STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Greenville County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN WILLIE LEWIS,

APPELLANT

APPELLATE CASE NO 2017-000482

RECEIVED
MAY 15 2018
SC Court of Appeals

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in charging the jury that "[a] reasonable doubt is that doubt which would make an honest, conscientious juror searching for the truth in a case to hesitate to act" where the use of such language is disfavored, especially in the context of the court's charge on reasonable doubt?

II.

Whether the trial court erred in declining to charge Appellant's requested instructions on identification and credibility where they court's standard charges failed to address many of the factors that the jury should reasonably consider in evaluating the accuracy of the identification and the credibility of the witnesses and failed to charge the jurors that they "may believe all, part, or none of a witness' testimony" and "may believe many witnesses against one or one against many?"

III.

Whether the trial court erred in admitting the out-of-court statements of Appellant where the statements were not knowingly, intelligently, and voluntarily tendered under the totality of the circumstances?

STATEMENT OF THE CASE

On June 28, 2016, the Greenville County returned indictments against Appellant Brian Lewis for armed robbery, possession of a weapon during the commission of a violent crime, conspiracy, and resisting arrest. R. 489

On February 7 – 9, 2017, Lewis appeared for trial before the Honorable Brian M. Gibbons and a jury. Lewis was represented by William Grove and Michael Martinez, and the State was represented by assistant solicitor Jennifer Tessitore. R. 1. The jury retuned verdicts of guilty as to all offenses. R. 480. Judge Gibbons imposed sentences of twenty-seven years for armed robbery, a consecutive term of five years for the weapons offense, a concurrent term of five years for conspiracy, and a concurrent term of one year for resisting arrest. R. 484.

This appeal follows.

ARGUMENT

I.

The trial court erred in charging the jury that "[a] reasonable doubt is that doubt which would make an honest, conscientious juror searching for the truth in a case to hesitate to act" where the use of such language is disfavored, especially in the context of the court's charge on reasonable doubt.

Introduction

Appellant Brian Lewis was the scape goat for three teenage boys – Donny Campbell, Cordell Lewis, and Robert Jackson – who were afraid of facing the consequences of their actions and feared that Lewis had told police what he knew about their involvement in the robbery of a pizza delivery man. On the afternoon of July 22, 2015, Steven Haefner, the owner of a Domino's pizza in Greenville went to deliver pizza to Grove Station Apartments. When he knocked on the door of apartment 283, no one answered. Haefner returned to his car and saw four young black men walk out of the breezeway toward him. R. 110, l. 18 – 114, l. 20.

Robert Jackson told Haefner that the pizza was for "his people" and offered to pay with a credit card. At Haefner's prompting, Jackson knocked lightly on the apartment door and also received no response. R. 114, l. 24 – 115, l. 15; R. 178, l. 13 – 179, l. 17. When Jackson motioned for Haefner to come toward him, another black male came out of the breezeway with what Haefner believed was a handgun and told Haefner to get on the ground and throw his keys and wallet. R. 115, ll. 15-19; R. 119, l. 12 – 120, l. 4. Haefner complied with the demands and said the gun was held to the back of his head while someone picked up his keys and wallet. R. 122, l. 5 – 123, l. 9. Donny Campbell and Cordell Lewis each kicked Haefner before getting into Haefner's blue Toyota Highlander and driving off. R. 123, ll. 12-16; R. 245, ll. 19-23; R. 324, l. 15 – 327, l. 10.

Despite the brevity of his interaction with the gunman and ability only to describe him as a "black gentleman . . . shorter than I was" wearing a T-shirt, during a photo array conducted two days after the incident and Lewis' arrest, Haefner selected Lewis' picture and identified him as the person who approached him with a gun and made an in-court identification of Lewis. R. 120, l. 5 – 121, l. 6; R. 131, l. 3 – 136, l. 2; R. 146, ll. 1-19. The "gun" was not an actual firearm, but rather an unloaded CO2 pellet pistol that resembled an automatic weapon. R. 121, ll. 7-14; R. 341, l. 13 – 344, l. 20. Lewis denied any involvement in the armed robbery but admitted that he got into the stolen car near another courtyard up the hill and was driving it when confronted by police later that night. State's Ex. 53.[1]

Donny Campbell, Cordell Lewis, and Robert Jackson all testified at Lewis' trial, each having accepted a plea offer to reduced charges in exchange for their testimony. R. 235, l. 4 – 266, l. 6; R. 318, l. 6 – 334, l. 24; R. 167, l. 17 - 184, l. 25 None of them told the same story. Campbell admitted that the call for the pizza delivery was made from his cell phone and that the airsoft gun used belonged to him, yet he claimed that it was Lewis who placed the call and held the gun. R. 240, l. 19 – 241, l. 14; R. 260, ll. 17-20. Notably, when police apprehended Campbell the airsoft gun was found in the woods next to where Campbell was hiding, and he admitted that he carried it into the woods with him. R. 241, l. 15 – 242, l. 6; R. 267, l. 15 – 272, l. 5; R. 280, l. 19 – 281, l. 4. Jackson admitted to his role in trying to stall the pizza man by pretending that the pizza was his but said he walked away when Brian Lewis came out with a gun. R. 178, l. 9 – 181, l. 13. He claimed that he "never saw the other two guys" but admitted that in his first statement to police he named Cordell Lewis. R. 181, ll. 14-16; R. 189, ll. 7-18. Cordell Lewis, Appellant Lewis' younger brother, said that Campbell placed the pizza order. R.

