

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Dorchester County
Honorable Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Petitioner,

vs.

JAMES ARCHIE CREWS, IV,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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OCT 30 2018
SC Court of Appeals

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STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals err by reversing Crews's conviction based solely on the trial judge's decision to instruct the jury the testimony of a victim need not be corroborated where, when the trial judge's jury instructions are considered as a whole in conjunction with the other specific circumstances involved in Crews's case, the presentation of that particular instruction could not have misled or confused the jury in a manner improperly prejudicial to Crews and, thus, any error in its presentation was harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

Procedural History

On November 15, 2013, Respondent James Archie Crews, IV was arrested following an investigation into allegations he repeatedly engaged in oral sex and anal sex with a minor child who shared a home with him. In December of 2015, the Dorchester County Grand Jury indicted Crews for one count of first-degree criminal sexual conduct with a minor. On March 14, 2016, a jury trial was commenced in the Dorchester County Court of General Sessions with the Honorable Diane Schafer Goodstein, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Crews as indicted. Following the verdict, the trial judge sentenced Crews to a term of imprisonment of life without parole. Crews then timely filed and perfected an appeal.

Subsequently, on appeal, the Court of Appeals issued an unpublished opinion unanimously reversing Crews's conviction based on the decision in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). State v. Crews, Op. No. 2018-UP-339 (S.C. Ct. App. filed July 25, 2018). Thereafter, the State petitioned the Court of Appeals for rehearing, and, on October 1, 2018, the State's petition was denied.

Factual History

In November of 2013, the nine-year-old victim ("Victim") was living in a trailer home located in Summerville, South Carolina, along with his mother ("Mother"), his eleven-year-old sister ("Sister"), and his forty-three-year-old stepfather, Crews. (App'x pp. 58-59; pp. 81-82; pp. 144-145; State's Ex. # 4 (Forensic Interview Recording)). For several months leading up to that time period, Mother and Crews were experiencing marital difficulties and routinely fighting with

one another, including about Crews's decision to dress in women's clothing against Mother's wishes. (App'x p. 152; p. 154).

On the night of November 11, 2013, Mother informed Crews their relationship was over and advised him she wanted him to leave the home. (App'x p. 160). Crews responded by temporarily retiring to a different part of the residence. (App'x p. 153). Thereafter, on the following day, the two continued to argue, but, after a pause in the fighting, Crews attempted to reconcile with Mother. (App'x p. 153). In doing so, he asked the children to go outside and, when they did so, attempted to convince Mother they could make their relationship work. (App'x pp. 153-154). Apparently satisfied with the effectiveness of his efforts, Crews then headed off to class at a local technical college. (App'x p. 148; p. 154).

Once Crews was gone, Victim reentered the home and, while appearing to be troubled by something, asked Mother if she was going to try to make things work with Crews. (App'x p. 154). Mother responded she was considering giving Crews "another chance," and Victim quickly asked her not to do so. (App'x p. 77; State's Ex. # 4). Concerned, Mother questioned Victim about what was troubling him, and Victim initially hesitated to provide a truthful response. (App'x p. 77; p. 154). However, Mother continued to press, and Victim eventually revealed Crews had been anally and orally raping him for some time. (App'x p. 77; pp. 120-121; p. 154; State's Ex. # 4).

Shocked and horrified, Mother immediately reported the allegations to both the Summerville Police Department and Victim's biological father. (App'x p. 78; p. 146; pp. 154-155; p. 160). Shortly after that, Victim briefly spoke with a law enforcement officer and was then referred to the Dorchester Children's Center ("the Center") for a medical examination and forensic interview. (App'x p. 78; pp. 116-118; p. 171).

At the Center, Ashleigh Benda, a pediatric sexual assault nurse and expert in child abuse pediatrics, conducted the medical examination of Victim. (App'x pp. 167-171). Based on her examination of Victim's body, Benda found no signs of any injuries. (Tr. p. 175; p. 195). However, Victim, who seemed very shy and timid, reticently reported he was sexually abused "a couple" of times in the past in a manner involving "penile and anal contact." (App'x pp. 174-176; p. 191; pp. 199-200). Furthermore, Victim indicated he was embarrassed and afraid, and he stated he did not want to talk about the sexual abuse ever again. (App'x p. 174; p. 199). Significantly, Benda's findings were in no way inconsistent or unexpected for the types of sexual abuse Victim reported. (App'x pp. 176-178; pp. 195-196).

