

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2016-000670
Unpublished Opinion No. 2018-UP-339

RECEIVED

AUG 08 2018

SC Court of Appeals

THE STATE,

Respondent,

v.

JAMES ARCHIE CREWS, IV,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On July 25, 2018, this Court issued an unpublished opinion in which it reversed Appellant James Archie Crews, IV's conviction for first-degree criminal sexual conduct with a minor and remanded his case for a new trial. State v. James Archie Crews, IV, Op. No. 2018-UP-339 (Ct. App. filed July 25, 2018). In reversing Crews's convictions, this Court held the trial court erred by instructing the jury that the victim's testimony need not be corroborated by other evidence in light of our supreme court's decision of State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), which was reached following Appellant's trial. This Court recognized this particular jury instruction had been approved by our supreme court at the time of Appellant's trial pursuant to State v. Rayfield, 369 S.C. 106, 117-18. 631 S.E.2d 244, 250 (2006). Furthermore, this Court held it could not conclude the trial court's instruction was not harmless because the case hinged on credibility, noting a lack of independent testimony from other witnesses with firsthand

knowledge of the abuse. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes this Court misapprehended and overlooked its argument regarding the harmlessness of any error in light of the record before this Court, including the trial court's improper jury instruction on evaluating the credibility of juvenile witnesses, which encouraged the jury to give heightened scrutiny to the testimony of Victim, who was the lone juvenile witness to testify during trial.

During its jury charge, the trial court gave the following instruction pertaining to how the jury should evaluate the credibility of juvenile witnesses:

Now, during this trial you heard testimony from a child. Where a witness is a child you must determine as with any witness whether that testimony is believable. In deciding believability you may consider **not only matters that I have already discussed with you, but** you may also consider the age of the child, the child's ability to observe and remember facts and the child's ability to understand and answer questions. Because **young children may not fully understand what is happening here**, it is up to you to decide whether the child understood the seriousness of appearing as a witness at this criminal trial, whether the child understood the questions, whether the child has a good memory, and whether the child understands the difference between lying and telling the truth.

In addition, **young children may be influenced** by the way the questions are asked. It is up to you to decide whether the child understood the questions asked.

(Tr. 396-97) (emphasis added).

Immediately after that instruction was given, the trial court instructed the jury regarding non-corroboration of a victim's testimony pursuant to Section 16-3-657:

Now, ladies and gentlemen, I further charge you that the testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 and I further charge you that this offense is alleged to be a violation of Section 16-3-655.

(Tr. 398).

Following the conclusion of all jury instructions, Appellant objected to the non-corroboration charge, arguing it would confuse the jury. (Tr. 406-07). The trial court denied Appellant's objection. (Tr. 407). Thereafter, deliberations began at 12:12 p.m. (Tr. 407-08).

After nearly forty minutes of deliberation, the jury sent the trial court a note inquiring as to whether either the State or defense counsel could have called Victim's sister as a witness. (Tr. 408, Court's Ex. No. 4). The trial court responded the jury had all the information necessary to make its decision. (Tr. 408, Court's Ex. No. 4). The jury next asked to watch the forensic interview again and the jury was called back into the courtroom to watch the video. (Tr. 408-10, Court's Ex. No. 5). The jury reached its verdict at 2:26 p.m., convicting Appellant of first-degree criminal sexual conduct with a minor. (Tr. 411-12).

Respondent respectfully argues this Court misapprehended and overlooked Respondent's argument regarding the harmlessness of any error. While the State is not disputing this Court's finding that the trial court's jury instruction was erroneous in light of the subsequently-issued Stukes decision, under the specific facts and circumstances of Appellant's case, any error that resulted from the presentation of the non-corroboration charge was harmless beyond a reasonable doubt and did not render Appellant's trial so fundamentally unfair as to warrant a new trial.

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.”).

