

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED

APR 23 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MELVIN P. STUKES,

APPELLANT

APPELLATE CASE NO. 2012-212628

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in charging the jury, over objection, S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658 when, under the facts of this particular case involving the defense of consent, the charge confused the jury, improperly bolstered the testimony of the prosecuting witness and constituted an impermissible comment on the facts?

STATEMENT OF THE CASE

In August of 2010, the Richland County Grand Jury indicted Stukes for criminal sexual conduct first degree and burglary first degree, indictments #10-GS-40-2700-2701. On July 24, 2012, Stukes proceeded to jury trial before the Honorable DeAndrea G. Benjamin. Attorneys Tracy E. Pinnock, Brian R. Shealey and Alicia Dyar represented Stukes at trial. Attorneys Kathryn C. Ashton and Daniel R. Goldberg prosecuted the case on behalf of the State. On July 27, 2012, the jury returned verdicts of guilty and Judge Benjamin sentenced Stukes to twenty five years concurrent for each charge. A timely notice of intent to appeal was served on August 1, 2012. This appeal follows.

STATEMENT OF FACTS

Sometime after 9:30 PM on May 10, 2004, Misty Shealy Millender drove from her apartment at the Park Apartments on Longcreek Drive off of Broad River Road to Jacqueline Bruton's house in Hopkins, an approximate thirty minute drive. (R. p. 139, line 24 – p. 140 lines 1-3; p. 184, line 6- p. 185, line 1). Millender told Bruton that she had been sexually assaulted that night. (R. p. 181, line 23 – p. 182, lines 1-19). Bruton convinced Millender to go to hospital. (R. p. 147, line 18 – p. 148, lines 1-9). Bruton and Millender then drove from Hopkins to the Lexington Medical Center where Millender was examined. (R. p. 148, lines 7-14).

Millender testified that about 9:30 PM on May 10, 2004, as she was getting ready for work her doorbell rang and without looking, she opened the door. (R. p. 142, line 1 – p. 143, lines 1-7). According to Millender a man forced his way in, she fell over the side of the couch, blacked out and when she awakened she was being sexually assaulted on the couch. (R. p. 143, line 22 – p. 144, lines 1-16). Sergeant Pearson with the Richland County Sheriff's Department testified that the only information Millender could provide was that the suspect was male. (R. p. 214, lines 4-24). Sergeant Pearson testified that Millender told Deputy Hicks that the assailant grabbed her by the throat with his left hand and hit her in the face with his right hand. (R. p. 216, lines 13- 20). In a written statement to Investigator Branham with the Richland County Sheriff's Department on May 14, 2004, Millender stated that she believed the assailant grabbed her around the neck with his right hand and punched her with his left hand. (R. p. 325, line 21 – p. 326, lines 1-4). Donna Sharpe, an emergency room nurse at the Lexington Medical Center testified that there was no bleeding bruising or abrasions in the pelvic area but testified that Millender had "a red area

surrounded by bruise to right cheek bone below right orbit, small red area to right lower eyelid, and a red mark to the right side of the neck resembles a hand mark.” (R. p. 248, lines 11-14). The report from Deputy Hicks lists no visible injuries to Millender. (R. p. 216, lines 21-25).

Investigator Brian Metz of the Richland County Sheriff’s Department went to the Lexington Medical Center at 2:40 AM on May 11, 2004. (R. p. 200, line 2 – p. 201, line 1). Millender told Investigator Metz that she had been sexually assaulted in her apartment. (R. p. 202, lines 8-15). Investigator Stan Richards of the Richland County Sheriff’s Department processed Millender’s apartment for forensic evidence at 3:15 AM on May 11, 2004. (R. p. 283, lines 3-23). Based on information given to Investigator Richards about the location of the assault, his investigation focused on the door and the sofa. (R. p. 284, lines 6-10). Investigator Richards testified that he found no usable finger prints on the door and no seminal fluids on and around the couch. (R. p. 295, lines 2- 21) Investigator Richards admitted that he did not collect the sheets from inside the bedroom. (R. p. 296, lines 2-14).

On October 27, 2004, Rhonda Fields, a DNA analyst at the South Carolina Law Enforcement Division developed an unidentified male profile from semen found on Millender’s underwear. (R. pp. 404-405). In 2007, the profile developed was found to match the Appellant. (R. p. 406, lines 1-4). In 2010, Fields tested a buccal swab from Appellant and confirmed that the developed male profile from Millender’s underwear matched the Appellant. (R. p. 406, lines 5-25).