On the same date, Millicent Walker, the director of clinical services at the Center, conducted a forensic interview of Victim. (App'x p. 204; p. 242; State's Ex. # 4). During the course of the forensic interview, Victim revealed Crews had forced him to "suck his private part" and had also painfully "put his private part in [his] butt" at various points in the past. (State's Ex. # 4). Additionally, Victim recounted the abuse primarily occurred in Sister's bedroom at their home and had also occurred in the living room, and he further noted Sister observed the oral sex occurring on at least one occasion and had possibly observed three instances of abuse in total. (State's Ex. # 4). Furthermore, Victim indicated he could not remember when the first instance of abuse occurred, opined the abuse may have started when he was around seven or eight years old, and indicated he did not initially reveal the abuse because Crews had told him to keep it a secret between the two of them. (State's Ex. # 4).

Following Victim's disclosure, Crews was arrested and indicted for first-degree criminal sexual conduct with a minor, and he proceeded to trial. (App'x pp. 10-11; pp. 342-343). At the outset of trial, the trial judge presented preliminary remarks to the jurors, advised them they were

the exclusive judges of the facts, and expressly noted nothing she stated during the course of trial should be interpreted as her opinion on the facts. (App'x pp. 32-46). Following the trial judge's preliminary remarks, the parties presented their opening statements to the jury. (App'x pp. 46-56). During the course of the solicitor's opening remarks, the solicitor indicated the State intended to prove Victim was repeatedly raped both orally and anally by Crews while noting the testimony of a victim did not have to be corroborated in order to be believed. (App'x pp. 46-49). Thereafter, during the course of defense counsel's opening statement, defense counsel maintained Crews had been falsely accused, and he further asserted the solicitor "made a big point" to tell them about the lack of a need for corroboration because the State would be unable to provide any corroboration for Victim's allegations. (App'x pp. 51-52). Furthermore, defense counsel urged the jurors to pay attention during the course of trial to what was presented along with what was not presented.¹ (App'x pp. 55-56).

Subsequently, as the trial proceeded forward, Victim, who was eleven years old by that point, testified about the sexual abuse he suffered at Crews's hands. (App'x p. 57; p. 61). Specifically, Victim recounted Appellant engaged in oral sex and painful anal sex with him as many as three to four times a week and sometimes more than once a day whenever he was alone with Crews in their shared home, and he noted the abuse typically occurred in Sister's bedroom because Crews was able to determine if a vehicle was pulling into the home's driveway from that particular location. (App'x pp. 60-64; pp. 66-68; pp. 70-72; p. 74; p. 86; p. 95). Victim also noted Crews had shown him pornography depicting "a girl with a penis" at various points in time and occasionally wore a "cheetah-looking" article of women's clothing that was "super tiny"

¹ As part of his opening statement, defense counsel also urged the jurors to imagine if a trusted friend or family members was charged with something as "heinous" as the crime for which Crews was charged and maintained they were required to afford the feeling such a thought would produce to Crews. (App'x p. 55).

during some of the instances of abuse. (App'x pp. 75-77). Victim further indicated Sister had observed the abuse on several occasions during the time period in which it was continuously occurring. (App'x p. 96; p. 103). Additionally, Victim testified he could not remember precisely when the abuse began but noted it went back to his earliest memories. (App'x p. 85). Moreover, Victim stated the abuse continued until he eventually revealed it to Mother at a time when Crews, who had told him to keep the abuse secret, was not at home. (App'x p. 64; p. 77; pp. 120-121). Furthermore, on cross-examination, Victim acknowledged he had not previously revealed everything he discussed during his trial testimony, and he admitted there had been some inconsistencies between his testimony and his prior statements about the abuse. (App'x p. 113; pp. 116-11). However, Victim explained he had become increasingly more comfortable speaking about the abuse since it was initially disclosed based on all the times he had discussed it, and he further noted he had never previously been asked about many of the things he talked about during trial. (App'x pp. 107-108; p. 121; p. 123).

