assault was supported by abundant independent evidence, including testimony regarding the victim’s injuries, the presence of semen in the victim’s body, the condition of the victim’s home following the reported assault, the fingerprint evidence connecting Jenkins to the victim’s home, the discovery of Jenkins in close proximity to the victim’s home, and the victim’s positive identification of Jenkins as her attacker). As a result, any error in the presentation of the recently-invalidated statutory non-corroboration jury instruction was entirely harmless in Witherspoon’s case, and Witherspoon did not sustain actual prejudice from its presentation to the jury such that the harsh remedy of a reversal of his convictions was warranted on appeal. See United States v. Hastings, 461 U.S. 499, 509 (1983) (“[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]”); see also Calderon v. California, 525 U.S. 141, 146 (1998) (“The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.” (citations omitted)); State v. Wyatt, 317 S.C. 370, 372, 453 S.E.2d 890, 891 (1995) (“While we agree there was error, appellant cannot show sufficient prejudice from it to warrant reversal.”).

Based on the foregoing reasons, the State respectfully asks this Court to reconsider this matter, permit the parties an opportunity to fully brief Witherspoon's case in light of the Stukes decision that was issued after the Petition for Writ of Certiorari and Return to Petition for Writ of Certiorari were filed, permit the parties to argue the matter before this Court, vacate the portion of this Court's opinion finding the trial judge's error regarding the jury charge was prejudicial to Witherspoon, and affirm Witherspoon's convictions and sentence after finding any error committed in regard to the jury instructions was harmless under the specific circumstances of Witherspoon's case.

Respectfully submitted,

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PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 17th day of November, 2016.



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