ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000493

THE STATE,

Respondent,

v.

GABRIEL JON RIOS,

Appellant.

FINAL BRIEF OF RESPONDENT

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Whether the trial court erred in refusing to charge the jury with law related to the defense of alibi when only evidence of a partial alibi was presented at trial?

II.

Whether the trial court's refusal to charge the jury on the defense of alibi prejudiced Rios in light of the closing arguments and the overall jury charge?

III.

Whether the trial court's refusal to charge the jury on the defense of alibi prejudiced Rios in light of overwhelming evidence presented at trial?

STATEMENT OF THE CASE

The Spartanburg County Grand Jury indicted Rios for burglary first degree, armed robbery, possession of a weapon during the commission of a violent crime, kidnapping, and assault and battery first degree. (R. p. 331-340 and R. p. 18, ll. 11-20). On February 26, 2013, Rios proceeded to jury trial before the Honorable R. Lawton McIntosh. Matthew Shealy, Esquire, represented Rios during the trial, and Assistant Solicitor Timi Poulos and Russell Ghent prosecuted the case. The jury returned guilty verdicts on all counts. (R. p. 316 l. 16-p. 317 l. 9). Judge McIntosh sentenced Rios to forty years' imprisonment for burglary first, thirty years' imprisonment for armed robbery, five years' imprisonment for possession of a weapon during the commission of a violent crime, thirty years' imprisonment for kidnapping, and ten years' imprisonment for assault and battery first degree. (R. p. 324 ll. 11-22). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Gale Holt came face to face with an intruder in her home on the morning of August 14, 2010. (R. p. 58, l. 1 – p. 59, ll. 1-3). Holt recognized the man as "Gabe," a man who previously worked for her husband both at his business and in the Holts' home. (R. p. 59, l. 4 – p. 60, ll. 1-15). According to Holt, the man held a sharp object at her neck, forced her down the hall to her husband's office, and demanded that she open the safe. (R. p. 60, l. 17-20, R. p. 61, l. 9 – p. 62, ll. 1-16).

When she was unable to open the safe, the man forced her into the bedroom, tied her hands behind her back while she was lying face down, and pulled the Holt's gun from its holster. (R. p. 62, l. 14 – p. 63, l. 10). Rios then demanded Holt's money and her purse. (R. p. 63, ll. 11-13). Once he located the purse, Rios rummaged through it and through Holt's jewelry armoire. (R. p. 63, l. 13 – p. 64, ll. 5). Rios took what he wanted, told Holt not to move, and said he would kill her. (R. p. 64, ll. 4-8). Rios took her money, cell phone, and stole her car. (R. p. 64, ll. 14-20). After calling the police and her husband, Holt told police that Gabe committed the crimes, and she identified Gabriel Rios as the perpetrator in a photo line-up on the same day the crime occurred. (R. p. 82, l. 2—p. 84, l. 15).

After being indicted for burglary first degree, armed robbery, possession of a weapon during the commission of a violent crime, kidnapping, and assault and battery first degree, Rios proceeded to a jury trial on February 26, 2013. (R.p.331-340; R. p. 18, ll. 11-20). During the trial, Holt identified Gabriel Rios as the home invader and testified about the events that took place on the morning of August 14, 2010, during the trial. (R. p. 85, ll. 1-14). She also identified a photo line-up where she circled a picture of Rios and identified a signed affidavit. (R. p. 82, l. 14—p. 85, l. 16). Both the circled picture

in the photo line-up and the affidavit were admitted into evidence. (R. p. 82, l. 14—p. 85, l. 16).

Phil Holt, the victim's husband, also testified about the events that transpired on the morning of the home invasion and how he called the police. (R. p. 99, l. 23—p. 100, l. 23). He testified that he knew Rios, who had worked for him on and off for a number of years. (R. p. 100, l. 24—p. 101, l. 2). Specifically, Rios helped Phil Holt install the safe that Rios attempted to open and rob. (R. p. 101, ll. 12-18).