In addition to Victim's testimony, Mother, who was still married to Crews at the time of trial, testified for the prosecution, and, during her testimony, she confirmed Crews had been dressing in women's clothing and routinely was alone with her children, including Victim, when she was not home. (App'x p. 145; p. 147; p. 152). Likewise, Benda testified about her findings from the medical examination of Victim, and she explained the absence of any injuries was not inconsistent with the sexual abuse Victim reported. (App'x pp. 171-178; pp. 195-196; p. 198). Furthermore, Kendra Twitty, a "blind" expert in child abuse dynamics and disclosure who had never personally met Victim, testified generally about the disclosure process and the common nature of delayed disclosures while emphasizing the timing of a disclosure was not determinative

of whether abuse had occurred. (App'x pp. 127-135; p. 138). Finally, the recording of Victim's forensic interview was admitted into evidence and played for the jury.² (App'x pp. 243-244).

Following the presentation of that testimony and evidence, the State rested its case, Crews personally elected not to testify, and the defense rested without calling any witnesses. (App'x pp. 250-252). At that point, the trial judge conducted an informal charge conference and gave the parties an opportunity to review her intended jury instructions. (App'x p. 254). The solicitor then inquired if the trial judge intended to instruct the jury on the statutory non-corroboration language from Section 16-3-657 of the South Carolina Code of Laws, and the trial judge confirmed she did intend to instruct the jury on that language.³ (App'x p. 260). In response, defense counsel objected to such an instruction, and the trial judge overruled defense counsel's objection. (App'x p. 260).

Thereafter, the solicitor presented her closing argument to the jury. (App'x pp. 264-279). During her closing argument, the solicitor specifically advised the jurors they had to assess witness credibility and could consider a wide variety of factors in doing so, including whether any corroborating evidence had been presented, before asserting Crews's case hinged on whether they believed Victim about the sexual abuse inflicted upon him. (App'x pp. 265-266). As her argument continued, the solicitor indicated Victim's testimony did not necessarily have to be corroborated in order to be believed in light of the statutory non-corroboration language but maintained Victim's testimony was, in fact, corroborated in significant respects through Mother's testimony about Crews's cross-dressing. (App'x pp. 266-267; p. 273). Furthermore,

² Some portions of the forensic interview recording were redacted at the request of defense counsel. (App'x pp. 226-233; p. 329).

³ Pursuant to Section 16-3-657, "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658." S.C. Code Ann. § 16-3-657.

the solicitor urged the jury to believe Victim as he had no identifiable incentive to fabricate the allegations. (App'x p. 270; p. 276).

Following those remarks, defense counsel presented his closing argument to the jury and immediately focused on the solicitor's remarks about Victim's testimony not needing to be corroborated. (App'x pp. 279-308). Specifically, defense counsel argued the solicitor "essentially banked" the State's case on the fact Victim's testimony did not have to be corroborated and agreed Victim's testimony could alone be sufficient for conviction if it left them firmly convinced of Crews's guilt. (App'x p. 280). However, defense counsel advised the jurors they still had every right to consider whether anything had been presented that supported or corroborated Victim's testimony. (App'x p. 280). Defense counsel then focused on perceived inconsistencies in Victim's testimony, pointed out Victim's testimony included many new details that had not previously been revealed, and noted the State failed to call witnesses who could have corroborated Victim's testimony, including Sister. (App'x pp. 283-287; p. 303). Furthermore, defense counsel urged the jurors to consider the factors for assessing witness credibility identified by the solicitor, including the presence or absence of corroboration, and defense counsel argued they should consider the absence of any proof other than Victim's testimony when rendering their verdict. (App'x p. 294; p. 307).

Thereafter, the trial judge instructed the jury on the applicable law. (App'x pp. 308-326). In instructing the jury on the law, the trial judge indicated the burden of proof was solely on the State, stated the defendant was not required to prove his innocence, noted the presumption of innocence was an "important rule of the law," thoroughly defined reasonable doubt, advised the jurors they were the exclusive judges of the facts, reconfirmed nothing she stated should be interpreted as a comment on the facts, instructed the jurors they were responsible for determining

the weight and value of the evidence presented, indicated they were required to consider all the evidence in determining whether Crews's guilt had been established beyond a reasonable doubt, and instructed they could not consider the fact Crews elected not to testify in any manner during their deliberations. (App'x pp. 309-314; pp. 316-317). Additionally, regarding witness credibility in general, the trial judge instructed the jurors they had to determine the credibility of the witnesses, advised them they could believe one witness over many or many witnesses over one, stated they could believe or reject a witness's testimony in whole or in part, and noted they could consider interest, bias, prejudice, and motive along with a witness's appearance and mannerisms when making a credibility determination. (App'x p. 316). Furthermore, the trial judge gave the following jury instruction focused specifically on the testimony of juvenile witnesses:

Now, during this trial you heard testimony from a child.⁴ 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.