Here, any error resulting from the trial court’s decision to instruct the jury on the statutory non-corroboration language was harmless because it could not have had any impact on the verdict. Initially, the jury’s inquiry as to whether Victim’s sister would or could have testified establishes the jury was considering (and perhaps searching for) corroboration to support Victim’s testimony, which demonstrates the jury thoroughly evaluated the credibility of the Victim’s testimony—including in regard to whether it was sufficiently corroborated—even after being presented with the non-corroboration charge. See Court’s Ex. No. 4. In light of that fact, it is illogical to assume that the non-corroboration charge would have resulted in the jury’s guilty verdict. Beyond that key factor, the present case is highly distinguishable from Stukes, where the jury was clearly confused and appeared to “inescapably” misunderstand the instruction based on its note to the trial court. Unlike the jury in Stukes, the jury in Appellant’s case did not send a question expressing confusion over the non-corroboration instruction, but rather, appeared to ignore the instruction altogether based on the jury note it did submit, which appeared to question the absence of testimony that could have potentially corroborated Victim’s claims of sexual abuse. Similarly, aspects of Victim’s testimony were corroborated, including Appellant dressing

in female clothing. Moreover, aside from the testimony and evidence presented by the State, Appellant—unlike the defendant in Stukes—elected **not** to testify in his own defense during his trial, did not refute Victim’s testimony about what had occurred, and did not offer any explanation or theory in regard to why Victim would fabricate a claim of repeated sexual assaults. Additionally, this case is also distinguishable from Stukes because the jury was already alerted to give special scrutiny to Victim’s testimony with the juvenile witness jury instruction prior to receiving the non-corroboration charge, a situation that was not present in Stukes as no such charge was not given. Therefore, in this case, unlike in Stukes, the non-corroboration charge was harmless beyond a reasonable doubt and reversal is not warranted. See McBride, 416 S.C. at 394, 786 S.E.2d at 442 (finding any error in the trial court’s non-corroboration charge was harmless).

Furthermore and most importantly, any purported prejudice Appellant suffered from the trial court’s non-corroboration instruction was significantly outweighed and effectively eliminated by the enormous benefit Appellant derived from the trial court’s presentation of an extensive improper charge on evaluating the credibility of juvenile witnesses, which incorrectly suggested the testimony of a child required greater scrutiny than other witnesses, which necessarily meant Victim since he was the only juvenile witness. This improper charge, which the trial court gave **directly before** the non-corroboration charge, singled out Victim and conveyed to the jury that his testimony should be more heavily scrutinized than all the other witnesses who testified at trial. In particular, this charge suggests juvenile witnesses are less likely to remember things accurately, are less likely to know the difference between a truth and a lie, are less likely to appreciate the seriousness of the proceedings, and are more easily lead. This charge is a misleading and incorrect statement of law as these are issues that could potentially

plague all witnesses regardless of their age.¹ Moreover, by commenting on the veracity of juvenile witnesses, the trial court erroneously gave an impermissible and unconstitutional charge on the facts that invaded the province of the jury. See S.C. Const. art. V, § 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”); Stukes, 416 S.C. at 499, 787 S.E.2d at 483 (“[I]t is not within the province of the court to express an opinion to the jury on its view of the facts. By addressing the veracity of a victim’s testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury.”); State v. Cheeks, 401 S.C. 322, 329, 737 S.E.2d 480, 484 (2013) (“[W]e hold that the ‘strong evidence’ charge is improper as an expression of the judge’s view of the weight of certain evidence.”); State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976) (“Any further instruction on [whether the witness is fearful of retribution or has any hope of leniency from the prosecution] might have invaded the province of the jury to draw inferences from the evidence.”); State v. Thorne, 237 S.C. 248, 251, 116 S.E.2d 854, 855 (1960) (“The Judge must be careful to avoid expressing, or even intimating, any opinion, as to the facts, and if he does so, whether intentionally or unintentionally, a new trial must be granted. Under our Constitution the jury is the exclusive judge of the facts, and the true meaning and real object is that the jury must be left to form its own judgment, unbiased by any expressions, or even intimations, of opinion by the Judge.”). In light of the vast benefit Appellant received from the trial court’s unconstitutional charge pertaining to the credibility of juvenile witnesses, any error stemming from the court’s non-corroboration charge is harmless beyond a reasonable doubt. Stated differently, to the extent the error regarding the non-