Investigator Lorin Williams with the Spartanburg County Sheriff's Department testified he (Williams) responded to the accident scene. (R. p. 126, l. 22—p. 127, l. 8). Investigator Williams testified that Gale Holt provided a description of the invader and identified him as "Gabe." (R. p. 128, ll. 10-23). Investigator Williams explained the photo line-up presented to Holt on the day of the invasion and Holt's identification of Rios in the line-up. (R. p. 129, l. 14-p. 132, l. 10). Finally, Investigator Williams testified that Rios was arrested between 6:00 and 6:30 on the evening of August 14, 2010. (R. p. 132, l. 22, p. 133, l. 5).

ARGUMENT

I. The Trial Court did not err in failing to instruct the jury on the alibi defense because Rios' alibi defense was incomplete.

Rios argues the trial court erred in failing to instruct the jury on the defense of alibi. However, based on the incomplete evidence of Rios' whereabouts during the commission of the crime, the trial did not err, and its ruling should be affirmed.

Evidence of a partial alibi defense is not enough to warrant a jury instruction on the alibi defense. *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). Notably, the *Robbins* Court adopted 21 Am.Jur.2d, Criminal Law section 136 on the defense which provides: "To be successful, ***his alibi must cover the entire time when his presence was required for accomplishment of the crime***." *Id.* (citing 21 Am.Jur.2d Criminal Law § 136) (emphasis added). The *Robbins* Court held that "[a]libi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission." *Id.*

Rios attempts to establish an alibi defense based on witness testimony. Even examining the testimony from these witnesses in the most favorable light, Rios' alibi defense falls short of being complete. The victim, Gail Holt, testified that on the morning of Saturday, August 14, 2010, she woke up a bit before 7:30 AM. (R. p. 58, ll. 1-5). When questioned about the timing of the crime, the victim testified that it occurred between 7:30 and 8:00. (R. p. 67, ll. 1-9-16).

In his defense, Rios' wife, Sonia Rios, testified that her husband called her at 7:25 a.m. on August 14, 2010. (R. p. 219, ll. 10-20). Rios testified that she received a call from a landline phone number. (R. p. 224, ll. 6-20). Earlier in the trial, Estar Boyd

testified that she was living at a Florida Avenue residence in Spartanburg, SC when the crime occurred and testified as to her phone number, which was the same number testified to by Rios. (R. p. 215, ll. 1-17; R. p. 216, ll. 18-23). Boyd testified that from time to time she would allow Rios to use her Florida Avenue landline, though she did not recall whether Rios used her phone on the day of the crime. (R. p. 215, l. 25—R. p. 217, l. 22).

Curtis Jones, a retired deputy sheriff and current employee of the Seventh Circuit Public Defender's Officer then testified on Rios' behalf. (R. p. 228). Specifically, Jones testified that the distance from the residence where the home invasion occurred, to the Boyd residence, from where a call was placed to Sonia Rios, is 5.2 miles. (R. p. 229, ll. 4-25). Additionally, Jones testified that it took him sixteen minutes to drive from the victim's residence to the Florida Avenue residence. (R. p. 230, ll. 1-5). Adding sixteen minutes to the alleged 7:25 phone call is 7:41 a.m. Giving Rios the benefit of any doubt only accounts for eleven minutes of the time period of the crime. Therefore, his alibi defense is incomplete.

As the *Robbins* Court held, to be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime." 275 S.C. at 375, 271 S.E.2d at 320. Additionally, the *Robbins* Court held that the evidence created an inference that Robbins was elsewhere at the time of the crime. *Id.* at 376, 271 S.E.2d at 320. There, the crime was alleged to have taken place at 10:45 p.m., and Robbins testified that he picked up his wife from work at 10:00 and went straight home. *Id.* at 375, 271 S.E.2d at 320. Therefore, some evidence existed that accounted for Robbins' whereabouts during the 10:45 time of the crime.