(App'x pp. 319-320). Immediately after giving that instruction specifically directed at juvenile witnesses testimony, the trial judge gave the following brief charge:

Now, ladies and gentlemen, I further charge you that the testimony of the victim need not be corroborated in prosecutions under

⁴Notably, Victim was the lone juvenile witness to testify during trial. (App'x p. 57).

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.

(App'x p. 320). After that, the trial judge instructed the jury on the elements of first-degree criminal sexual conduct with a minor and emphasized the verdict must be unanimous before concluding the jury instructions. (App'x pp. 320-322).

At the conclusion of the jury charge, defense counsel renewed his objection to the instruction on the statutory non-corroboration language, and the trial judge once again overruled the objection while noting the instruction was consistent with the then-applicable law. (App'x pp. 328-329). The jurors then began their deliberations, and, during the course of those deliberations, the jury foreman submitted notes asking for the forensic interview recording to be replayed and inquiring about whether either side could have called Sister as a witness. (App'x pp. 328-332; pp. 340-341). Subsequently, after approximately two-and-a-half hours of deliberations, the jury convicted Crews as indicted. (App'x p. 329; pp. 332-333). The trial judge then imposed a life sentence. (App'x p. 339).

Following his conviction, Crews appealed, arguing the trial judge committed reversible error by instructing the jury on the statutory non-corroboration language. (App'x pp. 346-367). While his case was pending on appeal, this Court decided State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), and found a jury instruction on the statutory non-corroboration language to be improper. (App'x p. 390). Thereafter, the Court of Appeals reversed Crews's conviction while relying on the decision in Stukes. (App'x pp. 388-391). Specifically, the Court of Appeals found the trial judge's giving of the jury instruction was erroneous and was not harmless because "the case boiled down to credibility" and "there was no independent testimony from any other witness with firsthand knowledge as to the abuse[.]" (App'x pp. 390-391).

ARGUMENT

Did the Court of Appeals err by reversing Crews's conviction based solely on the trial judge's decision to instruct the jury the testimony of a victim need not be corroborated where, when the trial judge's jury instructions are considered as a whole in conjunction with the other specific circumstances involved in Crews's case, the presentation of that particular instruction could not have misled or confused the jury in a manner improperly prejudicial to Crews and, thus, any error in its presentation was harmless beyond a reasonable doubt?

Relying on this Court's decision in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), the Court of Appeals concluded the trial judge erred by presenting a jury instruction on the statutory non-corroboration language from Section 16-3-657 during Crews's trial. Furthermore, without considering the specific factors that distinguished Crews's case from Stukes, the Court of Appeals concluded the presentation of the improper jury instruction was not harmless before reversing Crews's conviction. Contrary to that conclusion, any error committed in the presentation of the challenged jury instruction was harmless beyond a reasonable doubt based on the other jury instructions presented coupled with the other specific circumstances involved in Crews's case, which ensured the jury was not confused or misled and Crews was not improperly prejudiced by the presentation of the challenged jury charge. Accordingly, the Court of Appeals erred by reversing Crews's conviction. The State's petition for a writ of certiorari should be granted, and Crews's conviction should ultimately be affirmed.

Most trial errors, including errors involving jury instructions, are subject to harmless error analysis. State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009); see State v. Logan, 405 S.C. 83, 98, 747 S.E.2d 444, 452 (2013) (“[E]rroneous jury instructions are subject to harmless error analysis.”). When an error is found in a case on appeal, an appellate court must ordinarily still review the record as a whole to ascertain the impact of that error. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006); 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.”); see also United States v. Hasting, 461 U.S. 499, 509 (1983) (“[I]t 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[.]” (emphasis added)). 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); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“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.”). Significantly, after reviewing the entire record, the appellate court will typically not set aside a judgment based on insubstantial errors not affecting the result, and errors are generally deemed harmless when they do not contribute to the verdict. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991); see State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) (“Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.”).

