STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NATHANIEL WITHERSPOON,

APPELLANT

APPELLATE CASE NO. 2013-001440

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted by the Charleston County Grand Jury for the offenses of criminal sexual conduct in the first degree and burglary in the first degree. R. p. 347-352. His case was called to trial on June 19, 2013 before the Honorable Deadra L. Jefferson, and a jury. Andrew Grimes and Christina Parnell represented appellant. Timothy Finch and Elizabeth Riddle were the assistant solicitors. R. p. 1 - 2.

On June 21, 2013 the jury found appellant guilty on both counts. R. p. 334, ll. 9-25. Judge Jefferson sentenced appellant to eighteen years imprisonment, concurrent, on the two counts. R. p. 345, l. 22 – 346, l. 3.

This appeal follows.

ARGUMENT

1.

The court erred by instructing the jury that the alleged victim's testimony did not have to be corroborated since this was an impermissible charge on the facts and prejudicial.

Relevant Facts

The alleged victim, Sharon R., was sixty-four years old at the time of the incident on October 24, 2011. R. p. 26, ll. 9-12. She lived in an apartment in North Charleston. R. p. 27, ll. 7-9. She was legally blind because of cataracts. R. p. 28, ll. 1-9.

Ms. R. admitted that she regularly used crack cocaine. One of the men who often came by her apartment to do crack cocaine was nicknamed "New York". R. p. 29, l. 11 – 30, l. 13. Ms. R. remembered that New York had come by the night before or the night of the incident. R. p. 29, ll. 8 -16.

She testified that she was laying down watching television because she could not sleep. She thought she heard her cat scratching at the door to be let into the apartment. She went to the door and there was a man standing there. He was "very soft-spoken." R. p. 30, l. 17 – 33, l. 6.

The man asked to use the phone claiming his car had "broken down." She agreed to let him use the phone. While she walked to get the phone "he grabbed me around the throat and started dragging me to the bedroom .... I was doing everything I could to get help, to get away from him. And he grabbed me by my hair, pulled me down, and he started beating me in the face. And I kept hollering, you know, for somebody to help me. And finally he looked at me very soft-spoken, and he says, I have a knife. *I don't remember anything after that. Except looking around and looking for something to put on.*" She stated she then went

to her neighbor's house across the street and the neighbor called 911. I told her I'd been attacked and raped. I mean, I was raped." R. p. 30, l. 17 – 33, l. 6. (emphasis added).

Ms. R. admitted she had no idea who the person was that assaulted her. She told a detective she thought it could either be a dark-skinned white guy or a black man. R. p. 45, l. 15 – 46, l. 9. She also said it could have been "maybe an Italian guy." R. p. 46, ll. 21-22.

She admitted she had friends who came over to her apartment to "get me high" on crack cocaine. R. p. 52, ll. 15-20. She named "Cooper, a guy named New York, and …a friend of mine named Pam" as recent partakers. R. p. 52, ll. 15-20.

Jill Farman was an investigator with the North Charleston Police Department. R. p. 86, l. 21- 87, l. 14. She remembered that Sharon R. had been in the emergency room and had dried blood on her and she had other injuries as well. R. p. 88, l. 17 – 89, l. 2. The included a scratch around her neck, and "some redness there." R. p. 89, ll. 8-14. Farman described her as "exhausted."

Farman also related that Sharon R. she thought a dark-skinned white male or an Italian or maybe light-skinned black male may have been her attacker. R. p. 90, l. 3 – 92, l.1. Ms. R. also told Farman that "New York" had been there the night before and they were smoking crack. R. p. 92, l. 13 – 93, l. 24.

Farman admitted that appellant having a consensual sexual relationship with the alleged victim would be "an option to explain why his [appellant's DNA] was there, yes." R. p. 104, l. 20 – 105, l. 16. However, Farman refused to admit that that a consensual sexual relationship would have changed her evaluation of this case – evidentially that she thought appellant was guilty. R. p. 111, l. 23 - 112, l. 2. Farman admitted that she understood appellant was very cooperative with the police. R. p. 126, ll. 2-5.

