

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenwood County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2018-001395

THE STATE,

Respondent,

vs.

DEMORRIS OCTSWAVIOUS ANDREWS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge, who otherwise presented jury instructions that correctly conveyed the relevant and applicable South Carolina law to the jury, properly declined to present a jury instruction indicating the testimony of an informant must be examined by the jury with greater care than the testimony of other witnesses because such an instruction would have constituted an improper, confusing, misleading, and unconstitutional comment on the facts in direct violation of the mandates of the South Carolina Constitution.

STATEMENT OF THE CASE

In November of 2016, Appellant Demorris Octswavious Andrews was arrested following an investigation into a murder that had occurred a few days earlier. In January of 2018, the Greenwood County Grand Jury indicted Appellant for murder, armed robbery, and possession of a weapon during the commission of a violent crime. On July 16, 2018, a jury trial was commenced in the Greenwood County Court of General Sessions with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. At the conclusion of the five-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of thirty-five years for murder, thirty years for armed robbery, and five years for possession of a weapon during the commission of a violent crime. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

Just after 5:00 p.m. on October 25, 2016, an individual named Nicole Reid called 911 and reported a shooting had occurred at an apartment located in Greenwood, South Carolina. (Tr. pp. 75-76; p. 122; p. 213; pp. 215-216; p. 218; p. 237; p. 241; pp. 524-525). In response to the call, law enforcement officers were quickly dispatched to the scene, and Officer Martin Harralson of the Greenwood Police Department arrived within just a few minutes. (Tr. p. 76; pp. 248-249; p. 260). Upon arriving, Officer Harralson approached the apartment identified in the call and noticed blood both on the apartment's door and pooling on the ground by the door. (Tr. p. 249). He then looked inside and observed a man on the ground up against the door just inside the apartment. (Tr. pp. 249-250; pp. 262-263). At that point, Officer Harralson pushed his way in and found fifty-seven-year-old Barry Warren ("Victim") alone inside the apartment suffering from a gunshot wound to the neck and lifelessly lying in a large pool of blood.¹ (Tr. pp. 250-251; pp. 263-264; pp. 498-501). By that time, Victim was already deceased from a close-range gunshot wound consistent with having been inflicted by an "execution" shot that had struck his carotid artery and caused him to rapidly bleed to death. (Tr. p. 263; pp. 498-502; p. 504; pp. 506-507). Officer Harralson then checked the rest of the apartment for possible threats, found a blood trail leading from the bedroom to Victim's body, and secured the scene while he waited for investigators to arrive. (Tr. p. 250; p. 255; p. 261; p. 271).

Shortly after that, investigators from the Greenwood Police Department arrived at the scene and began trying to ascertain what had transpired. (Tr. pp. 305-306; pp. 508-511). In doing so, the investigators spoke with a number of people gathered outside Victim's apartment, including an individual named Keith Jackson. (Tr. pp. 113-114; pp. 306-307; p. 331). Through

¹ In addition to the gunshot wound to his neck, Victim also had sustained a gunshot wound to one of his hands. (Tr. pp. 498-499).

their efforts, the investigators were able to identify Appellant Demorris Octswavious Andrews as a potential suspect based on the limited information they obtained. (Tr. pp. 113-114; p. 309; p. 320; p. 331; p. 513; pp. 521-522).

Several days later, Appellant was eventually tracked down, taken into custody, and interviewed by Detective Joseph Collins of the Greenwood Police Department. (Tr. p. 305; p. 309; p. 315). During the interview, Appellant admitted he had been at the scene of the crime at several unspecified points in time on the date of the shooting.² (Tr. p. 372; pp. 380-381). However, he denied having any involvement with Victim's murder. (Tr. p. 365; p. 370). Furthermore, he claimed to have been at the home of a friend named Zykerious Searles on that same date, and he maintained he played video games and smoked marijuana with Searles while at that location. (Tr. pp. 322-323).

Following the interview, investigators made contact with Searles in an attempt to verify Appellant's asserted alibi. (Tr. pp. 455-456; p. 480; p. 522). Critically though, Searles did not corroborate that alibi. (Tr. pp. 389-392; pp. 455-456; p. 480). Instead, he reported Appellant approached him around the time of the shooting at a location a short distance away from Victim's apartment and repeatedly asked for a ride to the other side of town, which Searles ultimately provided.³ (Tr. pp. 389-393; pp. 414-416; p. 419; pp. 455-456). Furthermore, Searles

² Based on Appellant's behavior during the interview, Detective Collins thought Appellant seemed reluctant and hesitant. (Tr. pp. 320-321; pp. 324-325; p. 356). Detective Collins's suspicions were further raised when Appellant provided totally inconsistent statements about whether the clothing he was wearing at the time of the interview was the same clothing he had been wearing at the time of Victim's death. (Tr. pp. 321-322).