In State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), this Court—subsequent to Crews’s trial—was confronted with the question of whether the giving of a jury instruction on the statutory non-corroboration language from Section 16-3-657 was both improper and harmless. In that case, the trial judge instructed the jury over objection on the substance of the statutory language by simply informing the jurors the testimony of a victim in a sexual assault case need not be corroborated, which was an unquestionably accurate statement of law. Stukes, 416 S.C. at 495-496, 787 S.E.2d at 481; see State v. Rayfield, 369 S.C. 106, 120, 631 S.E.2d 244, 251 (2006) (Pleicones, J., dissenting) (“No witness’s testimony need be corroborated.”),

overruled by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Ultimately, Stukes was convicted and appealed, and, on appeal, this Court reversed after finding the challenged jury instruction to be unconstitutionally erroneous. Stukes, 416 S.C. at 496, 787 S.E.2d at 481. In reversing, this Court concluded a jury instruction on the statutory language of Section 16-3-657 was confusing and “violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case.” Id. at 499, 787 S.E.2d at 483; see S.C. Const. art. V, § 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”).

Specifically, this Court explained:

[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. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak. Moreover, it is inescapable that this charge confused the jury. Specifying this qualification applies to one witness creates the inference the same is not true for the others.

Stukes, 416 S.C. at 499-500, 787 S.E.2d at 483 (footnote omitted). Furthermore, beyond finding error, this Court determined Stukes’s individual case was not amenable to harmless error analysis for several different reasons. Id. at 500, 787 S.E.2d at 483. Particularly, this Court found the error could not be found to be harmless because: (1) Stukes’s case hinged on credibility since the victim testified she was raped and Stukes alternatively stated the two engaged in consensual intercourse; and (2) the jurors expressly demonstrated confusion over the jury instruction by submitting a note inquiring if the victim’s testimony had to be accepted as true. Id.

In the case sub judice, the circumstances involved were very different from the circumstances of Stukes’s case. In light of the key differences that existed, any error in the presentation of the jury instruction on the statutory non-corroboration language from Section 16-

3-657 could not have had the improper impact on the outcome of Crews's case that it did in Stukes based on the differing circumstances involved. See Hasting, 461 U.S. at 509 (recognizing the impact of an error is generally dependent on the error in relation to the record of the individual case viewed as a whole); see also Logan, 405 S.C. at 90, 747 S.E.2d at 448 ("In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial.").

Most significantly, the jury in Crews's case was not presented with the type of "he said, she said" situation the jury had to evaluate and address in Stukes's case. Specifically, in Stukes, the victim testified Stukes non-consensually raped her while Stukes directly presented a contrary version of events and claimed he engaged in consensual intercourse with the victim. See Stukes, 416 S.C. at 500, 787 S.E.2d at 483 ("[Stukes's] [v]ictim said it was rape; [Stukes] said it was consensual."). In light of the existence of competing testimony between Stukes's victim and Stukes, the presentation of the non-corroboration charge in Stukes was problematic and not harmless because the jury could have misinterpreted the trial judge's instruction to mean only the victim's testimony did not have to be corroborated while Stukes's testimony did actually need some corroboration in order to be accepted as true. See id. ("Specifying this qualification applies to one witness creates the inference the same is not true for the others."). In fact, the Stukes jurors' misunderstanding from the instruction was plainly illustrated by their submission of a note inquiring if they had to accept the victim's testimony as true. See id. ("This confusion is illustrated by the jury's query as to whether our law implies a victim's testimony *must* be accepted as being true.").

Meanwhile, in Crews's case, Victim testified Crews orally and anally raped him while Crews neither offered any contradictory testimony or statements at any point prior to or during

trial nor offered testimony from any other witnesses to present a version of events that differed from Victim's version. That fact is of critical importance because, without the existence of competing testimony or witnesses, the jury could *not* have improperly concluded the statutory non-corroboration language meant Victim's testimony could or should be held to one standard requiring no corroboration while the testimony of other opposing witnesses was to be held to a different standard that required corroboration. Instead, the presentation of a jury instruction on the statutory non-corroboration language in Crews's case could have only led the jury to believe—correctly—Victim's testimony did not necessarily have to be corroborated in order to be believed, which was both unquestionably true as a matter of law and an important legal concept for the jury to be aware of so long as it was communicated in a non-misleading manner.⁵

