

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Jocelyn Newman, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOHN FITZGERALD ANDERSON,

APPELLANT

Appellate Case No.: 2018-001596

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Court erred in denying Appellant's request to have the jury charged on Appellant's character when it was necessary for the jury to understand that it could consider evidence of Appellant's character when determining guilt.

- II. Whether the Court erred in allowing Investigator Powell to testify regarding statements made in an initial police report made to Officer Smith when such testimony was inadmissible hearsay and improperly corroborated Anthony Gilmore's testimony.

STATEMENT OF THE CASE

Appellant John Fitzgerald Anderson was arrested on June 28, 2017 (Trial Tr. vol. 1, 81:19-21 August 20, 2018). Prior to commencement of his trial, Appellant pleaded guilty to charges of failing to stop for a blue light and driving under suspension, third or subsequent offense (Trial Tr. vol. 1, 12:6-13 August 20, 2018). He pleaded not guilty and was tried by a jury of his peers before the Honorable Jocelyn Newman on charges of exploitation of a vulnerable adult, unlawful entry on another person's lands, and receiving stolen goods (Trial Tr. vol. 1, 52:3-6 August 20, 2018). Appellant's trial took place from August 20, 2018 through August 22, 2018, after which a jury found him guilty of all charges (Trial Tr. vol. 1, 410:1-10 August 22, 2018). Appellant was sentenced to eighteen (18) years and one hundred and twenty (120) days in prison (Trial Tr. vol. 1, 430:1-19 August 22, 2018). This appeal followed.

FACTS

Appellant John Anderson lived across the street, about four hundred (400) yards from Ms. Bertha Robinson's residence. Trial Tr. vol. 1, 75:2-3 August 20, 2018. Ms. Robinson lived alone (Trial Tr. vol. 1, 257:20-2 August 21, 2018) and, according to her physician, suffers from dementia (Trial Tr. vol. 1, 261:3-6 August 21, 2018). Appellant's former girlfriend, Whitney Jones, testified that Appellant was a "good person" (Trial Tr. vol. 1, 228:23-229:3 August 21, 2018) who would on occasion bring meals to Ms. Robinson, drive her where she needed to go, and help her with various tasks when she needed it. Trial Tr. vol. 1, 250:16-251:15 August 21, 2018.

In May of 2017, Ms. Robinson's out-of-state relatives obtained a power of attorney over her when they noticed her bills were going unpaid and money was missing from various bank accounts. Trial Tr. vol. 1, 118:9-119:5 August 20, 2018. At that time Ms. Robinson's nephew, Anthony Gilmore, filed a police report identifying items that he believed to be missing from Ms. Robinson's home (Trial Tr. vol. 1, 119:8-24 August 20, 2018), hired a part-time caregiver for Ms. Robinson (Trial Tr. vol. 1, 121:9-13 August 20, 2018), and set up security systems on Ms. Robinson's property (Trial Tr. vol. 1, 121:17-21 August 20, 2018). In the police report he gave to Officer Derrick Smith (Trial Tr. vol. 1, 93:20-94:7 August 20, 2018), Mr. Gilmore voiced his concerns and identified Appellant as a potential suspect regarding the items and money missing from Ms. Robinson (Trial Tr. vol. 1, 74:12-16 August 20, 2018). Subsequently, Mr. Gilmore placed trespass signs on Ms. Robinson's property (Trial Tr. vol. 1, 125:6-11 August 20, 2018) and law enforcement informed Appellant he was not to enter the property (Trial Tr. vol. 1, 77:3-5 August 20, 2018).

On the morning of June 28, 2017, Mr. Gilmore notified law enforcement that security footage showed Appellant on Ms. Robinson's front porch. Trial Tr. vol. 1, 121:22-25 August 20, 2018. Upon learning that Ms. Robinson was not at her home, Ms. Robinson's caregiver also notified law enforcement that she was missing. Trial Tr. vol. 1, 151:11-5 August 20, 2018. Mr. Gilmore was notified by Ms. Robinson's bank shortly thereafter that Ms. Robinson was making withdrawals at her bank. Trial Tr. vol. 1, 123:19-23 August 20, 2018.