On March 23, 2010, Investigator Godfrey with the Richland County Sheriff’s Department found Millender in the Orangeburg County Detention Center. (R. pp. 414-415). On May 5, 2010, Sergeant Caldwell with the Richland County Sheriff’s Department

arrested Appellant at his sister's apartment on Marlboro Street. (R. p. 377, lines 1-10). According to Sergeant Caldwell, when he read the arrest warrant for criminal sexual conduct against Misty Shealy [Millender], Appellant replied that the warrant was a mistake because he did not know Shealy [Millender]. (R. p. 372, lines 16-24).

The same day he was arrested, Appellant voluntarily gave a DNA sample and statement to Investigator Godfrey. (R. p. 429, line 17 – p. 430, 431, lines 1-11; pp. 436-446). Appellant admitted having lived at the Ashton Apartments with his son's mother Quantina Brown. (R. p. 439, line 23 – p. 440, lines 1-4). Investigator Godfrey testified that the Ashton Apartments were close to the Park Apartments where Millender lived in 2004. Investigator Godfrey testified that Appellant lived at the Ashton Apartments in 2004. (R. p. 433, line 21 – p. 434, lines 1-7). Investigator Godfrey showed Appellant a driver's license photo of Millender and Appellant denied knowing her. (R. p. 440, line 15 – p. 441, lines 1-11). Appellant admitted knowing a college student named Christopher who lived in the Park Apartments and a man named Louis who worked at the Exxon on Broad River Road. (R. p. 440, lines 7-14). When asked if he had consensual sex with Misty Shealy [Millender] Appellant responded, "Not to my knowledge." (R. p. 443, lines 8-10). Appellant denied breaking into Misty Shealy's apartment and he denied raping her. (R. p. 443, lines 3-7). When asked why his semen would be located inside Ms. Shealy's body¹, Appellant answered, "It couldn't be no other option. I had sex with her, sir." (R. p. 443, lines 19-22).

At trial Appellant testified that he met Misty Shealy [Millender] at his friend Louis' house. (R. p. 506, lines 1-2). Appellant testified that he and Millender went back to her apartment, she invited him in, they went into her bedroom and had consensual sex on her

¹ The semen was actually found on Millender's underwear. While semen was identified from the vaginal swab submitted from Millender, the DNA analyst was unable to identify the contributor. (Tr. pp. 453-454).

bed. (R. p. 506, lines 2 – p. 507, lines 1-25). Appellant testified that when police questioned him he did not recognize the photo of Millender and did not know her name. (R. p. 513, line 18 – p. 514, lines 1-11). Appellant testified that after he was arrested and talked with police in 2010, he had time to think back to 2004, and he remembered having sex with Millender. (R. p. 514, line 12 – p. 515, lines 1-6). Appellant again denied knowing Millender's name. (R. p. 515, lines 2-6).

ARGUMENT

The trial judge erred in charging the jury, over objection, S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658 when, under the facts of this particular case involving the defense of consent, the charge confused the jury and improperly bolstered the testimony of the prosecuting witness and constituted an impermissible comment on the facts.

The defense in this case was consent. The credibility of the witnesses was a key determination for the jury. Prior to trial Stukes moved to prevent any reference to S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated. (R. p. 74, lines 7-16). Appellant submitted a written motion and memorandum in support of the motion, marked as Court's Exhibit #1. (R. p. 75, lines 8-9; Court's Exhibit #1, R. p. 654). The State agreed not to reference the statute in opening statements and the judge withheld ruling on the motion until the close of the case but before the charge to the jury. (R. p. 74, line 22 – 75, lines 1-6).

At the close of the case but before the charge to the jury, Appellant objected to any mention of S.C. Code §16-3-657 providing that the testimony of the victim need not be corroborated. (R. p. 544, line 11 – p. 545, 546, 547; pp. 549-552). Appellant argued that the State should be barred from mentioning the law in closing argument. (R. p. 547, lines 10-11). In the alternative, Appellant objected to the judge charging the jury with the law and argued that the standard charge on credibility of the witnesses was sufficient. (R. p. 547, lines 11-19). Appellant specifically argued that constituted an impermissible comment on the facts by the judge. (R. p. 545, lines 1-3). Additionally, Appellant argued that the charge improperly bolstered the testimony of the prosecuting witness, Misty Shealy Millender. (R. p. 546, line 10 – p. 547, lines 1-7). The judge overruled Appellant's objection to charging the jury with S.C. Code §16-3-657, citing State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct.App. 2011). (R. p. 550, line 18 – p. 551, 552, lines 2-4).