See Rayfield, 369 S.C. at 120, 631 S.E.2d at 251 (Pleicones, J., dissenting) (explaining no

⁵ Notably, from a biblical standpoint, the concept of an absolute need for corroboration before a witness in a criminal case is to be believed could very well be familiar to many of South Carolina's citizens who are selected to serve on juries. See Deuteronomy 19:10 (New International Version) ("One witness is not enough to convict anyone accused of any crime or offense they may have committed. A matter must be established by the testimony of two or three witnesses."); see generally State v. Kelly, 331 S.C. 132, 140, 502 S.E.2d 99, 103 (1998) ("Two other members of the jury indicated they were reading their Bibles on their own."). Furthermore, from the standpoint of South Carolina law, the uncorroborated testimony of a witness has *not* always been legally sufficient to sustain a conviction throughout our state's history, which plainly demonstrates the need for a jury instruction disabusing jurors of any inaccurate beliefs they potentially might hold about an unyielding mandatory requirement for corroborative evidence in a criminal trial. See S.C. Code of 1912 § 389 (Crim. Code) ("[N]o conviction shall be had [for the offense of seduction under promise of marriage] on the uncorroborated testimony of the woman upon whom the seduction is charged; and no conviction shall be had if on trial it is proved that such woman was at the time of the alleged offense, lewd and unchaste[.]"); see also State v. Sharpe, 138 S.C. 58, ___, 135 S.E. 635, 640 (1926) (rejecting Sharpe's contention following his conviction for an abortion-related offense he was entitled to a new trial due to the fact the testimony of the "complaining witness" was not corroborated because "there was sufficient corroboration in this case of the complainant's testimony"); State v. Teal, 108 S.C. 455, ___, 95 S.E. 69, 72 (1918) (instructing a seduction case should not even be submitted to the jury if the victim's testimony is not corroborated); State v. Whitaker, 103 S.C. 210, ___, 87 S.E. 1001, 1001 (1916) (evaluating on appeal the question of "whether there was any testimony corroborating the testimony of the prosecutrix").

witness's testimony need be corroborated as support for the argument a jury instruction on the statutory non-corroboration language was problematic); see also United States v. Levi, 405 F.2d 380, 382 (4th Cir. 1968) ("That guilt or innocence may sometimes turn upon the credibility of one witness has been always of concern to society because of the possibility of error or false swearing. Yet it is well established at common law . . . that ordinarily the testimony of one eyewitness is sufficient for the purpose of identification of the perpetrator of a crime." (footnotes omitted)). Beyond that, the jurors—unlike the jurors in Stukes—did *not* submit any notes in Crews's case suggesting they were confused by the trial judge's instruction indicating Victim's testimony did not have to be corroborated in order to be believed. Cf. Stukes, 416 S.C. at 500, 787 S.E.2d at 483 (considering the jury's demonstrated confusion as evidenced by a jury note in finding the error in the presentation of the jury instruction on the statutory non-corroboration language was not harmless). To the contrary, Crews's jury actually submitted notes suggesting the jurors were properly evaluating the credibility of Victim's testimony by comparing it to his out-of-court statements about the abuse while also considering the absence of the testimony of Sister, who—based on Victim's testimony—could have potentially corroborated Victim's account. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("[W]ithout some showing the jurors disregarded [a trial judge's] instructions, this Court declines to presume prejudice."). As a result, any error in the presentation of the statutory non-corroboration jury instruction in Crews's case was harmless even though the same could not be said in Stukes's case. See State v. Vaughn, 268 S.C. 119, 126, 232 S.E.2d 328, 331 (1977) ("In deciding whether the jury was misled or the appellant prejudiced by allegedly erroneous instructions, the charge must be considered as a whole. When viewed in context, the language employed clearly did not have a confusing or misleading effect." (citations omitted)).

