STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable J.C. Nicholson, Circuit Court Judge
Appellate Case Tracking No. 2017-000199

The State, Respondent,

vs.

John Andrew Biggs, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in refusing to give Appellant's requested jury instruction from section 56-5-6170 because it is not applicable to a jury's determination at trial.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In the early morning hours of October 8, 2015, Mr. Walker began having abdominal pains. Mr. Walker's wife called their son, Calvin Walker, Jr., and he went over to their apartment to check on him. Mr. Walker decided to go to the emergency room at Trident Hospital on Rivers Avenue in North Charleston. Mr. Walker wanted to go to the emergency room alone, so no one else was in his vehicle. (T.68; R.___).

At the same time Mr. Walker was coming to a stop at a traffic light at the intersection of Rivers Avenue and Eagle Landing Drive, Appellant was speeding down Rivers Avenue in his pickup truck. Appellant drove his truck at a near constant speed of between 98 and 101 miles per hour with the throttle of the truck opened at 100 percent. (T.80-81; 93-94; R.___). He was not swerving or veering, but instead maintaining control of his vehicle and heading down the lane directly toward Mr. Walker's vehicle. (T.85; 94-95; R.___). Appellant never hit the brakes and never attempted to avoid the collision with Mr, Walker. Instead, he crashed squarely into Mr. Walker's vehicle travelling full speed.

The impact drove the mustang across the intersection, where it stopped ten to twenty feet behind where vehicles were stopped on the opposite side of the road. (T.73; R.___). According to the first officer on the scene, Mr. Walker's mustang was missing its back end and no one was moving in the vehicle. (T.106; R.___). Officer Trask found Mr. Walker in the vehicle unresponsive. (T.106; R.___). Mr. Walker was trapped in the vehicle, which burst into flames despite several people trying to put out flames with fire extinguishers. (State's Exhibit 1; T.74; 106-107; R.___). Both vehicles were mangled to the point neither driver could be removed without assistance. (State's Exhibit 6; T.113; R.___).

Mr. Walker died immediately as a result of the crash and the extensive injuries suffered. His aorta was "torn in half not only once but twice as it came down along the length of his back." (T.121; R.___). Mr. Walker's liver was torn, as were his lungs. He had multiple rib fractures in the back on both sides. (T.121; R.___). Mr. Walker was burned severely, but had passed away prior to the fire starting from his massive injuries. (T.121; R.___).

Sergeant Booker, with the South Carolina Highway Patrol, explained he was part of the multidisciplinary Accident Investigation Team (MAIT team). (T.129; R.___). After retrieving vehicle data, Sergeant Booker determined Appellant's vehicle was travelling between 98-101 miles per hour at the time of the accident. (T.130-137; 142). He indicated there was no attempt at braking by Appellant prior to the crash. (T.143; R.___). Trooper Proctor, also with the South Carolina Highway Patrol, accessed the "black box" for Appellant's pickup truck. The box reported the last 5 readings of Appellant's speed and throttle. According to the information retrieved, the vehicle was travelling 98 miles per hour at the time of the crash, and its throttle was at 100 percent. (T.150-151; R.___).[1] Trooper Proctor also explained if the vehicle is seen not swerving or "maintaining a straight trajectory" it indicates the driver remained in control of the vehicle. (T.155; R.___). The various officers all concluded Appellant was travelling more than twice the legal speed limit at the time he slammed into the stationary vehicle driven by the victim. (T.186; R.___).

[1] The estimate of 98 miles per hour was confirmed by Sergeant King of the North Charleston Police Department who used an entirely different method to estimate the speed of Appellant's vehicle. (T.174; R.___).

ARGUMENT

I. The trial court did not err in refusing to give Appellant's requested jury instruction from section 56-5-6170 because it is not applicable to a jury's determination at trial.

Appellant contends the trial court erred in refusing to give a jury instruction that a traffic accident does not give rise to a presumption that a violation of the law has occurred. He maintains the instruction is appropriate pursuant to section 56-5-6170 of the South Carolina Code. The statute, however, is not meant for a jury's determination, but is instead instructive of police investigating the scene of an accident and determining whether they must charge a violation of a crime. As a result, the trial court did not err in refusing to give the requested jury instruction.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007). Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

Merits

"In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence

presented at trial should not be refused.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict." State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (citing State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). "Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous." Id.