In closing argument the State referenced the statute arguing:

The judge is also going to tell you about the law in this State, 16-3-657 of the South Carolina Code of Laws, and that statute says that the testimony of a victim does not need to be corroborated in a criminal sexual conduct case. That is the law in this state, and what that means in simple terms, if the victim says that she was raped, there doesn't have to be other evidence for you, if you believe her, to find a man guilty of the CSC. It doesn't have to be corroborated. It can be her word versus his and if you take her word, that's all it takes.

(R. p. 581, line 24 – p. 582, lines 1-8).

In charging the jury the judge stated, “The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence. Necessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.” (R. p. 604, lines 4-10). The judge went on to give the general credibility of witnesses charge. (R. p. 604, lines 11-22). Appellant renewed the objection to charging §16-3-657. (R. p. 616, lines 17-20). The State made no objection to the jury charge. (R. p. 616, line 16).

Jury deliberations began at 12:05 PM. (R. p. 618, line 8). The jury returned to the courtroom at 1:25 PM requesting a copy of the law. (R. p. 619, lines 1-4; Court's Exhibit #3, R. p. 688). The judge declined to provide a copy of the charge to the jury but told them if they would like a specific part re-charged, she would do that. (R. p. 619, lines 5-12). The jury requested a recharge on criminal sexual misconduct. (R. p. 619, lines 22-24; Court's Exhibit #5, R. p. 703). The jury returned at 1:30 PM and the judge re-charged the jury in regard to criminal sexual conduct in the first degree. (R. p. 620, line 3 – p. 621 lines 1-3). Shortly after the recharge the judge realized she had omitted the portion of the charge stating that “If you find that a sexual battery did occur, you must then decide whether the state has proved beyond a reasonable

doubt that – it's 1) the defendant used aggravated force to accomplish the sexual battery. Aggravated force means the use of physical force or violence of a high and aggravated nature to overcome the victim, this includes the use of a deadly weapon.” (R. p. 622, lines 2-10). The judge omitted this portion in both the initial charge and the re-charge. (R. p. 611, line 21 – p. 612, lines 1-13; p. 620, line 9 – p. 621, lines 1-3). Appellant moved for a mistrial based on the erroneous instruction. (R. p. 624, lines 2-7). The judge denied the motion and at 2:06 PM re-charged the jury with the full law on criminal sexual conduct first degree. (R. p. 627, line 6 – p. 628, 629, lines 1-10). Appellant renewed the motion for a mistrial and the motion was again denied. (R. p. 629, lines 16-25).

The jury then asked for a definition of aggravated battery. (R. p. 630, lines 4-7; Court's Exhibit 6, R. p. 704). Appellant again asked for a mistrial. (R. pp. 630 – 634). The judge denied the motion and at 2:48 PM re-charged the jury with the full law of criminal sexual conduct first degree. (R. p. 635, lines 7 – p. 636, lines 1-19).

The jury then asked two more questions. The jury first requested to see the defendant's transcript testimony. Second, the jury asked, “The South Carolina that the victim—the South Carolina law that the victim's testimony in CSC – CSE does not have to be corroborated, does the victim – does that law imply that the victim's testimony must be accepted as being true?” (R. p. 637, lines 1-13; Court's Exhibit #7, R. p. 705; Court's Exhibit #8, R. p. 706). The judge told counsel that she would replay the defendant's testimony. (R. p. 637, lines 3-7). In regard to the second question, the judge proposed re-charging the general credibility of witnesses charge. (R. p. 637, lines 14-22). Appellant again moved for a mistrial. (R. p. 638, lines 4-7). The judge denied the motion stating, “Well, I think that – I'll just deny the motion. I think the answer will clarify their question, and if there was ever a question as to whether or not the jurors thought

they had to only consider her testimony, I think by them asking this question that it will definitely be clear that the answer to that is no once I read it to them. So, I will deny the motion for a mistrial.” (R. p. 638, lines 8-15). At 4:56 PM the jury returned to the courtroom and the defendant’s testimony was replayed. (R. p. 638, line 21 – p. 639, lines 1-11). In response to the jury’s second question, the judge failed to instruct the jury that the law does not imply that the victim’s testimony must be accepted as being true. Instead, the judge instructed the jury:

Ladies and gentlemen of the jury, you must determine the credibility of all witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.

