STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Orangeburg County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK LAMOUNT FURTICK,

APPELLANT

APPELLATE CASE NO 2017-001236

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in denying Appellant's motion to ask additional voir dire questions, where the questions that had been asked already did not cover bias and prejudice from either law enforcement involvement or victimhood of a violent crime, where Appellant had been indicted and was on trial for burglary and kidnapping?

Did the trial court err in charging the jury on voluntary intoxication and allowing the state to show the charge on a television screen during closing, where such a charge confused the issue, diminished the state's burden of proof, and constituted a charge on the facts?

STATEMENT OF THE CASE

Appellant was indicted for kidnapping and burglary in the first degree. R. 212-215. He proceeded to trial on May 23, 2017 before the Honorable Maite Murphy and a jury in Orangeburg County. R. 1. Breen Stevens and Peggy Hinds represented Appellant, and Ashley Cornwell appeared on behalf of the State. The jury found Appellant not guilty of the first-degree burglary charge and guilty of the kidnapping charge. R. 198, ll. 14 – 22. Judge Murphy sentenced Appellant to the maximum sentence of thirty years. R. 205, ll. 2 – 5.

This brief follows.

ARGUMENT

I. The trial court erred in denying Appellant's motion to ask additional voir dire questions, where the questions that had been asked already did not cover bias and prejudice from either law enforcement involvement or victimhood of a violent crime, where Appellant had been indicted and was on trial for burglary and kidnapping.

Relevant facts

Appellant Derrick Furtick was at a friend's house playing poker on August 19, 2016. R. 136, ll. 5 – 11. At some point in the night, Appellant heard voices outside and checked the back door. R. 137, l. 13 – R. 138, l. 21. Upon returning to the poker table, the people who Appellant had been playing cards with had placed guns in the table. Id. Appellant was informed that he needed to leave the house. Id. As he began to leave, one of the individuals began "cocking a gun" so Appellant ran. Id. As he ran, shots were fired at him. Id.

Appellant ran to the nearest house and knocked on the door. R. 138, l. 22 – R. 142, l. 15. Due to the impending danger, he turned the doorknob as he knocked. Id. Scared, he ran inside to hide. Id. He hid on one of the rooms. Id. As he testified at trial, he "didn't know what was going on." Id. He was "just scared." Id.

After he entered the home, he heard a female inquire about his presence and identity. Id. He told her he needed help because someone was trying to kill him. Id. The woman, Danielle Monroe, opened the door to let her son out so that he could go get help. Id. Appellant, fearful that the shooters were chasing him, closed the door. Id.

Appellant and Monroe ended up in the front yard after Monroe followed her son outside. Id. Appellant held Monroe close to him because he "just felt safe around her." Id. He held her until the police arrived. Id.

Appellant was detailed, placed in a police car, and driven to the hospital. R. 142, l. 18 – R. 143, l. 6. Appellant almost died in the hospital following a drug overdose; he stayed there for approximately six days. R. 151, ll. 5 – 22.

Appellant was indicted by an Orangeburg County grand jury at its May 8, 2017 term for Kidnapping and Burglary. R. 212-215. Following a two-day trial, the jury found him guilty of kidnapping and not guilty of the first degree burglary charge. R. 198, ll. 14 – 22. Judge Murphy sentenced Appellant to thirty years' imprisonment for the kidnapping charge. R. 205, ll. 2 – 5.

Discussion

Following jury selection, counsel for Appellant placed an objection on the record regarding proposed voir dire and a question that was not asked by the trial judge to the jury. R. 32, l. 15 – R. 36, l. 11; R. 207-211. In particular, counsel had submitted a question as to "whether any member of the jury panel is related by blood or marriage to or a friend or acquaintance of any member of a law enforcement agency." Id. Two other similar questions had also been submitted: whether any member of the jury had been employed by a civilian or military law enforcement agency and whether any member of a prospective juror's family or close friend had been a victim of a burglary or violent crime. Id.

Counsel's rationale for requesting these three questions and subsequently objecting was explained in detail:

> My own personal experience as previously being in the service, as well as previously being in law enforcement in the service for a period of time, usually

> folks are really conservative when they're in that field. And so when it comes to that - - and also have a bent against defendants.
>
> And so based on that, that's pretty much why we wanted to do that. For lack of a better term, it would [indicate] to us any bias potentially against our client that we would definitely exercise strikes on.

