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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON SCOTT MORTON,

APPELLANT

APPELLATE CASE NO. 2015-002641

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in overruling appellant's objection to the solicitor's closing argument that it was defense counsel's "job to create reasonable doubt in your minds," which improperly shifted the burden of proof to the defendant?

STATEMENT OF THE CASE

On September 8, 2015, the Chester County grand jury indicted appellant for safecracking and receiving stolen goods in the amount of $2,000.00 or less, third offense. R. 295-98. On December 15, 2015, appellant was tried before the Honorable Brian M. Gibbons and a jury. R. 1. Julie Hall represented the State. R. 1. Devon Nielson represented appellant. R. 1. The jury convicted appellant. R. 284, ll. 8 – 23. Judge Gibbons sentenced appellant to concurrent terms of twenty years' imprisonment for safecracking and ten years' imprisonment for receiving stolen goods. R. 292, l. 21 – 293, l. 4. This appeal follows.

ARGUMENT

The trial court erred in overruling appellant's objection to the solicitor's closing argument that it was defense counsel's "job to create reasonable doubt in your minds," which improperly shifted the burden of proof to the defendant.

Appellant was charged with safecracking and receiving stolen goods that related to two burglaries (for which he was not charged). Amberly Lee Ann Freeman testified that one of her residences was "ransacked." R. 51, ll. 19 – 25. She noticed a television and a microwave oven were missing. R. 51, ll. 19 – 25. She used the television as collateral for a loan. R. 54, ll. 2 – 4.

Mary Talbert testified that the house she still owned, but no longer lived in, was robbed. R. 89, ll. 2 – 10. A safe was stolen. R. 90, ll. 4 – 6. The safe contained baseball cards, "change, and old money." R. 90, ll. 7 – 9. Two other safes were gone. R. 90, ll. 10 – 22. A scooter was taken. R. 92, ll. 11 – 20. Dale Earnhardt memorabilia was missing. R. 92, l. 21 – 93, l. 21. Firearms were stolen. R. 93, ll. 11 – 13.

Natasha Hatcher ("Hatcher") moved into appellant's house. R. 105, l. 15 – 106, l. 12. Hatcher was tangentially related to appellant's wife and had grown up with her. R. 101, l. 19 – 103, l. 6. Hatcher also grew up with Linsey Yarborough ("Yarborough"), appellant's brother-in-law. R. 102, l. 12 – 103, l. 6.

About a week after Hatcher moved into appellant's house, she claimed that one night Yarborough arrived carrying a television. R. 107, l. 11 – 108, l. 9. Appellant entered with a white microwave oven. R. 108, ll. 2 – 9. Several nights later, Yarborough and his girlfriend came to the house with "a pocketful of coins." R. 110, ll. 6 – 15. Hatcher heard appellant ask where they got the coins and if there was another safe in the house. R. 111, ll. 15 – 21.

Appellant, his wife, and Yarborough then left and returned several more times. R. 112, l. 15 – 113, l. 24. Hatcher claimed they returned from these trips with Dale Earnhardt memorabilia, a scooter, baseball cards, and a white safe. R. 112, l. 15 – 113, l. 24. When they began trying to open the safe with tools, Hatcher went to bed. R. 113, ll. 14 – 24.

Hatcher did not see them open the safe. R. 113, l. 14 – 114, l. 10. She claimed that from her bedroom, she could tell by the sound that the safe door opened with a "pop" and heard it hit the floor. R. 113, ll. 14 – 19. The next morning she saw the safe opened, but admitted she had no idea what was taken out of it, if anything. R. 114, ll. 4 – 10. A police officer found a safe behind the house "in a pile of junk." R. 146, ll. 6 – 17. The officer also determined that the television brought into the house by Yarborough had the same serial number as the television used by Freeman for collateral. R. 153, ll. 1 – 4.

Hatcher's credibility was significantly undermined on cross-examination. R. 125, l. 21 – 128, l. 14. After calling the police, Hatcher wrote a statement. R. 125, l. 21 – 126, l. 2. She claimed she gave this statement the morning after the safe was brought to the house. R. 131, ll. 14 – 15. Hatcher insisted the date the safe was brought to the house was April 21, but her statement was dated May 1. R. 125, ll. 21 – 24. R. 132, ll. 8 – 9. Her account in the statement differed significantly from her testimony in that nowhere in the statement did she say appellant and the others left the house and returned multiple times. R. 126, l. 16 – 127, l. 21.

Yarborough testified for the State and his testimony also contradicted Hatcher's story. R. 182, l. 22 – 189, l. 2. Yarborough bought the television from a man for ten dollars and sold it to appellant. R. 184, l. 9 – 185, l. 2. The television was cheap because it lacked a power cord. R. 184, ll. 16 – 19. Yarborough did not believe the television was stolen and never told appellant that it was stolen. R. 195, ll. 9 – 13.

Several witnesses testified for appellant. Appellant's son testified that appellant was not involved in anything regarding the safe or the stolen goods because appellant was in prison when these events occurred. R. 207, ll. 15 – 22. Appellant's daughter testified that he could not have had anything to do with the alleged crimes because she remembered getting baseball cards from Yarborough before appellant got out of prison. R. 213, l. 10 – 215, l. 4. Appellant's grandmother corroborated this testimony. R. 216, l. 14 – 218, l. 12.