Furthermore, based on the specific circumstances of Crews's case, the jury could not have been under the mistaken impression the trial judge's jury instruction on the statutory non-corroboration language constituted an expression of the trial judge's own personal views or opinions on the facts of the case. Critically, that is true because the trial judge—both through her preliminary remarks to the jury and her jury charge—expressly instructed the jurors nothing she stated to them during trial should be construed as reflecting her own non-existent opinion on the facts, and nothing appearing in the record suggests the jury, who was presumed to faithfully follow the trial judge's instructions, did not understand and follow the clear, specific, and easily-understood instructions on that point. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (“[J]urors are presumed to follow the law as instructed to them.”); cf. State v. Arther, 290 S.C. 291, 295, 350 S.E.2d 187, 189 (1986) (“The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented.”). Likewise, both the solicitor *and* defense counsel directly confirmed to the jury during their closing arguments a victim's testimony does not have to be corroborated in a sexual assault case, which ensured the trial judge's jury instruction on the statutory non-corroboration language would not have been misinterpreted as anything other than a mere statement of an accurate legal principle all the parties agreed was valid and applicable to Crews's case. See Turner v. Lyles, 68 S.C. 392, 401, 48 S.E. 301, 305 (1908) (holding a comment on the facts is not reversible error unless there are reasonable grounds for supposing the jury may have been influenced by the comment in a manner prejudicial to the defendant). In fact, since it was undisputed by the parties in Crews's trial Victim's testimony did not need to be corroborated in order to be believed, the trial judge's jury instruction on the statutory non-corroboration language could not

even truly be considered an improper comment on the facts under South Carolina law. See State v. Norris, 270 S.C. 552, 553, 243 S.E.2d 440, 440 (1978) (concluding a trial judge's reference to undisputed facts during a jury charge is not improper or unconstitutional); see also State v. Arther, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986) ("When facts stated in a charge are not in dispute, the instruction is not erroneous."); Norris v. Clinkscales, 47 S.C. 488, ___, 25 S.E. 797, 807-808 (1896) ("[A] judge would not be violating the constitutional inhibition [against charging juries on matters of fact] if he in his charge repeated the testimony as to undisputed facts or admitted facts, or stated their legal effect, or pointed out the different conclusions which might be drawn from them, or the inquiries they would naturally give rise to.").

Finally, even assuming the jurors could have somehow mistakenly interpreted the trial judge's brief instruction on the statutory non-corroboration language standing alone and taken in isolation as constituting an expression of the trial judge's personal views on Victim's testimony that was unfavorable to Crews, the jury could not possibly have believed the trial judge was expressing a favorable opinion about Victim's credibility when the remainder of her jury instructions are considered as a whole as required for a harmless error analysis. That is true because, *immediately before* presenting her limited charge on the statutory non-corroboration language, the trial judge presented a lengthy—and inaccurate—charge directly singling out the testimony of children and advising the jurors the testimony of a juvenile witness necessarily required a higher level of scrutiny that was not applicable to other witnesses.⁶ See State v.

⁶ Notably, the trial judge's jury instruction was fully consistent with a proposed jury instruction regarding the testimony of children from the South Carolina Criminal Trial Benchbook, which reads: "DURING THIS TRIAL, YOU HAVE 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

Green, 267 S.C. 599, 603, 230 S.E.2d 618, 619 (1976) (recognizing there is no fixed age which an individual must attain in order to be competent to testify as a witness); see also Rule 601, SCRE (“Every person is competent to be a witness except as otherwise provided by statute or these rules.”). Through that troubling jury charge, the trial judge directly stated young children—which necessarily would have meant Victim to the jury since he was the *only* juvenile witness who testified during the entirety of trial—may not understand what was happening during the trial and may be influenced by the way questions are asked. Cf. Stukes, 416 S.C. at 499, 787 S.E.2d at 483 (“By addressing the veracity of a victim’s testimony in its instruction, the trial court emphasizes the weight of that evidence in the eyes of the jury.”). Similarly, through that charge, the trial judge implied extra scrutiny was necessary in regard to a juvenile witness’s memory, awareness of the seriousness of testifying in court, comprehension of the questions asked, and general understanding of the distinction between telling the truth and lying. Thus, despite the fact all the considerations identified in that particular instruction are important for and potentially applicable to all witnesses since *any* witness—young or old—may, for example, be led by leading questions or fail to understand the seriousness of appearing in court, the trial judge implied to the jury Victim’s testimony alone was in need of extra scrutiny while Victim alone might suffer from the various serious failings the trial judge assigned to his young age through that jury charge. See id. at 99, 787 S.E.2d at 483 (“Specifying this qualification applies to one

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 THAT QUESTIONS ARE ASKED. IT IS UP TO YOU TO DECIDE WHETHER THE CHILD UNDERSTOOD THE QUESTIONS ASKED.” S.C. CRIMINAL TRIAL BENCHBOOK 63-64.