³ Notably, the location where Appellant requested a ride from Searles could be reached from Victim's apartment on foot in no more than six minutes while walking at a leisurely pace. (Tr. p. 79; p. 389; p. 524).

denied smoking marijuana or playing video games with Appellant on that date. (Tr. p. 392; pp. 455-456).

In addition to speaking to Searles, the investigators also again attempted to find out from Jackson if he had any information about what had occurred on the date of the incident. (Tr. pp. 114-115; pp. 522-523). In doing so, they showed a photograph of Victim's body to Jackson, and, upon seeing it, Jackson finally decided to cooperate and admitted he saw Appellant run out of and flee from Victim's apartment on the date of the shooting after he heard popping sounds that sounded like firecrackers exploding. (Tr. p. 112; pp. 114-115; p. 117; p. 119; p. 163; p. 165; pp. 522-523).

Based on the information provided by Searles and Jackson, Investigator Matt Blackwell of the Greenwood Police Department spoke with Appellant about the incident one more time. (Tr. pp. 455-456; pp. 522-523). During the interview, Appellant once again denied killing Victim, and he continued to insist he played video games and smoked marijuana with Searles on the date of the incident despite Searles's assertions to the contrary. (Tr. pp. 455-456; p. 463; p. 474; p. 480). Beyond that, Appellant also bizarrely requested a photograph of Victim's body while indicating he wanted one to hang up on the wall of his room. (Tr. p. 456).

Ultimately, based on the information uncovered in the investigation, Appellant was arrested for Victim's murder. (Tr. p. 523). Following Appellant's arrest, an individual named Dwayne Sanders, who was incarcerated at the jail along with Appellant, initiated contact with Sergeant Blake Moore of the Greenwood Police Department and reported he had information about Appellant's case. (Tr. pp. 423-424; p. 508; p. 541). In response, Sergeant Moore spoke with Sanders, and Sanders—without requesting help or receiving any promises from the officer—informed him Appellant had confessed to robbing and killing Victim during their

conversations at the jail. (Tr. pp. 529-531; p. 539). In recounting Appellant's jailhouse confession, Sanders reported several details that had not been publicly disclosed, which Sergeant Moore considered to be a significant detail. (Tr. pp. 530-531).

Subsequently, Appellant was indicted for murder, armed robbery, and possession of a weapon during the commission of a violent crime, and he proceeded forward to trial. (Tr. p. 8; Indictments). During the course of trial, the officers and other individuals involved in the investigation into Victim's death testified about the information they uncovered that led to Appellant's arrest for the killing, several witnesses who were near the scene at the time of the shooting recounted their recollections of what had occurred, Searles and another individual provided testimony refuting Appellant's asserted alibi, Jackson confirmed he saw Appellant flee from Victim's apartment just before Victim came to the door and exclaimed he had been shot, and Sanders testified about the incriminating admissions Appellant made to him at the jail. (Tr. pp. 107-165; pp. 181-208; pp. 211-261; pp. 268-292; 305-381; pp. 388-397; pp. 413-419; pp. 422-448; pp. 451-480; pp. 508-558). Following the presentation of all that evidence and testimony, the jury convicted Appellant as indicted. (Tr. p. 674). The trial judge then sentenced Appellant to an aggregate thirty-five-year term of imprisonment for his crimes. (Tr. p. 685).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) (“[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant’s due process rights have been violated.”). When reviewing a jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) (“A jury charge which is substantially correct and covers the law does not require reversal.”); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) (“A trial court’s decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.”). Moreover, an appellate court will only reverse a trial judge’s decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (“An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.”); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) (“[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.”).

ARGUMENT

The trial judge, who otherwise presented jury instructions that correctly conveyed the relevant and applicable South Carolina law to the jury, properly declined to present a jury instruction indicating the testimony of an informant must be examined by the jury with greater care than the testimony of other witnesses because such an instruction would have constituted an improper, confusing, misleading, and unconstitutional comment on the facts in direct violation of the mandates of the South Carolina Constitution.

Appellant contends the trial judge abused his discretion by declining to specifically instruct the jury the testimony of an informant had to be examined with greater care than the testimony of any other witness. In support of that contention, Appellant—without explaining how the requested instruction would not have constituted an improper and unconstitutional comment on the facts—maintains such a jury instruction was supported by the evidence presented, has been recognized as appropriate in several federal appellate court decisions, and was necessary under the circumstances due to the purported insufficiency of the general witness credibility instruction presented. Contrary to Appellant’s contention, the trial judge, who otherwise completely and accurately instructed the jury on all the applicable law, correctly declined to present a jury instruction singling out and requiring greater scrutiny of the testimony of an informant because such an instruction would have constituted an impermissible comment on the facts. As a result, the trial judge committed no conceivable error by declining to present an instruction to the jury that would have violated the mandates of the South Carolina Constitution. Appellant’s convictions should be affirmed.