During her closing argument, referencing defense counsel Nielson, the solicitor told the jury, "And its Mr. Nielson's job to create reasonable doubt in your minds. I ask you to do is not to get lost in the red herrings—" R. 265, ll. 5 – 7. Appellant immediately objected. R. 265, ll. 8 – 10. Defense counsel argued, "I believe that's burden shifting. Her saying I have a job of creating reasonable doubt I believe is burden shifting." R. 265, ll. 8 – 10. The trial judge disagreed, ruling, "The statement is on the record. You can go on, Ms. Hall." R. 265, ll. 11 – 13.

The trial court committed constitutional error in allowing the solicitor's burden-shifting argument to stand. The Due Process Clause requires the proof of every fact necessary to convict a defendant to meet the beyond-a-reasonable-doubt standard. U.S. Const. amends. V, XIV. In re Winship, 397 U.S. 358 (1970). "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. at 364. The prosecution bears this burden of proof. Mullaney v. Wilbur, 421 U.S. 684, 703 (1975); Tot v. United States, 319 U.S. 463, 469-70 (1943).

The solicitor's improper argument violated this bedrock principle of constitutional law. Appellant has no "job" to create reasonable doubt in the minds of the jury. A criminal defendant may stand silent throughout the trial. U.S. Const. amends, V, XIV. Doyle v. Ohio, 426 U.S. 610 (1976). It is always the State's "job" to overcome the presumption of innocence and dispel reasonable doubts. The solicitor's argument was improper and the trial court erred in not sustaining appellant's objection.

The solicitor's flagrantly erroneous argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This determination requires the Court to look to "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Bennett v. Angelone, 92 F.3d 1336, 1345–46 (4th Cir. 1996) (internal quotation marks omitted). Appellant has met this standard. The solicitor's argument was allowed to stand. The trial court did not strike the solicitor's argument from the record. Because it found no error, the court did not give a limiting instruction, further prejudicing appellant.

The error in this cannot be harmless because the trial court's jury charges included improper instructions to find the truth that further diluted the State's burden of proof. See State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012); State v. Aleksy, 343 S.C. 20, 538 S.E.2d 248 (2000) (holding instructing the jury to "seek the truth" is improper). See also State v. Beaty, ___ S.C. ___, ___ S.E.2d ___, 2016 WL 2474479 (Dec. 29, 2016) rehearing granted March 24, 2017. Under Daniels, Aleksy, and Beaty, instructing juries to search for the truth dilutes the State's burden of proof.

In Daniels, the Court held it was error for the trial judge to tell the jury their verdict "would represent 'truth and justice for all parties.'" Daniels at 255, 737 S.E.2d at 475. In Aleksy and

Beaty, the Court condemned language telling juries to seek the truth, to search for the truth, or to find true facts. Aleksy at 26-27, 538 S.E.2d at 251 ("Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'"); Beaty at *2 ("[W]e agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict.").

In appellant's case, Judge Gibbons' instructions violated all of these principles, magnifying the error in the solicitor's burden-shifiting argument. The trial court told the jury in its opening charge, "This trial is **a search for the truth** in an effort to make sure that **justice is done between the parties** before the Court, both the state of South Carolina and the defendant." R. 36, ll. 13 – 16 (emphasis added). This instruction contains the "search for the truth" error of Aleksy and the "justice for all parties" error of Daniels. The trial court continued, "Now, **searching for the truth** and making sure justice is done can sometimes be a slow, deliberate and repetitive process, the opposite of what you may have seen on TV, in movies or read in books." R. 36, ll. 17 – 20 (emphasis added). This instruction on searching for the truth was also erroneous.

The court's erroneous instructions were repeated in its final jury charge. Judge Gibbons said, "As jurors, then, it is your duty to determine the effect, the value, the weight, **and the truth of the evidence** which has been presented during this trial." R. 269, ll. 16 – 19 (emphasis added). When he told the jury how to deliberate, he instructed them, "**Your sole duty** is to sort through the information you receive **and find the truth of the evidence** presented in this courtroom." R. 279, ll. 14 – 16 (emphasis added). The court added:

> It's your duty then in your deliberations **to determine the truth of this case** giving the defendant the benefit of every reasonable doubt on these charges. And **from the facts which you determine to be true**, you take and apply the law which I have just given you **to arrive at your verdict which speaks the truth.**

R. 280, ll. 3 – 9 (emphasis added). These comments about speaking the truth and the truth of the case were at the very end of the court's charge, which further compounded the error as they were among the last charges the jury heard.

The proof in this case was far from conclusive. The State's witnesses lacked credibility. At the directed verdict stage, Judge Gibbons noted that the case against appellant was circumstantial. R. 199, ll. 11 – 13. The State had last argument and its comment that the defendant's job was to create reasonable doubt improperly shifted the State's burden. The trial judge's instructions did not cure the error because he repeatedly, and erroneously, told the jury their duty was to seek the truth, not to hold the State to its burden of proof. Given the lack of overwhelming evidence and the trial judge's improper jury instructions, the error in this case cannot be harmless. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.

David Alexander
Appellate Defender

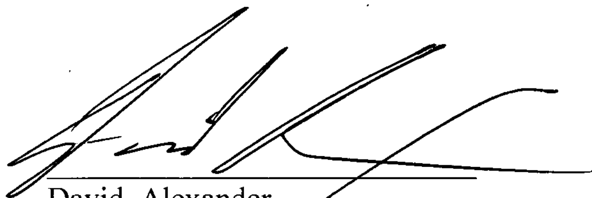
ATTORNEY FOR APPELLANT

This 7th day of December, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this 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 Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 7, 2017.



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