A pursuit between law enforcement and Appellant ensued, resulting in Appellant's arrest after he wrecked the vehicle he was driving. Trial Tr. vol. 1, 209:11-210:2 August 21, 2018. Upon Appellant's arrest, his vehicle was searched and several items recovered, including a key to a Jaguar and some jewelry. Trial Tr. vol. 1, 83:13-85:8 August 20, 2018.

At the trial of this case, Appellant's pretrial request to suppress testimony regarding the allegedly stolen jewelry was denied, though Appellant argued that allowing the State to identify the jewelry as stolen without producing a witness to testify that the exact jewelry in Appellant's possession was in fact stolen violated the rules surrounding hearsay. Trial Tr. vol. 1 43:10-45:10 August 20, 2018. Appellant later objected to Investigator Powell's testimony regarding the allegations made in the initial police report as being inadmissible hearsay. Trial Tr. vol. 1, 72:13-20 August 20, 2018; Trial Tr. vol. 1, 74:12-8 August 20, 2018. These objections were also overruled. Trial Tr. vol. 1, 72:20 August 20, 2018; Trial Tr. vol. 1, 74:19 August 20, 2018.

At the close of evidence, Appellant requested a jury charge that evidence regarding his character could be considered when making a determination of guilt (Trial Tr. vol. 1, 346:20-348:5 August 22, 2018), and the Court denied his request (Trial Tr. vol. 1, 350:5-21 August 22, 2018). During deliberations, the jury submitted two questions to the Court (Trial Tr. vol. 1, 404:17-23 August 22, 2018; Trial Tr. vol. 1, 406:24-407:2, August 22, 2018) and requested that portions of

Investigator Powell's testimony regarding Anthony Gilmore's initial police report be read back to them (Trial Tr. vol. 1, 407:24-408:21, August 22, 2018).

b

STANDARD OF REVIEW

In criminal cases, the appellate courts review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). A trial court must charge the current and correct law. *McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995). To warrant reversal for refusal to give a requested jury charge, the refusal must have been erroneous and prejudicial. *Sherer v. James*, 286 S.C. 304, 334 S.E.2d 283 (Ct. App. 1985), rev'd on other grounds, 290 S.C. 404, 351 S.E.2d 148 (1986). Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved. *McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603, 606 (1994) (citing *Waldrup v. Metropolitan Life Ins. Co.*, 274 S.C. 344, 263 S.E.2d 652 (1980).).

Evidentiary rulings are within the discretion of the trial court and will not be disturbed absent showing of an abuse of discretion or legal error that prejudices the defendant. *State v. Rice*, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007).

ARGUMENT

I. The Court erred in denying Appellant's request to have the jury charged on Appellant's character because it was necessary for the jury to understand that it could consider evidence of Appellant's character when determining guilt.

The South Carolina common law allows for a charge to the jury that it may use evidence of a defendant's character or reputation when deciding whether he is guilty, and the failure to charge the jury as such in this case prejudiced Appellant.

A. Appellant was entitled to have the jury charged that they could consider his character when deciding guilt.

It is well settled that a defendant may use evidence of good character in defense of his innocence, and a trial court should instruct the jury as to the weight they may place on such evidence. A defendant may introduce evidence of his good character, and good reputation may be considered by a jury in determining guilt. *State v. Harrison*, 343 S.C. 165, 170, 539 S.E.2d 71, 73 (Ct. App. 2000) (citing *State v. Lyles*, 210 S.C. 87, 41 S.E.2d 625 (1947)). “Generally, where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all other evidence, in determining the guilt or innocence of the defendant.” *State v. Green*, 278 S.C. 239, 240, 294 S.E.2d 335, 335 (1982) (citing *Lyles*, *supra*).

Appellant in this case proffered evidence of his good character through the testimony of his former girlfriend, Whitney Jones, who referred to Appellant as a “good person” (Trial Tr. vol. 1, 228:23-229:3 August 21, 2018) and spoke to the good deeds he would do for Ms. Bertha Robinson in taking her meals, driving her where she needed to go, and generally ensuring she was taken care of. Trial Tr. vol. 1, 250:16-251:15 August 21, 2018. At the close of evidence when discussing jury charges, Appellant requested a charge on the law of *State v. Green*, citing the

testimony of Ms. Jones as something the jury should be instructed could create doubt. Trial Tr. vol. 1, 346:20-348:5 August 22, 2018.