[1] State's Exhibit 53, the DVD of the redacted interview of defendant, is on file with this Court.

322, ll. 1-5. Cordell alleged that Lewis was the one with a gun, but admitted that he did not give a statement inculpating Lewis until after police told him that Lewis had given a statement putting all of the blame on Cordell. R. 323, ll. 8-20; R. 331, ll. 19-25. At that point, Cordell told the investigators – who lied to him about the content of Lewis' statement – "well, if he rolled on me, I'm going to roll on him back." R. 332, l. 1 – 333, l. 12.

Moncia Moran, the property manager at Grove Station apartments claimed that she saw Donny Campbell, Robert Jackson, Cordell Lewis, and Brian Lewis together in the breezeway at approximately 2:30 p.m. on the day of the incident, at which time she told them not to loiter in the common areas. R. 152, l. 19 – 156, l. 3. However, investigator Michael Stanton said the conversation with the property manager yielded only three names – Robert Jackson, Cordell Lewis, and Denzel Owens. Stanton averred that Denzel Owens' name never came up again in the investigation and there was "no evidence that indicates he's involved." R. 194, l. 21 – 195, l. 5; R. 224, ll. 15-21.

Relevant Facts

During the charge conference, Judge Gibbons said: "I am staying away from saying 'true verdict.' I am aware of [what] *State v. Beat[y]* says about commenting on 'a verdict that speaks the truth.' I don't say that." R. 415, ll. 3-6. However, at the end of his credibility charge, Judge Gibbons told the jurors: "It becomes your duty as jurors to analyze and to evaluate the evidence and determine what evidence convinces you of its truth." R. 453, ll. 2-4. In his charge on reasonable doubt, Judge Gibbons further instructed:

> **So what is a reasonable doubt? I've said that word seventeen times. What does that mean? A reasonable doubt is that doubt which would make an honest, conscientious juror *searching for the truth* in a case to hesitate to act.** Proof beyond a reasonable doubt must therefore be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. Proof beyond a reasonable doubt can also be described as proof that leaves you firmly convinced of the Defendant's guilt.

R. 456, l. 20 – 457, l. 7 (emphasis added). Following the charge, defense counsel objected to the Court's reasonable doubt charge, arguing: "You directed a 'search for the truth' language. I believe -- something along the lines of an honest and sincere, conscientious juror in search of the truth, we would object to that language." R. 476, ll. 16-21. Judge Gibbons responded: "Objection overruled." R. 476, l. 22.

Discussion

Nearly two decades ago, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), our Supreme Court strongly urged trial judges to avoid using any "seek" language in their charges to the jury. The Court noted that such "in search of the truth" language was unnecessary and ran the risk of unconstitutionally shifting the burden of proof to the defendant. 333 S.C. at 151-56, 508 S.E.2d at 865-68.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), our Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the court in Aleksey noted that in that case the "seek" language was used in the instruction on witness credibility. 343 S.C. at 27, 538 S.E.2d at 251-52. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. Id. Thus, the Aleksey Court found that there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. Id. at 28-29, 538 S.E.2d at 252-53.

In State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), our Supreme Court considered a jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, the Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is `just' or `fair' to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." 401 S.C. at 256, 737 S.E.2d at 475.

Despite our Supreme Court's repeated admonitions regarding the dangers of "seek the truth" language in the court's jury charge, trial judges have continued to employ new derivatives of this burden shifting language. Recently, in State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13), *rehearing granted* Mar. 24, 2017, our Supreme Court reviewed the trial court's preliminary remarks to the jury, which included use of the terms "search[ing] for the truth," "true facts," and "just verdict." The Court ruled:

> [W]e agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Beaty, at 15-16. Even so, the Beaty Court found no prejudice sufficient to warrant reversal from the comments in light of its review of the entirety of the opening comments and the trial record. Id. at 16.