Section 56-5-6170 explains:

> The Department of Public Safety shall administer and enforce the provisions of this chapter with respect to State highways, and law enforcement officers generally shall also enforce this chapter within their respective jurisdictions. No police officer in investigating a traffic accident shall necessarily deem the fact that an accident has occurred as giving rise to the presumption that a violation of a law has occurred. Arrests and criminal prosecution for violation of this chapter shall be based upon evidence of a violation of the law.

S.C. Code Ann. § 56-5-6170 (Supp. 2016).

This Court addressed the statute in Lapp v. S.C. Dep't of Motor Vehicles, 387 S.C. 500, 507, 692 S.E.2d 565, 569 (Ct. App. 2010). The defendant alleged his arrest was invalid under the statute. This Court found "Lapp's arrest was predicated upon more than just the fact that an accident had occurred." Id. In essence, this Court's holding is that the statute prevents an arrest and prosecution merely on the basis of the occurrence of an accident. This is clearly not the situation in the present case. The statute is aimed at police officers by its very instruction and informs them that they do not have to find a violation of the law, and cannot arrest someone for a violation of the law, solely because an accident occurred.

Additionally, once the charge goes to a criminal prosecution and trial, the determination articulated by the statute would be an appropriate one for the judge to make at the directed verdict stage. If the State only set forth evidence of an accident, without any other evidence of a violation of law, then it may be appropriate grounds for a directed verdict. The statute does not limit or expand on what a jury must determine, which whether the State proved beyond a reasonable doubt the defendant met the elements required for guilt under the statute he is accused of violating. As a result, the requested instruction was inapplicable to a jury and was properly not charged by the court.

Additionally, the jury charge given by the trial court thoroughly and correctly charged the jury on its role as fact finder; the elements they must find the State proved beyond a reasonable doubt in order to convict Appellant; and the type of evidence they are to consider. In the instant case, the jury was required to determine whether the State proved Appellant guilty of reckless homicide under section 56-5-2910. Section 56-5-2910 provides: "When the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless vehicular homicide." S.C. Code Ann. § 56-5-2910 (Supp. 2016). In other words, in order to convict Appellant, the jury clearly had to find more than just the fact an accident occurred. They had to find Appellant was operating a vehicle in reckless disregard of the safety of others and Mr. Walker died as a proximate result of Appellant's reckless driving.

The charge as a whole given by the judge informed the jury that they needed to find more than just the presence of an accident. By instructing the jury on the elements of the offense of reckless homicide, the judge explained all the required elements and the necessary findings by

the jury prior to concluding the State proved Appellant's guilt beyond a reasonable doubt. The judge specifically instructed:

> The defendant is charged with reckless homicide. The State must prove beyond a reasonable doubt that the defendant drove a vehicle with reckless disregard for the safety of others. Reckless disregard for the safety of others means an indifference to the consequences or result of one's act, a conscious indifference to the rights and safety of others or a conscious failure to exercise ordinary care. Consciousness means awareness. Reckless disregard for the safety of others is something more than a mere accident, negligent or carelessness. The State does not need to prove the defendant intended to cause harm and intended to endanger others. Intent is not an element of this crime; rather the State must prove beyond a reasonable doubt that the defendant operated a vehicle in a manner with a fully reckless disregard with potential to cause harm. In other words the State must prove the defendant consciously operated a vehicle dangerously or in a manner that did not heed the safety of others. The State must also prove beyond a reasonable doubt that the person was injured and died within three years of the date of the injury. Finally, the State must prove beyond a reasonable doubt that the injury to the defendant [sic] from the defendant's reckless driving was the proximate cause of the defendant's [sic] death.

(T.281-282; R.___). Clearly, the judge's instruction explained to the jury that it must find more than a mere accident occurred. The judge's instruction conveyed the relevant, correct, and necessary law establishing all elements the jury had to find the State proved beyond a reasonable doubt, and it was not error for the judge to refuse to give the instruction requested because it was amply covered by the charge given.

Additionally, the court charged that the jury was to consider all evidence presented, which would have included the fact the accident occurred. The jury was instructed only it can make findings of fact in this case. (T.282; R.___). The court told the jury:

> The evidence or lack of evidence from which you are to decide the case includes the following: The sworn testimony of the witnesses both on direct and cross regardless of who called the witness; the

> exhibits that have been received into evidence by the court and any facts agreed to or stipulated by the lawyers.