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 a witness and reject the remaining part of the testimony of that same witness. You may believe the witness in its entirety, or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motives in this case. You may also consider the appearance and manner of a witness while on the witness stand.

(R. p. 640, lines 1-16). The jury then returned with verdicts of guilty.

Appellant renewed the objection to charging the jury with S.C. Code §16-3-657. (R. pp. 645 – 648). Again, Appellant argued that the charge was an improper comment on the facts and improperly bolstered the testimony of the prosecuting witness. (R. p. 646, lines 6-11). The judge noted that in response to the jury’s question about accepting the victim’s testimony as true, she informed the jury that they must determine the credibility of **all** witnesses. (R. p. 648, line 15 – p. 649, lines 1-6). The judge, however, did not tell the jury that the statute does **not** require them to accept the victim’s testimony as being true. Despite the trial judge’s efforts with inclusion of the word “all”, the answer to the jury’s question was confusing and misleading and failed to clarify that the prosecuting witness, or victim as referenced in the statute, is a witness for

purposes of determining credibility. As evidenced by the jury's question, instructing the jury that the victim's testimony need not be corroborated confused the jury, improperly bolstered the testimony of the prosecuting witness and constituted an improper comment on the facts of the case.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), Schumpert argued that charging the jury with S.C. Code §16-3-657 was error as an improper charge on the facts. The South Carolina Supreme Court disagreed and wrote:

The trial judge properly charged the jury it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt. Taking the charge as a whole, we find no reversible error. Accord Lottie v. State, 273 Ind. 529, 406 N.E.2d 632 (1980). Id. 312 S.C. at 509, 435 S.E.2d at 863. The dissent in Schumpert noted:

I would also hold that the "no corroboration" charge based on S.C. Code Ann. § 16-3-657 (1985) was reversible error. It is axiomatic that a trial judge must not indicate an opinion or express a view reasonably calculated to influence the jury in deciding a material issue of fact because such comment is forbidden by S.C. Const. art. V, § 21. State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947). Since the charge specified only that the victim's testimony need not be corroborated, it appears to express an opinion on her credibility. In State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244 (1943), this Court rejected a similar "no corroboration charge" in the context of accomplice testimony. The law found in Section 16-3-657 should not be charged to the jury. S.C. Const. art. V, § 21.

The majority does not discuss the propriety of the "no corroboration" charge itself, but instead holds that the jury charge as a whole did not constitute reversible error. I disagree. We have rejected such analysis in State v. Bagwell, supra. Further, the charge was especially prejudicial in this case because it was the victim's word against the defendant's. I would hold that the giving of this charge was reversible error. Accord, Cox v. State, 44 S.W. 157 (Tex.Crim.Ct.App.1898).

Id. 312 S.C. at 510, 435 S.E.2d at 864.

In State v. Weldon, 89 S.C. 308, 71 S.E.2d 828, 828 (1911), the South Carolina Supreme Court approved the following charge: “The law in this state for a long number of years was declared by our Supreme Court to be that it was unsafe to convict upon the uncorroborated testimony of an accomplice. But our Supreme Court has recently changed that doctrine, and it is not the law now. The law in regard to the testimony of an accomplice is just like it is as to the testimony of any other witness in a case. That is to say, that you are the sole judges of the weight you should give to such testimony.” As noted by the dissent in Schumpert, in the same way that it is improper to instruct the jury that it is unsafe to convict based on the uncorroborated testimony of an accomplice, it is improper to instruct the jury that the prosecuting witness’ testimony need not be corroborated because in giving such a charge it appears that the judge is commenting on the credibility of the witness.

In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), Rayfield argued that charging the jury with S.C. Code §16-3-657 constitutes an impermissible comment on the facts of the case, improperly emphasizes the testimony of one witness, and carries a strong possibility of unfairly biasing the jury against the defendant. The South Carolina Supreme Court disagreed and wrote:

A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law. The jury in this case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses. The trial judge in this case, as shown in the above portions of the charge, fully and properly instructed the jury on these principles.

Id. 369 S.C at 117-118, 631 S.E.2d at 250. The dissent in Rayfield noted:

In general, the trial court is required to charge only the current and correct law of South Carolina. ... A jury charge is correct if it contains the correct definition of the law when read as a whole.” Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462,472 (2004) (citations omitted). Some principles of law, however, are not to be charged to a jury. See, e.g., State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (holding that although evidence of a defendant's flight is admissible as circumstantial evidence of guilt, it is improper for the trial judge to instruct the jury on the law of flight, because such an instruction “oftentimes has the potential for creating more problems than solutions,” as it “places undue emphasis upon that part of circumstantial evidence”).