A recent empirical study reveals the practical reality of the problems with truth-related language in jury charges. Michael D. Cicchini & Lawrence T. White, Truth or Doubt? An Empirical Test of Criminal Jury Instructions, 50 U. Rich. L. Rev. 1139 (2016). Two-hundred ninety-eight mock jurors were presented with the same fact pattern of a hypothetical sexual assault case, which included an instruction on the elements of the crime charged; a synopsis of testimony from the minor child, the child's mother, and the defendant; and closing arguments from the prosecution and defense. Cicchini, at 1150-51. The mock jurors were randomly given one of three jury charges – a "to search for the truth" instruction, a "doubt-only" instruction, or a "combination" truth and doubt instruction. Cicchini, at 1152-53. The study provided strong empirical data that "the truth-related language at the end of an otherwise proper reasonable doubt instruction actually diminishes the government's burden of proof." Cicchini, at 1155. The authors opined that their study reflects the invalidity of the judicial perception that the remainder of a jury charge can render the "truth" language harmless. Cicchini, at 1156-57.

It is simply not the jury's function to search for the truth. A jury's function is to determine whether the state has proven the defendant's guilt *beyond a reasonable doubt.* See Francis v. Franklin, 471 U.S. 307, 313 (1985) ("The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (citing In re Winship, 397 U.S. 358, 364 (1970)). Here, the "seeking the truth" language was included in the reasonable doubt charge, arguably the most precarious place it could appear. The jury's question regarding the amount of time that passed between the car driving off and when it circled it back by Haefner is evidence of their focus on determining the "truth" rather than evaluating the evidence that was presented. R. 191, ll. 10-15. The trial judge's refusal to rectify his erroneous

charge was not harmless in this case because there is evidence that the jury sought information outside of the record, ostensibly to fulfill their truth-finding mission and empirical data suggests that the inclusion of truth-finding language diminishes the state's burden of proof. Lewis is accordingly entitled to a new trial.

II.

The trial court erred in declining to charge Appellant's requested instructions on identification and credibility where they court's standard charges failed to address many of the factors that the jury should reasonably consider in evaluating the accuracy of the identification and the credibility of the witnesses and failed to charge the jurors that they "may believe all, part, or none of a witness' testimony" and "may believe many witnesses against one or one against many."

Relevant Facts

At the charge conference, defense counsel presented two proposed charges to the court – one on identification and one on credibility. R. 406, l. 11 – 407, l. 2; R. 485; 487. Originally, the prosecutor stated that she had no objection to the defense's requested identification charge. R. 407, ll. 3-21. Judge Gibbons then read his standard charge to the attorneys, which he described as "shorter, sweeter, [and] easier to understand." R. 407, l. 22 – 409, l. 13. Defense counsel reiterated his desire to submit the defense's proposed charge to the jury. R. 409, ll. 13-15. The prosecutor then backtracked, agreeing with the court that the charge he read was "shorter" and "sweeter." R. 409, ll. 17-20. She also expressed "concern" over the proposed charge's inclusion of language that "[t]he prosecution has the burden of proving beyond a reasonable doubt that the crime was committed AND that the defendant was the person who committed the crime," which she averred "just adds, uh, charges that will already be covered by Your Honor with respect to reasonable doubt." R. 409, l. – 410, l. 1. R. 485 Judge Gibbons ruled: "I'm going to charge my charge and not the Defendant's request to charge. Looking at the

Defendant's request to charge, I believe that it impermissibly comments on the facts, so I am not going to charge that one." R. 410, ll. 10-15.

With respect to the defense's credibility charge, counsel stated that he understood that the Court had a credibility charge but argued that the proposed charge "provides additional grounds/factors for the jury to evaluate a witness' testimony and whether they'd have a reason to lie or had various issues in viewing what happened, remembering what happened correctly." R. 411, ll. 2-14. Judge Gibbons ruled: "I will give the credibility charge, my own charge because it's easier to understand and it's not as long." R. 411, ll. 15-17. Though not necessary, following the conclusion of the jury charge, defense counsel renewed his objection to the use of the court's charges on identification and credibility rather than those requested by the defense. R. 476, ll. 10-14.

Discussion

There were several matters included in the requested charges that were missing from the standard charges given to the jury in Lewis' case. Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Having standard charges benefits judges, but trial judges should not abdicate their duties of charging the jury on the law as presented by the facts to a book of general charges. Rather, trial judges must mold standard charges to fit the particular circumstances of each case. See State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) (holding that "standard charges" or "approved charges" do not excuse a trial judge from crafting charges designed to address the specific case); State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) ("A trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant."); see also Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005)

("In light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification, and the critical importance of accurate jury instructions as the lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict, we can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification" (internal quotations omitted)); State v. Long, 721 P.2d 483 (Utah 1986) (discussing the importance and need for tailoring jury instructions on eyewitness identifications to the facts and circumstances of each individual case).

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). In the present case, the trial judge gave his standard charges on identification and credibility, such that there was no dispute that both matters were at issue in the trial and the proper subject of jury charges. The trial judge rejected the defense's proposed charges because he found that the proposed identification charge impermissibly commented on the facts and found that the proposed credibility charge was more difficult to understand and longer than the standard charge. R. 410, ll. 10-15; R. 411, ll. 15-17.