The only prerequisites under the law a defendant must satisfy before he is entitled to a jury charge on the value character evidence may lend to a jury's deliberations are that there is evidence of good character in the record and the defendant requests such a charge. *Green* at 240, 294 S.E.2d at 335. In this case, Appellant satisfied both requirements with Ms. Jones's testimony and Appellant's request for a jury charge on his character. Appellant was entitled to the requested charge and the Court erred in refusing to give it.

B. The Court's refusal to charge was not harmless error.

The lack of evidence against Appellant and obvious struggle of the jury to reach a determination of guilt means the Court's failure to charge the jury that evidence of Appellant's character could create doubt of his guilt was prejudicial. Where the State does not present overwhelming evidence of a defendant's guilt, a refusal to give a jury charge on evidence of a defendant's character is not harmless and constitutes reversible error. *Harrison*, at 175, 539 S.E.2d at 76; *State v. Lee-Grigg*, 387 S.C. 310, 317, 692 S.E.2d 895, 898 (2010).

At the trial of *Harrison*, the jury repeatedly asked questions of the court during their deliberations before finding Harrison guilty. *Id.* At 174-5, 539 S.E.2d at 75-6. The Court of Appeals found this information to be proof that the jury struggled in applying the law as charged to the facts of the case, and concluded that the jury may have found differently if they had been told that evidence of Harrison's good character may in and of itself create doubt as to his guilt. *Id.* at 175, 539 S.E.2d at 76. The Court further distinguished the facts in *Harrison* from the facts of *State v. Green* (cited *supra*) in finding that the refusal to charge was prejudicial. *Id.*

In *Green*, the Court held that the refusal to charge the jury on how it could use Green's character evidence was improper but did not prejudice Green. *Green* at 240, 294 S.E.2d at 335. In that case, Green admitted participation in the charged crime and, according to the *Harrison* court, his guilt was "conclusively established." *Harrison* at 175, 539 S.E.2d at 76. In contrast, in *Harrison* the Court concluded from its review of the record that the State did not present "overwhelming evidence" of Harrison's guilt. *Id.* The lack of evidence against Harrison, along with the obvious struggle by the jury to reach a verdict, led the Court of Appeals to conclude that the refusal to charge the jury that evidence of Harrison's character could cast doubt on his guilt was prejudicial and reversible error. *Id.*

The facts of this case mirror those of *Harrison* more than *Green*, meaning the refusal to charge in this case was prejudicial to Appellant. Here, as in *Harrison*, the jury posed multiple questions to the Court during its deliberations, even requesting to have certain portions of witness testimony read back (*see* Trial Tr. vol. 1, 404:17-23 August 22, 2018; Trial Tr. vol. 1, 406:24-407:2, August 22, 2018; Trial Tr. vol. 1, 407:24-5, August 22, 2018). The jury's questions and requests clearly point to a struggle to apply the charged law to the facts in evidence. Additionally, a review of the record shows an underwhelming amount of evidence against Appellant in this case, similar to the facts of *Harrison*. One can reasonably conclude that the jury may have decided differently if it had been charged that evidence of Appellant's good character could be used to cast doubt upon his guilt. For that reason, the Court's refusal to charge the jury on Appellant's requested character charge was prejudicial to Appellant and therefore reversible error. *Harrison*, at 175, 539 S.E.2d at 76; *State v. Lee-Grigg*, 387 S.C. 310, 317, 692 S.E.2d 895, 898 (2010).

II. The Court erred in allowing Investigator Powell to testify regarding statements made in an initial police report made to Officer Smith when such testimony was inadmissible hearsay and improperly corroborated Anthony Gilmore's testimony.

Investigator Powell's hearsay testimony regarding statements Anthony Gilmore made to Officer Smith improperly corroborated Anthony Gilmore's testimony and prejudiced Appellant. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is inadmissible unless it falls under an exception provided by the Rules of Evidence or by other rule or statute. Rule 802, SCRE. When admission of hearsay testimony causes prejudice, it constitutes reversible error. *The State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (citing *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010)). While admitted hearsay evidence that is merely cumulative to other evidence may be harmless (*State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)), it is the cumulative nature of hearsay testimony that serves to improperly corroborate the victim's testimony that makes such testimony prejudicial. *Jennings* at 478, 716 S.E.2d at 94 (citing *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Dawkins v. State*, 346 S.C. 151, 154, 551 S.E.2d 260, 261 (2001)). Where credibility is an ultimate issue in a case, improper corroboration evidence is not harmless. *Jennings* at 479, 716 S.E.2d at 94.