¹ Notably, juvenile witnesses are presumed to be competent like any other witness in South Carolina unless a showing to the contrary is made. See Rule 601, SCRE (“Every person is competent to be a witness except as otherwise provided by statute or these rules.”); see also 32 S.C. Jur. Witnesses § 6 (“Under the current rule, children are presumed to be competent unless it is shown otherwise.”).

corroboration charge (which unquestionably remains a correct statement of law even though it is not a proper jury instruction following Stukes) tipped the scales of justice against Appellant, the juvenile witness instruction (which was and is not a correct statement of law) that instructed the jury to place heightened scrutiny of the testimony of Victim tilted the scales substantially in the opposite direction such that Appellant suffered no prejudice from the trial court's manner of instructing the jury.²

Accordingly, based on the foregoing, the trial court's presentation of a jury instruction on the statutory non-corroboration language could not have had any impact on the outcome of Appellant'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

² Additionally, the non-corroboration jury instruction was necessary under the circumstances presented in this case—where the trial court instructed the jury immediately prior that the testimony of the Victim warranted increased scrutiny—which required the giving of the otherwise impermissible charge, akin to when the door is opened to otherwise impermissible evidence. Cf. State v. Page, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) ("It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.").

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 Appellant's case, and Appellant 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.”). Respondent respectfully requests this Court reconsider its finding that any error stemming from the non-corroboration jury instruction was not harmless. Moreover, if this Court grants Appellant a new trial based on the unconstitutional nature of the non-corroboration charge, this Court should also declare the trial court's credibility of juvenile witnesses unconstitutional and bar its use during Appellant's retrial or any other future trials.

Accordingly, for the foregoing reasons combined with the all the reasons raised in the Final Brief of Respondent, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision in light of the harmlessness of any error in charging the jury that a victim's testimony need not be corroborated, vacate its previous opinion, and ultimately affirm Appellant's convictions and sentence.

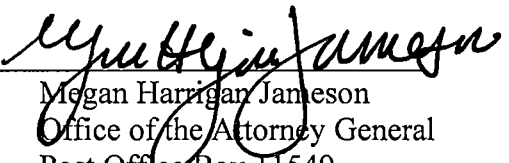
Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

140 N. Main Street, Suite 102
Summerville, South Carolina 29483
(843) 871-2640

BY: 
Megan Harrigan Jameson
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

August 8, 2018

STATE OF SOUTH CAROLINA
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APPEAL FROM DORCHESTER COUNTY
Diane S. Goodstein, Circuit Court Judge

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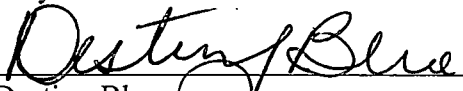
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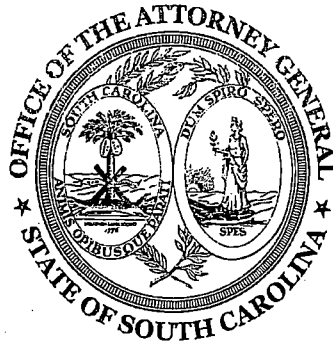
I, Destiny Blue, certify that I have served the within Respondent's Petition for Rehearing on Appellant by depositing two copies of the same in the interagency mailbox addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This _____ day of August, 2018.


Destiny Blue
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

August 9, 2018

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AUG 08 2018

SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. James Archie Crews, IV – Appellate Case No. 2016-00670

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar Number 100108

MRF/
Enclosures

cc: Susan B. Hackett, Esquire
Victim Advocacy Division