In a later post-conviction relief case, the Supreme Court held that the trial lawyer's failure to request an alibi charge was deficient representation. *Roseboro v. State*, 317 S.C. 292, 295, 454 S.E.2d 312, 314 (1995). There, Roseboro accounted for his whereabouts for the entire time period in which the crime occurred. *Id.* at 293, 454 S.E.2d at 313 ("He testified on February 23 he left his mother's house at 11:45 p.m. and walked to the home of a friend, Roy Miller, where he watched a basketball game until 1:00 a.m. and was then driven home."); *see also Riddle v. State*, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992) (where in his defense, Riddle testified that he was home asleep with his wife *the entire night of the crime*, and his wife corroborated this testimony). Clearly, there must be some evidence of the defendant's whereabouts during the entire time period of the commission of the crime in order to warrant a charge on the alibi defense.

In *Glover v. State*, another post-conviction relief case, petitioner argued trial counsel was ineffective for failing to contact witnesses who would have placed him in Florida on the day of the crime. 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995). There, the court found that the uncalled witness's testimony was not sufficient to establish an alibi defense. *Id.* at 498, 458 S.E.2d at 540. There, the court reasoned that the uncalled witness's testimony only placed Glover in Florida between 8:00 and 8:30 a.m. on the date the crimes occurred, while the crimes occurred in Williamsburg County over eleven hours later at approximately 8:30 p.m. *Id.* The *Glover* Court cited to the *Robbins* case for the proposition that "since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, ***a purported alibi which leaves***

it possible for the accused to be the guilty person is no alibi at all." *Id.* (*citing State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980) (emphasis added)).[1]

The South Carolina Supreme Court ruled similarly in the case of *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). There, Cherry argued his trial counsel was ineffective in failing to ensure the presence of an alibi witness who would have testified that he saw Cherry at the B-Q Lounge on the night of the crime. *Id.* However, the alibi witness would only have been able to testify that he had seen "Cherry frequently enough that he could not have gone out, committed the crime and returned to the lounge." *Id.* There, the *Cherry* Court found that this testimony "would not have constituted an alibi because [the alibi witness] could not definitely account for Cherry's whereabouts during the time the crime was committed." *Id.* at 118-19, 386 S.E.2d at 626.

In the cases where courts found alibi was established, there was evidence of the defendant's whereabouts during the entire time period in which the crime was committed. Specifically, the accounts of Robbins,' Roseboro's, and Riddle's whereabouts are the distinguishing factors between those cases and this case. Simply put, no evidence exists in the record to demonstrate Rios' whereabouts after the alleged 7:25 a.m. call he made to his wife. Therefore, this case is distinguishable from those cases.

However, this case is similar to and hard to distinguish from the situations in the cases of *Glover* and *Cherry*. Even assuming Rios drove from the place of the call to the place of the crime (for which there is no evidence), his whereabouts from 7:41 a.m. to

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[1] Interestingly, in a footnote, the *Glover* Court notes: "At the PCR hearing, Ms. Jordan (the uncalled trial witness) testified it took her approximately six and one-half hours to drive from her home in Florida to Williamsburg County. This testimony indicates that even if respondent was in Florida on the date the crimes occurred, he had ample opportunity to travel from Florida to Williamsburg County prior to the time the crimes occurred." *Id.* at 498, 458 S.E.2d at 540.

8:00 a.m. on August 14, 2010, are still unknown. Like the situation in *Glover*, Rios' purported alibi leaves it possible for him to be the guilty person. 318 S.C. at 498, 458 S.E.2d at 540. As in *Cherry*, no one can definitely account for Rios' whereabouts during the time frame of when the crime was committed. 300 S.C. 118-19, 386 S.E.2d at 626.

The trial court did not err in failing to instruct the jury on law related to the alibi defense. Assuming Rios called his wife from the residence on Perrin Drive on August 14, 2010, (which is only an allegation) Rios' presence is only accounted for for a small amount of time—not the morning, not an entire day, not even a full minute of time. Based on the lack of evidence in the record accounting for Rios' whereabouts on August 14, 2010, Rios' alibi defense is incomplete. Therefore, the trial court did not err in its jury instruction and should be affirmed. *State v. Patterson*, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006) ("The law to be charged must be determined from the evidence presented at trial.").