witness creates the inference the same is not true for others.”); see also State v. Cheeks, 408 S.C. 198, 200, 758 S.E.2d 715, 716 (2014) (finding a “strong evidence” jury instruction to be improper where it “unduly emphasized the evidence” and “deprived the jury of its prerogative to draw inferences and to weigh evidence”). Under such circumstances, any harm Crews could have suffered from the presentation of the jury instruction on the statutory non-corroboration language was eliminated by the trial judge’s equally—if not more—improper jury instruction *singling out* Victim’s testimony as requiring extra scrutiny and being inherently more susceptible to leading, misunderstanding, and other serious issues that would affect its credibility and believability. Cf. State v. Brown, 108 S.C. 490, ___, 95 S.E. 61, 63 (1918) (rejecting the appellants’ contention on appeal various portions of the trial judge’s jury instructions were erroneous after reviewing the entire jury charge *as a whole* and concluding “[i]nstead of being prejudicial to the appellants, the charge was too favorable to them”). Stated differently, any improper “tipping of the scales” to Crews’s detriment caused by the statutory non-corroboration language jury instruction was undone and, at a minimum, balanced out by the trial judge’s presentation of the inaccurate and unconstitutional charge on the testimony of juvenile witnesses, which sharply “tipped the scales” in the other direction by implying in a manner contrary to South Carolina law Victim’s testimony was inherently suspect based on his assumed age-related failings. See State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976) (finding no error on the part of the trial judge in declining to give an instruction stating “the testimony of a codefendant should be carefully scrutinized” and noting such an instruction might have been improper by “invad[ing] the province of the jury to draw inferences from the evidence”); cf. Gutierrez v. State, 177 So. 3d 226, 231-232 (Fla. 2015) (holding a jury instruction that “suggests one witness’s testimony need not be subjected to the same tests for weight or credibility as the

testimony of others has the unfortunate effect of bolstering that witness's testimony by according it special status" and, by giving such an instruction, the trial judge "effectively placed the judge's thumb on the scale to lend an extra element of weight to the victim's testimony").

Based on all those key distinguishing factors that were simply not present in Stukes's case, the trial judge's presentation of the jury instruction on the statutory non-corroboration language was not harmful to Crews when considered in conjunction with the other instructions given, including the thorough instructions on reasonable doubt, the State's burden of proof, and the presumption of innocence. See Vaughn, 268 S.C. at 126, 232 S.E.2d at 331 (concluding the giving on an erroneous jury instruction did not warrant reversal "since [Vaughn] received the benefit of a charge which was highly in his favor"). Therefore, reversal was not warranted in Crews's case, and the Court of Appeals, which did not appear to consider the individual case as a whole in conducting its harmless error analysis, erred in concluding otherwise. See Hasting, 461 U.S. at 509 ("[T]he Court of Appeals, while making passing reference to the harmless error doctrine, did not apply it. Its analysis failed to strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victims on the other.") see also United States v. Mechanik, 475 U.S. 66, 72 (1986) ("The reversal of a conviction entails substantial social costs[.] . . . These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial." (citations omitted)). The State's petition for a writ of certiorari should be granted, and Crews's conviction should ultimately be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,

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October 30, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Dorchester County
Honorable Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Petitioner,

vs.

JAMES ARCHIE CREWS, IV,

Respondent.

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OCT 30 2018

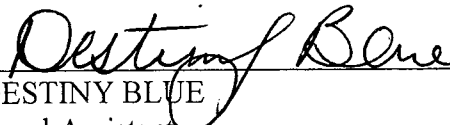
SC Court of Appeals

PROOF OF SERVICE

I, Destiny Blue, certify I have served the within Petition for Writ of Certiorari and accompanying Appendix on Respondent by delivering two copies of the same to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 30th day of October, 2018.



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ALAN WILSON
ATTORNEY GENERAL

October 30, 2018

Susan B. Hackett, Esquire
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Post Office Box 11589
Columbia, SC 29211

RECEIVED
OCT 30 2018
SC Court of Appeals

RE: State v. James Archie Crews, IV

Dear Ms. Hackett:

I am enclosing two copies of the Petition for Writ of Certiorari and the accompanying Appendix, along with proof of service, in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Daniel E. Shearouse (original and required copies enclosed)
Victim Advocacy Division