Identification Charge

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); 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); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). Jury instructions are important particularly in matters of witness identifications due to the high number of wrongful convictions based upon erroneous identifications. See Perry v. New Hampshire, 565 U.S. 228, 245 (2012).

The requested identification charge would have instructed the jurors: "You don't have to believe that the identification witness was lying or not sincere to find the defendant not guilty. It is enough that you conclude that the witness was mistaken in (his) (her) belief or impression." R. 485. It further expanded the list of factors to consider in determining the believability of the identification witness beyond the charged factors of "whether the witness has an adequate opportunity to observe the offender," "how long or short a time was available," "how far or close the witness may have been from the alleged offender," "the lighting conditions," and "whether or not the witness had the chance to see or know the person in the past." R. 461, l. 17 – 462, l. 4. The requested charge additionally instructed the jury to consider: "[t]he extent to which that person's features were visible and undisguised," "[w]hether there were any distractions occurring during the observation," and "any other circumstance that affected the witness's opportunity to observe the person committing the crime." R. 485. The requested charge further instructed the jury to consider the witness' capacity to observe the person who committed the crime and whether that capacity was impaired by "stress or fright at the time of the observation" or "personal motivations, biases, or prejudices." R. 485. Lastly, the requested charge instructed the

jury: "A witness's level of confidence in (his) (her) identification of the perpetrator is one of many factors you may consider in evaluating whether the witness correctly identified the perpetrator. However, a witness who is confident that (he) (she) correctly identified the perpetrator may be mistaken." R. 485

"Under South Carolina law, it is a general rule that a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989); S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). In this case, there was nothing in the defense's proposed charge that constituted an impermissible comment upon the facts.

In State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015), *petition for cert. denied* (Sept. 3, 2015), this Court found the "standard identification charge" sufficient, citing the fact that much of the substance of the requested charge was included in the charge given and that the trial court informed the jury that the State had the burden of proving beyond a reasonable doubt that Green committed the crime. 412 S.C. at 77, 770 S.E.2d at 430. The Green Court further ruled that "some of Green's requested charges would have been improper instructions into matters of fact or comments on the weight of the evidence." Id. at 77, 770 S.E.2d at 431. "Specifically, Green's request to charge the jury that '[i]dentification by a person of a different race may be less reliable than identification by a person of the same race' would have been improper because it would have asked the jury to place less weight on Victim's testimony because he was of a different race than Green." Id.

The Green Court wrote: "South Carolina appears to fall in the class of jurisdictions that view instructions regarding 'a witness's level of certainty in his or her identification in assessing

the reliability of the identification' as 'superfluous when general instructions on witness credibility and burden of proof are given' or 'an impermissible judicial comment on the evidence.'" 412 S.C. at 78, 770 S.E.2d at 431. It is notable, however, that several state courts around the country are reevaluating that past view and finding that the scientific evidence relating to eyewitness identifications reveals the necessity of specific identification instructions. See, e.g., State v. Mahmoud, 147 A.3d 833, 839 (Me. 2016) ("In light of the voluminous body of scientific research that has emerged regarding the reliability of eyewitness identification, and the subsequent evolving trend among both state and federal courts to instruct juries on this matter, we conclude that it is permissible, where relevant, to instruct jurors on the reliability of eyewitness identification."); Young v. State, 374 P.3d 395 (Alaska 2016), *abrogating* Buchanan v. State, 561 P.2d 1197 (Alaska 1977); Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015); Commonwealth v. Bastaldo, 32 N.E.3d 873 (Mass. 2015); State v. Cabagbag, 277 P.3d 1027 (Haw. 2012), *abrogating* State v. Vinge, 916 P.2d 1210 (Haw. 1996); State v. Henderson, 27 A.3d 872 (N.J. 2011).

In Perry v. New Hampshire, 565 U.S. 228, 232-33 (2012), the United States Supreme Court declined to extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officer. The Court explained that its "unwillingness to enlarge the domain of due process" took into account the "other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." 565 U.S. at 245. Amongst those protections listed were "eyewitness-specific jury instructions, which many federal and state courts have adopted, [that] likewise warn the jury to take care in appraising identification evidence." Id. at 246.

Unlike the request in Green, the defense's proposal here made no mention of cross-racial identification. The standard charge used omitted certain items and failed to include any type of provision that would have allowed the jury to consider all of the evidence presented. In fact, the instruction given did not even include all of the Neil v. Biggers, 409 U.S. 188, 199-200 (1972) factors related to reliability, which include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Rather, the jury was advised only that it must determine the accuracy of the identifications, consider the believability of the witnesses just as any other witness, and that they:

> [M]ay consider whether the witness had an adequate opportunity to observe the Defendant at the time of the offense. This will be affected by things like how long or short a time was available; how far or close the witness may have been from the offender, alleged offender; the lighting conditions; whether the witness had the chance to see or know the person in the past.