Contrary to the majority opinion, we did not hold in Schumpert that this no-corroboration charge was proper. Rather, “[t]aking the charge as a whole, we [found] no reversible error.” 312 S.C. at 509, 435 S.E.2d at 863. We observed that the trial judge, in addition to charging the jury under section 16-3-657, had charged “the jury it could believe any single witness over several, it was the sole judge of the facts, [the trial judge] had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt.” Id.

I would hold that it is error for a trial court to charge the jury that an alleged victim's testimony needs no corroboration. Although section 16-3-657 contains current and correct law, it is not a proper subject of a jury charge. Section 16-3-657 prevents courts, either on a dispositive motion at the trial level or on appellate review, from finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is uncorroborated. See James Cranston Gray, Jr., Criminal Law—Rape Reform in South Carolina, 30 S.C. L.Rev. 45, 55-60 (1979) (discussing the no-corroboration rule as governing judicial review of the sufficiency of the evidence); cf. Ludy v. State, 784 N.E.2d 459, 463 (Ind.2003) (holding that the no-corroboration rule is a legal standard for a court reviewing a conviction). Charging this rule does not assist the jury in fulfilling its function of deciding the facts and determining whether the state has proved the charged offense beyond a reasonable doubt. In fact, it “has the potential for creating more problems than solutions,” for it might cause confusion when read with the general charge on witness credibility.

More important, charging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need be corroborated. By specifically charging that the alleged victim's testimony need not be corroborated, the trial court singles out the alleged victim and “appears to express an opinion on her credibility.” State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting); see also S.C. Const. art. V, § 17 (providing that “[j]udges shall not charge juries in respect

to matters of fact, but shall declare the law”). I would therefore hold that charging a jury on the contents of section 16–3–657 constitutes error.

Further, I would overrule the holding in Schumpert that the charge as a whole can render this no-corroboration charge harmless. Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony.

Furthermore, this case is different from Ludy, *supra*, in which the Supreme Court of Indiana held that although the trial court had erred in giving the no-corroboration charge, the error was harmless because: “[T]he testimony of the victim was not uncorroborated.... [A]side from the victim's testimony there was substantial probative evidence establishing the elements of the charged offenses.” 784 N.E.2d at 463. Here, the only evidence of Petitioner's committing CSC was the testimony of the alleged victims. The jury had to determine whether it believed the purported victims or Petitioner.

For these reasons, I would hold that the circuit court committed reversible error in charging the jury. I would therefore reverse the decision of the Court of Appeals and remand the case to the circuit court for a new trial.

Id., 369 S.C. at 119-121, 631 S.E.2d at 251 - 252 (footnotes omitted).

As noted by the dissent in Rayfied in footnote 4, in Ludy, the Supreme Court of Indiana overturned Lottie v. State, 273, Ind. 529, 406 N.E.2d 632 (1980), the decision relied upon by the Schumpert majority. Ludy 784 N.E.2d 459, 462 and n.2 (Ind. 2003). The Court found that giving the following instruction was an error despite a long history of appellate approval: “A conviction may be solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt.” Id. at 61. The Ludy court reasoned that “To expressly direct a jury that it may find guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligation to consider all the evidence.” Id. at 462. The court also commented on the potential harms that may occur when a jury attributes meaning to the legal term “uncorroborated”:

Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness's testimony, and ignore evidence that conflicts with the witness's version of the events. Use of the word "uncorroborated" without a definition renders this instruction confusing, misleading, and of dubious efficacy.

Id. at 462.

In State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct.App. 2011), Hill argued that the judge erred in allowing the prosecution to unduly emphasize the no-corroboration rule found in S.C. Code §16-3-657 and then the judge further erred in choosing to instruct the jury on the no corroboration rule. The South Carolina Court of Appeals disagreed and wrote, "Accordingly, the single instruction on 'no corroboration,' was not unduly emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the 'no corroboration' charge." Id. 394 S.C. at 299, 715 S.E.2d at 379.