Id. Citing S.C. Code Ann. § 14-7-1020, counsel argued that on behalf of Appellant, he was statutorily authorized to move that certain questions be asked regarding bias or prejudice. The three items cited above would have allowed counsel to gain a better understanding of potential bias.

The State argued that the trial judge adequately asked about law enforcement and potential bias when she inquired whether there was "any member of the jury panel who [was] a member of or a contributor to any group which has as its primary concern the promotion of law enforcement of victim's rights? These groups would include but are not limited to MADD, SADD, or Citizens Against Violent Crime." R. 20, ll. 14 – 19; R. 35, ll. 12 – 14.

Appellant's motion was subsequently denied. R. 35, l. 15 – R. 36, l. 11. The court reasoned that the questions which were asked covered all of Appellant's concerns. The court noted that "[a]s a matter of fact, several jurors did come up and state that their family members have been a victim of violent crime when those questions were asked." Id.

However, a review of voir dire from the record does not support such a contention. Questions were asked about whether prospective jurors knew any of the witnesses, and a few individuals came forward. Juror Number 180 indicated that her son "committed a crime of marijuana" when asked if her son had been the victim of a crime. R. 10, ll. 10 – 25.

The statute cited by Appellant, S.C. Code Ann. § 14-7-1020, afforded Appellant the ability to inquire about bias and prejudice:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

S.C. Code Ann. § 14-7-1020

It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial. State v. Holland, 261 S.C. 488, 495, 201 S.E.2d 118, 122 (1973). "All criminal defendants have the right to a trial by an impartial jury." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (citing U.S. Const. amends. VI and XIV). To that end, the jury must render its verdict free from outside influences of all kinds. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998) (quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993)).

To protect both parties' right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determinate whether the jurors are aware of any bias or prejudice against a party, as well as to "elicit such facts as will enable [the parties] intelligently to exercise their right of peremptory challenge." Woods, 345 S.C. at 587, 550 S.E.2d at 284; see also State v. Coaxum, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014).

Parties in a case, through the trial court, " 'have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge.' " State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982); see also Wall v. Keels, 331 S.C. 310, 318, 501 S.E.2d 754, 758 (Ct. App. 1998).

In this case, through the voir dire rejected by the trial court, Appellant sought to determine which potential jurors were related to or close friends with individuals affiliated with law enforcement. Thus, while Appellant was willing to accept certain members on the jury, he sought to exclude, either for cause or through peremptory strikes, the potential jurors who were more likely to have actual bias against him. By refusing to even identify the potential jurors who may have been employed by a law enforcement agency, knew someone who had, or knew a family member or close friend who had been a victim of a burglary or violent crime, the trial court prevented Appellant from identifying those jurors who Appellant could argue should be excused for cause, and likewise prevented Appellant from intelligently exercising his peremptory strikes.

II. The trial court erred in charging the jury on voluntary intoxication and allowing the state to show the charge on a television screen during closing, where such a charge confused the issue, diminished the state's burden of proof, and constituted a charge on the facts.

After the State rested, and following a charge conference in chambers, defense counsel objected to the charge regarding voluntary intoxication on the basis that the charge "is tantamount to a charge on the facts, which is forbidden under South Carolina constitutional law." R. 131, ll. 15 – 19. Furthermore, counsel argued that such a charge would diminish the State's burden regarding intent. R. 131, ll. 23 – 25.

Counsel argued:

> [I]f the jury is instructed on voluntary intoxication, number one ... it would confuse the issue. Number two, it would actually diminish the government's burden of proof regarding intent itself. And, number three, obviously, we believe it's a charge on the facts.

R. 132, ll. 7 – 14.

Because Appellant had not yet testified, the trial judge indicated that "it will depend on what the defendant testifies to whether or not that will be charged at all." R. 132, l. 17 – R. 133, l. 1. Additionally, Judge Murphy suggested that she intended to charge voluntary intoxication if Appellant testified as such. Id. She disagreed with counsel's assertion that it diminished the State's burden of proof. Id.