R. 461, l. 17 – 462, l. 4. There was no "catch all" phrase to inform the jury that it could consider the totality of the circumstances, leading the jurors to believe that the short list of factors related to "opportunity to observe" were all that was proper for their consideration. Compare R. 461, l. 5 – 462, l. 13, with R. 485. The identification was crucial in this case, as Haefner was the only arguably unbiased witness to implicate Lewis. The co-defendants' self-serving testimony was hardly persuasive. Additionally, Lewis' presence in Haefner's SUV hours after the robbery was not inconsistent with Lewis' assertion that he became involved after the robbery had already occurred.

Credibility Charge

The requested charge on credibility was similarly more specific than the charge utilized by the trial judge in Lewis' case. The requested charge would have instructed jurors to use their "judgment and common sense" in deciding how believable each witness was in the case. R. 487. Rather than the vague factors listed in the standard charge, the proposed charge listed:

1. How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
2. Does the witness have something to gain or lose from this case?
3. Does the witness have any connection to people involved in this case?
4. Does the witness have any reason to lie or slant the testimony?
5. Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
6. How believable was the witness's testimony in light of other evidence presented at trial?
7. How believable was the witness's testimony in light of human experience?
8. Was there anything about the way the witness testified that made the testimony more or less believable?

R. 487. Further, the proposed charge listed the following instruction, completely absent from the trial court's charge:

> You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one against many.

R. 487.

The requested credibility charge was essential in this case, in light of the dubious nature of the co-defendants' conflicting testimony. In addition to the more specific factors to consider, one of the most important parts of the proposed charge was the paragraph on the jury's ability to believe all, part, or none of what a witness says and ability to believe many witnesses against one or one against many. R. 487. There is nothing nuanced about that requested paragraph, and

similar such instructions have been utilized in other case. See State v. Stukes, 416 S.C. 493, 502, 787 S.E.2d 480, 484 (2016) (trial judge charged, in relevant part, "In determining the believability of witnesses who have testified in this case, *you may believe one witness over several witnesses or several witnesses over one witness*. You may believe a part of ... the testimony of the witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety, or you may reject the testimony of a witness in its entirety." (emphasis in original)); State v. Mitchell, 399 S.C. 410, 420 n. 3, 731 S.E.2d 889, 895 n. 3 (Ct. App. 2012) (trial judge charged, in relevant part, "[Y]ou may believe everything a witness says, you may believe nothing a witness says. You may believe parts of a witnesses [sic] testimony and disregard other parts. You may believe one witness over several or several over one."). The "standard" charge given by the trial judge in Lewis' case contained no language on that point equivalent to that requested in the defense's proposed charge. This omission was especially important here, where the State paraded all three of Lewis' co-defendants into the courtroom to testify against him. It was imperative that the jury understand that it was not required to accept a witness' testimony in total and that the number of witnesses presented was not determinative.

The failure of the trial judge to give the defense's requested charges, where they did not constitute an impermissible charge on the facts and their content was not fairly covered by the charges given, was an abuse of discretion. Lewis was prejudiced due to the centrality of both identification and credibility to his trial. Lewis is accordingly entitled to a new trial.

III.

The trial court erred in admitting the out-of-court statements of Appellant where the statements were not knowingly, intelligently, and voluntarily tendered under the totality of the circumstances.

Relevant Facts

A pre-trial Denno[2] hearing was held to determine the admissibility of Lewis' statements to police. R. 54 – 94. The State admitted two statements made in this case – a brief oral statement at the scene of Lewis' arrest and a recorded interrogation of Lewis at the law enforcement center. Trial counsel renewed his objections to the statements prior to their admission, as well as at the close of the state's case and following the jury's verdict. R. 209, l. 22 – 210, l. 8; R. 211, l. 24 – 212, l. 2; R. 392, l. 9 – 393, l. 6; R. 405, ll. 1-11; R. 481, ll. 23-25.

Officers went to the apartment where Lewis' family resided based upon their suspicion that he was the driver of the stolen SUV that had crashed with a police car a few minutes earlier. R. 208, l. 12 – 209, l. 14. Lewis, who thought he had an outstanding warrant for a probation violation, went out the back window of the apartment. Officer Matthew Anderson instructed his K-9 to go after Lewis. Lewis suffered a dog bite to his arm, which can be seen bleeding through the gauze wrap on the later interrogation video. R. 59, ll. 4-13; R. 299, l. 3 – 307, l. 19; Court's Ex. 1.[3]

When investigator Michael Stanton arrived at 11:40 p.m., Lewis was sitting on the ground with his hands cuffed behind his back. R. 55, ll. 3-24; R. 68, ll. 16-18. Before providing any medical treatment, Stanton talked to Lewis about the "severity" of his situation, read Lewis some version of his Miranda[4] rights, and proceeded to question him. R. 55, l. 25 – 56, l. 16; R. 60, ll. 2-7; R. 66, l. 9 – 67, l. 7; R. 68, ll. 9-15. Stanton could not recall if Lewis was advised of

[2] Jackson v. Denno, 378 U.S. 368 (1964).