The present case can be distinguished from Schumpert, Rayfield and Hill because the jury's question demonstrates that, despite the charge "as a whole" the jury was still confused when instructed that the victim's testimony need not be corroborated. The jury in the present case asked if S.C. Code §16-3-657 implied that the victim's testimony must be accepted as being true, a clearly erroneous implication. The judge's attempt to answer the jury's question further confused the jury because the judge failed to instruct the jury that the statute does **not** require them to accept the victim's testimony as being true and failed to clarify that the prosecuting witness, or victim as referenced in the statute, is a witness for purposes of determining credibility. The jury's question demonstrates the point made in the dissent in Rayfield that instructing the jury that the victim's testimony need not be corroborated " . . .has the potential for creating more problems than solutions, for it might cause confusion when read with the general charge

on witness credibility.” Id. 369 S.C. at 120, 631 S.E.2d at 251, (citing State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980)).

An additional distinction from Schumpert, Rayfield and Hill is that those cases involved minor witnesses. Under the facts of this case, involving a determination of credibility in regard to the defense of consent between two adults, the jury question and the inadequate response from the judge rendered the charge “as a whole” an improper comment on the facts in violation of Article V, §21 of the South Carolina Constitution. The South Carolina Constitution states: “Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. Art. V, § 21.

In Grant the South Carolina Supreme Court wrote:

The charge on flight oftentimes has the potential for creating more problems than solutions. While we no longer sanction this charge by the judge, we recognize that evidence of flight remains proper. We also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight. However, we believe that the “law of flight” in a judge’s charge places undue emphasis upon that part of circumstantial evidence and it should not be charged hereafter.

Id. 275 S.C. at 408-409, 272 S.E.2d 171-172. The present case demonstrates the confusion created by instructing the jury that the victim’s testimony need not be corroborated, especially in a case involving the defense of consent where credibility of the witnesses is crucial. The present case presents an opportunity for the Court to re-visit the holdings in Schumpert, Rayfield and Hill as this case demonstrates that the instruction, despite the charge as a whole, is confusing, places undue emphasis on the testimony of the prosecuting witness/victim creates an improper implication that the jury must accept the prosecuting witness/victim’s testimony as true and constitutes an improper comment on the facts. As the Court did in Grant in reference to the instruction

on flight evidence, this Court should find that judges should not instruct the jury that the testimony of the victim need not be corroborated.

In State v. Blurton, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002) the South Carolina Supreme Court wrote, “The purpose of a jury instruction is ‘to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury.’” State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).” The charge in the present case pursuant to S.C. Code §16-3-657 that the testimony of the victim need not be corroborated confused and mislead the jury into believing that they had to accept the prosecuting witness’s testimony as true. The charge improperly bolstered the testimony of the prosecuting witness. The error was particularly prejudicial under the facts of this case where the defense was consent and the credibility of the witnesses was a critical determination for the jury.

In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480, (2013), the South Carolina Supreme Court found that instructing the jury that actual knowledge of the presence of a drug is strong evidence of intent to control its disposition and use was improper as an expression of the judge’s view of the weight of certain evidence. In Cheeks the court wrote:

Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts. For example, it is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt, and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places “undue emphasis” on that piece of circumstantial evidence. E.g., State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980). Similarly, charging a jury that “actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use” unduly emphasizes

that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence.


Id. 401 S.C. at 328-329, 737 S.E.2d at 484.

Instructing the jury that the victim's testimony need not be corroborated improperly emphasizes that testimony in the same way the charges in both Grant and Cheeks improperly emphasized certain evidence. The improper instruction was particularly harmful in the present case where the defense was consent and the credibility of the witnesses was a critical determination for the jury. The error was further compounded by the trial judge's failure, in response to the jury's question of whether they had to accept the victim's testimony as true, to instruct the jury that the statute does **not** require them to accept the victim's testimony as being true and the failure to clarify that the prosecuting witness, or victim as referenced in the statute, is a witness for purposes of determining credibility. Unlike Cheeks, the Appellant in the present case was prejudiced by the error in the instruction. This Court should find that instructing the jury that the victim's testimony need not be corroborated is no longer proper and reverse the Appellant's conviction and sentence.

CONCLUSION

Based on the above argument, Stukes' conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APR 23 2014

SC Court of Appeals

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MELVIN P. STUKES,

APPELLANT

APPELLATE CASE NO. 2012-212628

CERTIFICATE OF SERVICE

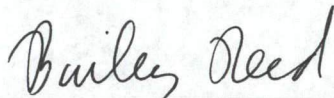
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of April, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of April, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.