Janet Ward was a sexual assault nurse at MUSC. R. p. 129, ll. 11-19. She remembered that Sharon R. reported to the emergency room with injuries. R. p. 138, l. 25 – 140, l. 2. Ward acknowledged that she was told by Ms. R. that she had not done drugs or drank alcohol within the last seventy-two hours. That obviously was not true. R. p. 145, l. 23 – 146, l. 1.

Catherine Leisy of SLED testified that appellant had a DNA match on the external genital swabs of Sharon R. On another swab appellant could not be excluded as a possible "contributor." R. p. 153, ll. 16-24; 160, l. 3 – 161, l. 17.

Officer Matt Lawless of the North Charleston Police Department was responding to a "shots fired" call unrelated to this case when he found a cell phone with the name "N. Witherspoon on the screen. The phone no longer had service." Lawless estimated this was "about a mile away" from the alleged victim's apartment. R. p. 77, l. 10 – 80, l. 21. The import of this was the phone Lawless found that it was the alleged victim's phone stolen by her attacker. R. p. 34, l. 23 – 35, l. 1; R. p. 79, ll. 20-25.

During the defense case, Tammy Stiles testified that she had often seen appellant, whom she had known for over twenty years, at the alleged victim's apartment. She said he was there "just about every time I went there." Stiles testified that appellant and Ms. R. were doing sexual favors "for one another." She said the alleged victim readily admitted her sexual relationship with appellant. R. p. 215, l. 6 – 219, l. 7.

Derrick Felder also testified that he knew that appellant and the alleged victim did drugs together at her apartment, and that they were having an ongoing sexual relationship. R. p. 228, ll. 7-25.

Charge Conference

Defense counsel Grimes objected to the judge's intention to instruct the jury that "the victim's testimony does not need to be corroborated; [it] is a comment on the facts." The judge said the Legislature had decided "in its province that a CSC victim's testimony does not have to be corroborated. And that is the law..." R. p. 251, ll. 10-20.

Grimes said that if the judge was going to charge it he was preserving the issue for appeal. The judge responded: "Knock yourself out." R. p. 251, l. 13 – 252, l. 5. Defense counsel cited the dissent in State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), for his contention that this jury instruction was not proper, and was a charge on the facts. R. p. 251, l. 14 – 254, l. 12; R. p. 275, l. 2 – 276, l. 11. Over objection the judge charged that pursuant to the statute "the testimony of the victim need not be corroborated." R. p. 326, ll. 9-14.

Discussion

As seen, the alleged victim in this case could not identify her attacker. The state's case against the appellant was circumstantial. Appellant presented evidence that he had an ongoing sexual relationship with the alleged victim. The defense strongly contended therefore that his DNA was found on the alleged victim was essentially meaningless. "And how do we know the DNA did not come from the assailant," Defense counsel asked the jury, "The assailant didn't ejaculate in her . . . Just brushed up against and it might be touch be touch DNA that's left there. That might be why it's weaker than Mr. Witherspoon's. R. p. 291, l. 8 – 294, l. 14. The other circumstantial evidence involved the alleged victim's cell phone.

It is apparent that the alleged victim lied at the emergency about her crack cocaine use. It is clear that the use of crack cocaine can strongly alter a person's perceptions and their ability to reason.

The jury instruction that the alleged victim's testimony did not need to be corroborated was especially prejudicial in this case given the alleged description of her attacker as being an Italian man, "a dark-skinned white guy or a black man." Appellant was a black man. "Doesn't that rule out Nathaniel by itself?," defense counsel asked.

The jury instruction in this case on the alleged victim's testimony does not need to be corroborated gives special status to an alleged victim of a criminal sexual assault that the victim of no other crime receives. Defense counsel correctly argued this jury instruction was an impermissible charge on the facts.

In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), the Supreme Court held that a judge could, but was not required to, charge South Carolina Code Section 16-3-657 that the alleged victim's testimony need not be corroborated. In Rayfield the defendant argued the jury instruction was a charge on the facts and it carried the strong possibility of unfairly biasing the jury against the defendant. It further improperly, and obviously, emphasized the testimony of one witness, the alleged victim, against others. See State v. Hill, 394 S.C. 280, 298, 715 S.E.2d 368, 378 (Ct. App. 2011).