[3] Court's Exhibit 1, the DVD of the full interview of defendant, is on file with this Court.

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

the exact charges against him, but said that Lewis was advised "this is serious, you need to be honest or something to that effect." R. 69, l. 20 – 70, l. 7; R. 74, ll. 17-23. According to Stanton, who was not wearing a body camera, Lewis said that he was "around the people" who committed the robbery and was "trying to make some easy money." Lewis purportedly described it as "a little job" "about getting a car and that he needed to drive." R. 57, l. 25 – 58, l. 16; R. 70, ll. 8-16. Lewis was then taken to the hospital by ambulance. R. 59, l. 21 – 60, l. 7.

Following his discharge from the hospital, Lewis was taken to the police station for a recorded interrogation, where he signed a written waiver of Miranda at 2:51 a.m. There were between three and five officers in the room at any given time. R. 61, l. 24 – 66, l. 5; R. 70, l. 24 – 71, l. 21; R. 78, l. 10 – 82, l. 12; Court's Ex. 1. Lewis remained handcuffed and shirtless the entire time. Court's Ex. 1. Dissatisfied with Lewis' initially vague responses to his question about the robbery, investigator Jay Kicklighter told Lewis: "Okay, Brian, look at me. You told these deputies and investigator Stanton you were willing to talk about the incident. This is your version of what happened." Court's Ex. 1, 9:28-9:40. Lewis responded: "I mean, I'm, I'm willing to talk about it. It might not be what y'all want to hear. It might not, it might not be what satisfies y'all. But, I mean, talk about it, I mean." Court's Ex. 1, 9:40-9:52. At that point, Kicklighter threatened:

> If it's not going to be truth, then no, we're not going to be satisfied. And we're not going to waste anybody's time. **We'll go on over to the jail, we'll get all the warrants and I won't talk to you again. The next time I see you will be in a courtroom when I'm testifying to make sure you go to prison for a very long time. And I won't have no dealings with your attorney. I'll be the guy in the solicitor's ear whispering "maximum sentence."**

Court's Ex. 1, 9:52-10:25. Lewis responded that the investigator asking for the maximum sentence made no difference to him. Court's Ex. 1, 10:25-10:49.

Displeased with Lewis' additional responses regarding the offense – particularly Lewis' unwillingness to speak about anyone's actions but his own – another officer told Lewis that "everybody will talk" and the other people involved were going to "be putting everything" on Lewis. Court's Ex. 1, 13:40-14:30. He encouraged Lewis to look out for himself and said: "Now if you don't want to say anything, that, that's perfectly fine with us. But, we don't have to give you, we don't have to give you the chance to talk and explain yourself but we are, okay? We give, we give everybody that chance because I think everybody is entitled to that chance." Court's Ex. 1, 14:30-15:05.

Lewis told the officers that he might be able to discuss what happened but needed to know the charges first. Court's Ex. 1, 15:10-15:39. The officers listed a variety of charges, including armed robbery, conspiracy, and possession of a weapon during a violent crime. Another officer chimed in that there would be additional charges related to the night's events, including attempted murder, resisting arrest, and failure to stop. Court's Ex. 1, 15:39-16:24. Lewis responded that if he was getting charged with all that, nothing he could say would make a difference. Court's Ex. 1, 16:24-16:35. Kicklighter told Lewis that the truth could help him, but Lewis said he would do his time. Court's Ex. 1, 16:34-17:10.

Another officer asked Lewis how old he was. Lewis responded that he was twenty-one. The officer told Lewis that he did not have a serious record, so he probably did not understand. He explained: "**We're talking you're going to prison for longer than you've been alive. You do the right thing and tell us the truth, we ain't talking about two or three years. We're talking about decades.** Alright. Mandatory minimum for armed robbery in this state is ten

years in prison. That's the minimum you can get. **Not to mention that you tried to kill a cop tonight. Okay. In this State, in this county, that's a big problem.**" Court's Ex. 1, 17:10-17:48. After Lewis responded that he did not know they were police at the time, another officer told Lewis "**I don't know if you really understand how serious this is because the ATF, the federal government, is jumping on board.**" Court's Ex. 1, 17:48-20:24. He claimed that the ATF was "chomping at the bit" for local cases like his. Court's Ex. 1, 20:24-20:34. He told Lewis that he order to fully cooperate, the officers needed "the full story" but were not going to beg him for it. Court's Ex. 1, 20:34-21:30.