Investigator Powell's testimony about the allegations Anthony Gilmore made in the police report he gave to Officer Smith constituted hearsay testimony because they were made by someone other than the declarant and were offered as proof of the matter asserted. Rule 801(c), SCRE. For this reason, his testimony about the statements Mr. Gilmore made regarding potentially missing jewelry and pointing to the Appellant as a person of interest in the disappearance of certain items was inadmissible under the Rules. Rule 802, SCRE.

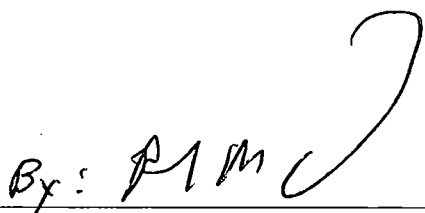
While, under a different set of facts, this improperly admitted hearsay testimony may be harmless error, the identity of the individual who made the out-of-court statements renders this admission prejudicial. Though Ms. Bertha Robinson is the alleged victim in this instance, her deteriorated mental state before, during, and after the time the initial police report was given made her incapable of filing it herself (*see* testimony of Dr. Stone, Trial Tr. vol. 1, 261:3-6 August 21, 2018). Because of her lack of awareness, Ms. Robinson's nephew, Anthony Gilmore, filed the police report on her behalf (Trial Tr. vol. 1, 119:8-24 August 20, 2018), effectively serving as an agent of Appellant's alleged victim.

When hearsay evidence serves to essentially duplicate a victim's testimony, it becomes prejudicial to a defendant because it offers improper corroboration of that testimony. *Jennings* at 478, 716 S.E.2d at 94. With conflicting testimony regarding Appellant's culpability and character, the necessity for the jury to decide the credibility of each witness on its own without undue influence from improper corroboration evidence is paramount and renders Investigator Powell's hearsay testimony harmful to Appellant. *Jennings* at 479, 716 S.E.2d at 94. Mr. Gilmore had an opportunity to testify regarding the statements he made in his police report (*see* testimony of Anthony Gilmore), so allowing Investigator Powell to also testify about those statements (Trial Tr. vol. 1, 72:13-20 August 20, 2018; Trial Tr. vol. 1, 74:12-8 August 20, 2018) served to throw additional weight towards Mr. Gilmore's credibility and prejudice Appellant. Additionally, the fact that the jury specifically requested that Investigator Powell's testimony be read back to them during deliberations and stopped the reading shortly after the portions where he discussed the claims made in the initial police report (Trial Tr. vol. 1, 407:24-408:21, August 22, 2018) proves that the jury found Investigator Powell's testimony persuasive and important and makes his testimony even more improper and damaging to Appellant.

Because Investigator Powell's testimony on statements made in the police report by the alleged victim improperly corroborated Mr. Gilmore's testimony, the Court erred in allowing Investigator Powell's inadmissible hearsay testimony.

CONCLUSION

The Court's refusal of Appellant's request to charge the jury that evidence of his good character could in and of itself cast doubt on his guilt was prejudicial error because it was clear the jury grappled with the application of the charged law to the facts in evidence and may have decided differently with additional charge on the law. Additionally, the Court's allowance of hearsay testimony that improperly corroborated the alleged victim's testimony prejudiced Appellant. For these reasons, this Court should reverse the trial court's rulings and remand the matter for a new trial on all charges.

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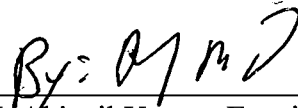
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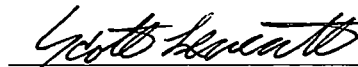
PROOF OF SERVICE

I certify that I have served Initial Brief of Appellant John Fitzgerald Anderson on Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant has been served upon John Fitzgerald Anderson, #377550, at Abbeville County Prison, 59 Old Calhoun Falls Road, Abbeville, SC 29630, this 3rd day of May, 2019.

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