The dissenters in State v. Rayfield noted this jury instruction did not assist the jury in fulfilling its function of deciding whether the state had proven the charges beyond a reasonable doubt. It created more problems than it solved, and the jury instruction was confusing as a whole.

As stated above, appellant is not aware of any other jury instruction that favors the testimony of a single witness over all others. Defense counsel correctly argued the instruction was a charge on the facts. See State v. Bagwell, 201 S.C. 387, 392, 23 S.E.2d 244, 249 (1942) (similar instruction on "uncorroborated" statements of accomplices should be received with caution and scrutinized by the jury with great caution was a charge on the facts which violated the State Constitution).

The purpose of the statute is to change the law that a rape charge need to be corroborated **when the trial judge** is determining whether to grant a directed verdict. It is **not a jury charge.**

The alleged victim in this case, as stated above, did not recognize her attacker, and her drug use, and her failure to be honest about her drug use at times, made her testimony very suspect. Appellant presented evidence that he was often at the appellant's apartment, where they did drugs together, and that were having an ongoing consensual sexual relationship. The state's case against appellant was circumstantial; the defense provided an appellant explained the DNA evidence. The jury instruction that the shaky testimony of the alleged victim did not need to be corroborated was highly prejudicial in this case, and it constituted reversible error.

2.

The court erred by refusing to instruct the jury on assault and battery in the first degree pursuant to South Carolina Code Section 16-3-600 (C)(1) as a lesser–included or lesser offense of criminal sexual conduct in the first degree since the facts of this case justified charging this statutory subsection in the same manner as ABHAN.

Relevant Facts

Defense counsel asked that the judge to charge the "new statute" on assault and battery in the first degree as a lesser-included offense of criminal sexual conduct in the first degree. He argued while technically it might not meet the elements test of being a lesser-included offense of CSC in the first degree that the judge should consider it as being similar to ABHAN, being a lesser-included offense of sexual crimes. R. p. 254, l. 13 – 256, l. 12.

The solicitor argued he did not think it was a lesser-included offense. The judge then went through the elements of South Carolina Code Section 16-3-600 (C)(1) which were that the person who committed that offense unlawfully injured another person during an act involving non-consensual touching of their private parts, either under or above their clothing. The perpetrator did so with lewd and lascivious intent, and he committed the offense during the commission of another crime, including, as here, burglary. R. p. 259, l. 25 – 261, l. 7.

Defense counsel Grimes argued that the facts of this case almost mirrored the elements of the assault and battery in the first-degree offense. The judge ultimately refused to charge assault and battery in the first degree. R. p. 262, l. 19 – 270, l. 12; R. p. 275, ll. 3-9.

Discussion

South Carolina Code Section 16-3-600 (C)(1) provides:

> A person commits the offense of sexual and battery in the first degree if the person unlawfully:
>
> (a) injures another person, and the act:
>
> (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or
>
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

Defense counsel correctly argued that the lesser offense should have been charged in this case. There was evidence alleged victim was injured, and she maintained that she had been sexually molested or raped. She did not remember what happened after he attacker grabbed her, and the solicitor admitted she not identify him. The state also charged appellant with burglary in the first degree, coupled with the CSC in the first-degree offense.

No forensic evidence demonstrated penetration to the exclusion of any other factual scenario. Defense counsel correctly argued that even if the assault and battery in the first-degree offense was not a lesser-included offense under the elements test, it still should have been instructed consistent with the Supreme Court's framework of ABHAN being a lesser-included offense criminal sexual conduct cases.

In State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001), the Supreme Court held that charging ABHAN as a lesser-included offense of criminal sexual conduct was proper. The Court noted that the Legislature in enacting new legislation was presumed to know the common law and that common law did not "always fit into neat categories we

might prefer." The Court found "compelling reasons not to abandon its long-standing inclusion of ABHAN of a lesser-included offense of attempted battery crimes." Id. 552 S.E.2d at 729.

The same is true here as defense counsel argued. The present offense of assault and battery in the first degree is a result of "new" legislation first enacted in 2010. South Carolina Code Section 16-3-600 (C)(1), mirrors one consistent version of the offense and evidence in this case. Defense counsel correctly analogized it to ABHAN in arguing why it should have been instructed in this case. The trial court erred by refusing to charge this lesser or lesser-included offense given the facts of this case.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 11, 2015

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