(T.285; R.___). After properly explaining the burden of proof on the State, the Court explained:

> You have been selected as fair and impartial jurors sworn to impartiality to try and determine the facts of this case. And when you comply with your oath to do then no one will have a right to criticize your verdict and you will fully discharge your duty as jurors. You are to decide this case according to the testimony you have heard from the sworn witnesses along with other evidence introduced. I charge you that as jurors you must make your decision in this case without bias, without prejudice to any party. You cannot allow yourself to be governed by sympathy, prejudice, passion, public opinion or any other arbitrary factor. Both the State and the defendant have the right to expect that each one of you will carefully and impartially consider all of the evidence in this case and that you will follow the law as I have explained it to you.

(T.287-288; R.___). These charges set forth a correct statement of the law and taken as a whole provided the jury with all necessary instruction. The jury charge requested by Appellant would prohibit the jury from assigning its own weight to the evidence presented and determining the facts on its own. As a result, the jury charge, when read as a whole, adequately conveyed all the required instruction to the jury.

Finally, any error in failing to give the instruction was entirely harmless. "Errors, including erroneous jury instructions, are subject to harmless error analysis." State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009); see also, Lowry v. State, 376 S.C. 499, 507, 657 S.E.2d 760, 764 (2008) ("an unconstitutional jury instruction will not require reversal of the conviction if the Court determines beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."); Arnold v. State/Plath v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (finding an improper malice charge harmless beyond a reasonable doubt); State v. Jefferies, 316 S.C. 13, 23, 446 S.E.2d 427, 433 (1994) (finding incorrect kidnaping charge which may have confused jury was harmless); State v. Kerr, 330 S.C. 132, 498

S.E.2d 212 (Ct. App. 1998) (holding improper and confusing jury charge on impairment in a DUI case was harmless error). When considering whether an error with respect to a jury instruction was harmless, the Court must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." Kerr, 330 S.C. at 144–45, 498 S.E.2d at 218 (citation omitted). As the South Carolina Supreme Court explained:

> Harmless error review looks to the basis on which the jury actually rested its verdict. From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must "find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."

Lowry, 376 S.C. at 508, 657 S.E.2d at 765 (quoting Yates v. Evatt, 500 U.S. 391, 403 (1991)) (internal citation omitted). The South Carolina Supreme Court has further explained: "In making a harmless error analysis, our inquiry is not what would the verdict have been had the jury been given the correct charge, but rather did the erroneous charge contribute to the verdict rendered." Jefferies, 316 S.C. at 22, 446 S.E.2d at 432 (citing Sullivan v. Louisiana, 508 U.S. 275 (1993)); see also, State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). "Thus, whether or not the error was harmless is a fact-intensive inquiry." Middleton, 407 S.C. at 317, 755 S.E.2d at 435 (citing Jefferies, 316 S.C. at 22, 446 S.E.2d at 432 ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.").

In the instant case, the failure to give the requested charge could not have impacted the verdict. The State presented ample facts demonstrating Appellant committed the offense of reckless homicide and not that a mere accident occurred. Appellant drove for an extended period of time with his throttle at 100 percent, travelling at 98-101 miles per hour on a street with a forty-five mile an hour speed limit. (T.141-142; 186; R.___). He was not swerving or seemingly

out of control based on the eye witness reports as well as the fact he collided squarely with the rear of Mr. Walker's vehicle. (T.85; 155; 181; R.___). Had Appellant been rendered unconscious or debilitated in some manner, expert testimony indicated the vehicle would not have continued travelling in a straight line due to the slope of the road. (T.179-180; R.___). Finally, Appellant's pickup truck squarely struck the rear of Mr. Walker's vehicle without ever attempting to apply the brakes and without letting off the throttle. (T.186-187; R.___). The impact killed Mr. Walker instantly due to the extreme injuries he suffered. (T.121-124; R.___). The facts of this case as presented do not demonstrate a mere accident. Instead, they clearly demonstrate an individual driving with absolute reckless disregard for the safety of those around him, and his reckless disregard resulted in the horrific death of Mr. Walker. As a result, the failure to give the requested charge could not have had any impact on the verdict reached by the jury. Accordingly, this Court should affirm the conviction and sentence because the trial court did not commit reversible error in failing to give the requested charge.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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March 20, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Honorable J.C. Nicholson, Circuit Court Judge
Appellate Case Tracking No. 2017-000199

The State, Respondent,

vs.

John Andrew Biggs, Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing 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
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I further certify that all parties required by Rule to be served have been served.
This 20th day of March, 2018.

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March 20, 2018

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RE: State v. John Andrew Biggs
Appellate Case Tracking No. 2017-000199

Dear Mr. Dudek:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
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Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division