Lewis then told the officers that he was not involved in any planning of a robbery or the robbery itself, but agreed that he drove the SUV after it was stolen. Lewis said that the SUV was going to be used in "another jugg"[5] but did not know the details of it. Court's Ex. 1, 21:30-24:24. Lewis told Kicklighter that he was wrong about his theory that Lewis jumped out of the apartment window because he knew he had a hit a deputy's car. Rather, Lewis said he thought he had an open warrant because he missed a court date. Court's Ex. 1, 26:25-27:16. Deputy Matthew Owens then asked Lewis when and where he got into the car. Lewis did not know a specific time, but said he got into the car "at the top of next court, beside it" and drove it to Emerald Commons neighborhood. Court's Ex. 1, 27:16-28:33. Owens responded that he wished Lewis the best of luck. Court's Ex. 1, 28:33-28:38. Another officer asked Lewis if he knew what federal prison was like and told him:

> **We ain't talking South Carolina dude. Like, federal prison, where it's enhanced because you used a gun on a violent crime.** Nobody else cares about you, as a matter a fact, everybody pointed their fingers at you. **And this is your one chance, because I'm telling you, these investigators are not going to speak to you again until you go to court** because you're insulting every single one in this room by telling us lies – things that we can prove completely wrong at

[5] A "jugg" is a way to make quick or easy money. R. 82, ll. 9-12; R. 257, ll. 11-17.

> this very moment. The best thing you can do for yourself right now is tell the truth. And if you don't want to do that, man, if you don't want to help yourself out, it don't matter to us.

Court's Ex. 1, 28:38-29:58. Lewis responded that if what the officers were saying was true, they would not be talking to him. Court's Ex. 1, 29:58-30:09. Kicklighter, who was visibly upset, said the interview was over and turned off the recording equipment. Court's Ex. 1, 30:09-30:28.

Following the testimony and review of the recorded interrogation video, the prosecutor argued that both statements were admissible. R. 85, l. 9 – 109, l. 24. Defense counsel argued for their exclusion, noting that it was undisputed that Lewis was in custody during both statements. R. 87, ll. 7-10; R. 88, ll. 2-3. Regarding the first statement, counsel cited the dog bite injury that was so serious blood was soaking through the bandage even hours later, the fact that no medical treatment was provided prior to the investigator speaking to Lewis, and the investigator's inability to recall the verbiage of the Miranda warnings given to Lewis. R. 87, l. 11 – 88, l. 12. Regarding the statement at the police station, counsel noted that Lewis could be seen "hunched over" with "a bandage on his arm that's turning red." R. 88, ll. 13-17; R. 89, ll. 11-14. Lewis was handcuffed, though in front of his waist, and surrounded by three or more officers. R. 88, ll. 18-20. Counsel asked the judge to pay particular attention to where Kicklighter threatened Lewis, "in no uncertain terms [having] said I'm going to do everything that I can do to make sure that you get the max" and eroding any prior voluntariness. R. 88, l. 21 – 89, l. 10; see Court's Ex. 1, 9:52-10:25.

The prosecutor responded that the video showed that Lewis "wanted to talk about it" and Kicklighter's statements were "pretty standard for, you know, if you cooperate it will help you." R. 89, l. 21 – 90, l. 5. She emphasized that no specific promise was made, but rather there was a general implication that "you know, if you tell the truth and you want to cooperate, you know,

there might be something I could say to the judge at your sentencing, in essence." R. 90, ll. 6-9. Thus, she argued that there was no coercion. R. 90, ll. 9-10. The prosecutor cited Lewis' response to Kicklighter that his asking for the maximum sentence made no difference to him, arguing "by his own admission that clearly is not construed to be a threat to him." R. 90, ll. 11-17. She said that Lewis never indicated that he was in distress, wanted an attorney, or wanted to stop talking. R. 90, ll. 18-23.

Following additional argument regarding redactions, Judge Gibbons issued his ruling admitting both statements into evidence but ordering some redactions. R. 94, l. 6 – 95, l. 13. The only explanation provided was: "Having heard everything I'm going to allow in both statements. Okay. I find they were knowingly, voluntarily, intelligently made with advice and notice of -- or notice of his *Miranda* warnings and rights." R. 94, ll. 7-10.

Discussion

The trial judge erred in admitting Lewis' statements at the apartment complex and during the interrogation at the police station. In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court wrote "that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. Id. at 376–77; State v. Miller, 375 S.C. 370, 381, 652 S.E.2d 444, 450 (Ct. App. 2007) (quoting State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976). In South Carolina, the judge makes this initial determination of voluntariness required by Denno. Miller, 375 S.C. at 382, 652 at 450.

In the initial phase of review by the trial judge, if a defendant was advised of his Miranda rights, but chose to make a statement anyway, the "burden is on the State to prove *by a preponderance of the evidence* that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). **The State bears this burden of proof even where a defendant has signed a waiver of rights form.** State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980).