II. Rios suffered no prejudice from the trial court not instructing the Jury on the Alibi Defense in light of Rios' closing argument and the entirety of the Jury instruction.

A charge on alibi was not necessary to ensure the jury's proper consideration of this case, and the lack of an alibi charge did not adversely affect the outcome of trial. Rios' attorney's closing argument and the trial court's jury instruction as a whole demonstrate that Rios suffered no prejudice from the trial court's refusal to charge the jury on the alibi defense.

Rios' attorney thoroughly argued alibi in his closing argument to the jury. Specifically, he argued:

> We presented Ms. Byrd who testified that she had a landline phone, what her phone number was. It's [xxx-xxxx]. And Mrs. Rios testified that she

> got this phone call around 7:22. I don't believe that she testified to the duration of that call. But she did speak with her husband, she testified to, and she, she received that phone call from that number, [xxx-xxxx], that that happened at 7:22. . . .
>
> Mr. Jones testified that it takes about 16 minutes from Florida Avenue to get over to Hillbrook, and that that drive was – it was in a car and it was the fastest way he could figure out, and the State had the opportunity to call a witness to reply to that and they didn't. So, that's – you just have to go with that. That's the only evidence in the record as to the distance between the one, the two points. . . .
>
> And if this happened about 7:30, then even if he caught a ride, he couldn't get over there because 16 minutes, plus 22, is 7:38. So, if he called her, immediately hung up, gotten into the car, driven over there, all of that without anytime in-between, he certainly couldn't have done it now.

(R. p. 260, l. 11—p. 262, l. 11).

Though the only evidence proffered by the Defendant on the alibi defense is an alleged phone call placed from a residential phone to his wife's cell phone, the trial court nevertheless allowed Rios to argue alibi in the closing.[2] Therefore, the jury had ample opportunity to consider the defense in deliberations, and Rios suffered no prejudice as a result. *State v. Lee-Grigg*, 374 S.C. 388, 415, 649 S.E.2d 41, 55 (Ct. App. 2007) aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010) ("To warrant reversal based on the trial court's failure to give a requested jury instruction, the failure must be both erroneous and prejudicial."); *State v. Patterson*, 367 S.C. 219, 224, 625 S.E.2d 239, 242 (Ct. App. 2006) ("In order for an error to warrant reversal, the error must result in prejudice to the appellant."); *see also Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (where the court did not reverse where Ford failed to establish a reasonable probability

[2] Notably, the cell phone record was never admitted into evidence. Furthermore, there is no other evidence presented by the defense which would warrant a charge on the defense of alibi-no testimony, no one mentioned Rios was in their presence during the commission of the crime. The entire closing argument on the alibi defense is a hypothetical theory based on nothing but the alleged phone call.

that the result of the trial would have been different had counsel's performance not been deficient).

Additionally, the trial court correctly instructed the jury on the State's burden. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Patterson*, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006); *see also Gibbs v. State*, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (internal citation omitted) ("In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed in its entirety and not in isolation."). In *Gibbs*, the Petitioner argued that he was prejudiced by his trial counsel's refusal to request an alibi jury charge. There, the *Gibbs* Court reviewed the jury charge requiring the State to prove identity beyond a reasonable doubt and found Gibbs suffered no prejudice from the jury instruction not containing an alibi charge. 403 S.C. at 496, 744 S.E.2d at 176.

Here, the trial court instructed:

> The burden is on the State of South Carolina at all time to prove his guilt beyond a reasonable doubt. . . .
> Now, an issue in this case involves the identification of the defendant as the person who committed the crime charged. This State has the burden of proving identity beyond a reasonable doubt. You must be satisfied, beyond a reasonable doubt, of the accuracy of the identification of the defendant before you may convict the defendant.
> Identification testimony is an expression of belief or impression of a witness. You must determine the accuracy of the identification of the defendant []. . . You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. . . .
> Once, again, I instruct you the burden of proof is on the State and extends to every element of the crime charged, and that would include specifically that of identification. If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

R p. 285, l. 8—p. 286, l. 13). The trial court's instruction here and in the *Gibbs* case are nearly identical. Thus, together with Rios' closing statement and the clear jury instructions, Rios suffered no prejudice by the trial court's failure to charge the jury on the alibi defense.