The trial judge ruled that "voluntary intoxication is properly charged based upon the circumstances as testified to by the defendant, and again, the same ruling pursuant to your objection to that charge." R. 162, l. 25 – R. 163, l. 15. Defense counsel likewise moved to prevent the State from showing the voluntary intoxication charge on the large television next to the jury. Id.

The charge given to the jury was as follows:

> Voluntary intoxication is not an excuse or a defense to crime, regardless of whether the crime is one involving general or specific intent. This rule also extends to the voluntary ingestion of drugs. A person who voluntarily ingests alcohol or drugs and thereby becomes intoxicated is not less responsible for his act while in such condition.
>
> If one voluntarily drinks intoxicating liquors, wine or beer or ingests drugs and becomes intoxicated to whatever degree, and if, while in that condition, commits an act which would be a crime if it had been committed by a sober person, the fact of intoxication would not relieve the intoxicated person from responsibility.

R. 195, ll. 13 – 24.

At the conclusion of the jury charges, defense counsel again objected to this charge and the State's use of the large screen. R. 197, ll. 5 – 11. Once more, the trial judge denied the motion. Id.

During closing argument, the State addressed this issue:

> I want to talk a little bit about voluntary intoxication. You heard the defendant get on the stand and, you know, other than this fact that he was scared and hiding, well, now we also find out, oh, well, I had to go to the hospital for six days, and, you know, the reason that I didn't talk to police or give police, you know, my story of why is because I was in the hospital, but I think I gave - - I think I gave law enforcement, but I don't know why there's no reports or why it didn't get written down. And I didn't write a statement because I was, you know, in the hospital and just never thought it about it afterwards.
>
> Voluntary intoxication is not an excuse or a defense to a crime, regardless of whether the crime is one involving general or specific intent. You don't get to say, well, I didn't mean to. I didn't know I was committing a crime because I was intoxicated or I didn't realize I was committing a crime because I was intoxicated. If an act committed by an intoxicated person would be a crime the same as if it would've been committed by a sober person, then it is still a crime. An intoxicated person is still responsible for that.

R. 172, ll. 1-21.

A trial court is required to charge the current and correct law in South Carolina. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). An appellate court will only reverse a trial court's decision regarding a jury charge if there is an abuse of discretion. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007).

In deciding whether the jury was misled or the appellant prejudiced by allegedly erroneous instructions, the charge must be considered as a whole. State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972); State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954); State v. Chappell, 185 S.C. 111, 193 S.E. 924 (1937).

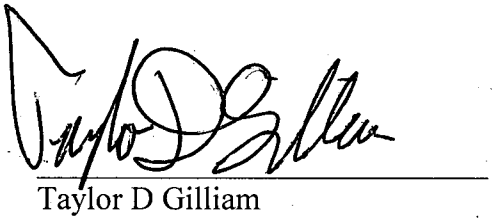
"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21; State v. Belcher, 385 S.C. 597, 602, 685 S.E.2d 802, 804 (2009). It is error to give instructions which are calculated to confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987); see also Wright v. Harris, 228 S.C. 144, 89 S.E.2d 97 (1955) (the giving of conflicting and irrelevant instructions is reversible error). This is so because the purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair and proper verdict can be reached. Leonard, 292 S.C. 133, 355 S.E.2d 270.

"The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." State v. Blurton, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). Counsel for Appellant never took the position that voluntary intoxication was a defense to his client's charges; in fact he recognized that such a tactic was forbidden. R. 131, l. 23 – R. 132, l. 14. Nonetheless, an instruction on voluntary intoxication had the effect of the judge expressing an opinion on Appellant's testimony and defense in violation of Art. V; Section 21 of the South Carolina Constitution.

As given, the charge remarked upon Appellant's actions and characterized them as a crime: "Voluntary intoxication is not an excuse or a defense to **crime**, regardless of whether the **crime** is one involving general or specific intent." (emphasis added). The State showed this charge to the jury on a large television screen. The jury may have been confused regarding its task. Rather than determine whether a crime had been committed without considering intoxication, the jury was instructed that voluntary intoxication does not excuse a crime. In other words, both the judge and the solicitor remarked on the existence of a crime and articulated that intoxication was not a defense. Instead, the charge should have been omitted, and the jury should have deliberated sans confusion.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction based upon the trial court's errors described above.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of August, 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, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 16, 2018

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of August, 2018.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of August, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.