"[T]he trial judge must examine the totality of the circumstances surrounding the statement and determine whether the State has carried its burden of showing the statement was made voluntarily." Miller, 375 S.C. at 383, 652 S.E.2d at 450. When considering the voluntariness of a statement, the court and jury should consider "not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693 (1993) (omitting internal citations). "Coercion is determined from the perspective of the suspect." Miller, 375 S.C. at 386, 652 S.E.2d at 452. Statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona, 437 U.S. 385, 398-99 (1978); Minnesota v. Murphy 465 U.S. 420, 427 (1984).

In the present case, there was no single factor that alone undermined the voluntariness of Lewis' statements, but they all had the cumulative effect of rendering his waivers involuntary. Not only could Investigator Stanton not recall the specific version of Miranda rights read to Lewis at the scene of his arrest, but he improperly coupled them with advice to Lewis about the severity of seriousness of the situation. R. 55, l. 25 – 56, l. 16; R. 59, ll. 1-13; R. 66, l. 9 – 67, l. 7; R. 74, ll. 17-23. Meanwhile, Lewis sat on the ground with his hands cuffed behind his back and a dog bite to his arm so deep that it was bleeding through the thick gauze wrap hours later

during his video interrogation. R. 55, ll. 6-24; Court's Ex. 1. While officers claimed that an ambulance had been called and the questioning was conducted during the "intermittent" period, there was no evidence that Lewis was aware that medical assistance was on its way and would be provided even if he remained silent. R. 59, l. 21 – 60, l. 7; R. 67, ll. 18-23. None of the officers were wearing body cameras, so there was nothing to corroborate their testimony. R. 70, ll. 8-16.

It is notable that during the recorded interrogation there were three to five officers in the room, and Lewis remained handcuffed, shirtless, and bleeding. R. 61, l. 24 – 66, l. 5; R. 70, l. 24 – 71, l. 21; R. 78, l. 10 – 82, l. 12; Court's Ex. 1. Though re-Mirandized at the police station, the interview was riddled with threats and coercion aimed at getting Lewis to tell the officers what they dubbed "the truth." They acted as though giving Lewis an opportunity to incriminate himself without consultation with an attorney was doing him some sort of favor. Court's Ex. 1, 14:30-15:05.

Kicklighter implied that because Lewis had purportedly told officers that he was "willing to talk about the incident" before that he was required to do so. Court's Ex. 1, 9:28-9:40. He threatened Lewis that if he not tell them what they wanted to hear, they would take him to the jail, get the warrants, and never speak to him or his lawyer. Kicklighter further told Lewis that he would make sure that he went to prison "for a very long time" and would be "in the solicitor's ear whispering maximum sentence." Court's Ex. 1, 9:52-10:25. This is hardly the kind of rhetoric that ensures that an arrestee understands that he can invoke his right to counsel or decide to stop speaking at any time. On the contrary, it imparts to the listener that their only opportunity to help themselves is in that moment and without an attorney.

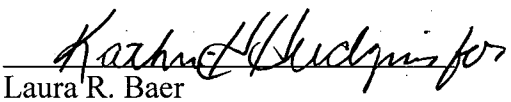
The prosecutor made much of Lewis' response that Kicklighter asking for the maximum sentence "made no difference to him," arguing that it showed that Lewis did not construe the

statement as a threat to him. R. 90, ll. 11-17; Court's Ex. 1, 10:25-10:49. The prosecutor's reasoning is flawed. Lewis' response is evidence that he most certainly understood that Kicklighter was intending to threaten and intimidate him. However, Lewis was a young man trying to appear tough to the many officers who surrounded him. That does not change that fact that Kicklighter, as well as several other officers, did threaten Lewis. Interestingly, the officers listed six offenses that Lewis was going to be charged with, which included attempted murder and failure to stop. Neither of those were ever charged. Court's Ex. 1, 15:10-16:24. Nevertheless, Lewis was told that he was "going to prison for longer than you've been alive" and that they were "talking about decades." Court's Ex. 1, 17:10-17:48. They lied to Lewis, telling him that the Bureau of Alcohol, Tobacco, Firearms and Explosives was involved and that he would serve his time in federal prison. Court's Ex. 1, 17:48-20:34; Court's Ex. 1, 28:38-29:58. Lewis was also told that the other co-defendants had and would point the finger at him. Court's Ex. 1, 13:40-14:30; Court's Ex. 1, 28:38-29:58. Kicklighter's overreaction to Lewis' recognition that the officers were lying to him further reflected the tense and intimidating nature of the interrogation. Court's Ex. 1, 29:58-30:28.

Based on this evidence, the prosecution could not meet its burden of proving that either of Lewis' waivers of his rights were voluntary. The trial judge erred in ruling that the statements were admissible. Lewis is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant Brian Lewis respectfully requests that this Court reverse his convictions and grant him a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of May, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 15, 2018

Kathrine H Hudgins for

Laura R. Baer
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589