III. Rios was not prejudiced by the trial court's failure to instruct on the alibi defense because there is not a reasonable probability that the outcome would have changed.

Even assuming the trial court erred in failing to instruct the jury on the alibi defense, Rios was not prejudiced because of the overwhelming evidence in the record demonstrating his guilt. *See e.g., State v. Patterson*, 367 S.C. 219, 228, 625 S.E.2d 239, 243 (Ct. App. 2006). "Error is harmless when it could not reasonably have affected the result of the trial." *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003)

Gale Holt testified that she "immediately" recognized the man in her hallway on the day of the incident. (R. p. 59, ll. 1-24). She said she knew him as "Gabe" and testified that Gabe had previously worked for her Husband both at Phil Holt's shop and at their home. (R. p. 59, ll. 10-13). Specifically, she testified that she recognized his "very distinctive voice." (R. p. 60, ll. 1-4). Additionally, she testified that nothing was covering his face and that she saw him "face-to-face." (R. p. 60, ll. 1-13).

Immediately following the home invasion, Holt told the police that "Gabe" was the perpetrator, and she identified Rios in a photo line-up that was admitted into evidence. (R. p. 82, ll. 2-13). Holt signed an affidavit to memorialize her line-up identification, and the signed affidavit was admitted into evidence. (R. p. 82, l. 19—R. p. 83, l. 6). Finally, Holt identified Rios in court as the man who broke into her home, tied her up, and robbed her at gunpoint. (R. p. 85, ll. 3-14).

Further, the victim and her husband knew Rios—he was not a random stranger. (R. p. 59, ll. 10-21). In fact, Phil Holt testified that Rios helped him install the safe that Rios attempted to open and rob. (R. p. 101, ll. 12-18). Holt testified that the safe was inside a closet in the office. (R. p. 101, ll. 20-21). Further, Holt testified that he did not know of another individual who would have knowledge of the safe or its placement in the Holt's home. (R. p. 102, ll. 1-6).

Furthermore, the victim's stolen vehicle was found in the Spartanburg Church's Chicken parking lot which was within the same vicinity of where Rios was ultimately arrested. (R. p. 133 l. 6-R. p. 134, l. 9; R. p. 138, l. 8—R. p. 139, l. 4). Specifically, Rio's place of arrest and the stolen car's location are "[r]oughly less than a quarter of a mile" apart. (R. p. 134, ll. 3-9). Finally, Rios' fingerprint was identified by an expert witness on a piece of glass found at the crime scene. (R. p. 186 ll. 12-23). Specifically, the State's expert witness found that the print on the glass matched Rios' right thumb print. (R. p. 186 ll. 12-23). Though Rios had not worked in the Holt home for over a year, his fingerprint was found on the large triangular piece of glass.[3]

Based on the more than ample amount of evidence proffered by the State, there is no reasonable probability that a trial result would have been different had the trial court instructed the jury on the alibi defense. *Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) ("In light of this overwhelming evidence of Ford's guilt, we find no reasonable probability that the result of the trial would have been different had counsel accepted the alibi charge."); *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003) ("Where a review of the entire record establishes the error is harmless beyond

[3] To insinuate that Rios' fingerprint somehow got on the glass from his previous work in the home is a red herring. Not only had Rios not worked for Holt for over a year, but Mr. Holt had the glass door replaced in the spring before the incident occurred. (R. p. 104)

a reasonable doubt, the conviction should not be reversed."). Moreover, the evidence presented in this case, including the victim's identification and Rios' fingerprint on the glass from the crime scene are direct, not circumstantial, evidence of his guilt. *But See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) ("An alibi charge is considered especially crucial when the evidence is entirely circumstantial as in this case."). Therefore, based on the overwhelming evidence of Rios' guilt and the key pieces of direct evidence incriminating him, Rios' conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

This 23rd day of May, 2014.

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