RELEVANT FACTS

During the course of the evidentiary phase of trial, Sanders, who had relayed incriminating information provided to him by Appellant to the police, reluctantly testified as a witness for the prosecution. (Tr. pp. 422-423). Through his testimony, Sanders indicated he was arrested for burglary in March of 2017, was housed in the same unit as Appellant at the jail, and

spoke with Appellant while incarcerated. (Tr. pp. 423-424). While speaking with Appellant, Sanders stated Appellant asserted he decided to rob Victim along with an individual named Jason Logan, Appellant reported he killed Victim by shooting him two or three times, Appellant indicated he stole a bag containing drugs and money before fleeing from the scene, and Appellant alleged he obtained a ride to the other side of town after the shooting.⁴ (Tr. pp. 423-430; p. 440; p. 447). After Appellant made those statements to him, Sanders indicated he contacted the police and candidly informed them of what Appellant had told him. (Tr. pp. 423-424; p. 429). Furthermore, Sanders acknowledged he was potentially facing a life sentence for burglary prior to that charge being dismissed. (Tr. pp. 431-432). However, he asserted the burglary charge was dropped at his alleged victim's request, he came forward solely because he was upset Victim had been killed, and he did not report Appellant's confession in order to get his charge dismissed. (Tr. pp. 433-434; p. 437; pp. 445-446).

At the conclusion of the evidentiary phase of trial, the trial judge discussed his intended jury instructions with the parties, and defense counsel asked the trial judge to instruct the jury the testimony of an informant must be examined and weighed with greater care than the testimony of other witnesses while citing to United States v. Luck, 611 F.3d 183 (4th Cir. 2010), as support for his request. (Tr. pp. 564-565). In response, the solicitor contended the trial judge's general instructions in regard to evaluating witness credibility would be sufficient while defense counsel's requested charge might constitute an unconstitutional comment on the facts. (Tr. pp. 565-567). Upon considering the matter, the trial judge determined the subject of the requested charge was appropriate for jury argument as opposed to for a jury instruction from the court and, as a result, declined to give the requested charge. (Tr. pp. 570-571). Defense counsel then

⁴ During their investigation, the police discovered and confirmed Logan was not present at the scene of the crime at the time Victim was murdered. (Tr. p. 345; p. 522; p. 548).

asserted he fully intended to make such an argument to the jury during his closing argument. (Tr. p. 571).

Thereafter, the parties presented their closing arguments to the jury. (Tr. pp. 577-643). Consistent with his assertion to the trial judge, defense counsel used his closing argument to repeatedly attack the believability and credibility of the State's witnesses, including Sanders. (Tr. p. 571; p. 604; p. 606; pp. 612-613; pp. 615-616; pp. 628-631; p. 643). In doing so, defense counsel characterized Sanders as a "snitch" with a horrible criminal record, asserted Sanders concocted his story due to the fact he was potentially facing life imprisonment for burglary, claimed Sanders was lying to avoid such a sentence, and contended Sanders was "[d]espicable." (Tr. pp. 628-631; p. 643). Furthermore, defense counsel expressed he was personally ashamed the police had fallen for Sanders's "nonsense" and maintained anyone who gave credence to Sanders's testimony was "nuts." (Tr. p. 630; p. 643).

Following the closing arguments, the trial judge instructed the jury on the applicable law. (Tr. pp. 645-661). Through his jury instructions, the trial judge affirmed the State had the burden of proving Appellant's guilt for each of the charged offenses beyond a reasonable doubt, thoroughly defined reasonable doubt for the jury, explained Appellant was presumed to be innocent, instructed the jurors they were the sole judges of the facts, defined the elements of the charged offenses, and indicated the jury's verdict must be unanimous. (Tr. pp. 647-649; pp. 654-657; p. 659). Additionally, the trial judge directly advised the jurors on evaluating the credibility of the witnesses, noted they could consider any inconsistent statements the witnesses had made in evaluating their testimony, and indicated they could consider a witness's past criminal record

in evaluating the believability of the witness's testimony.^{5 6} (Tr. pp. 650-652). Furthermore, consistent with his earlier ruling, the trial judge did not present any instructions specifically addressing the testimony of an informant or suggesting such testimony required greater scrutiny than the testimony of any other witness.⁷ (Tr. pp. 645-661).

Subsequently, at the conclusion of trial, the jury convicted Appellant of murder, armed robbery, and possession of a weapon during the commission of a violent crime. (Tr. p. 674). The trial judge then sentenced Appellant to an aggregate thirty-five-year term of imprisonment for his convictions. (Tr. p. 685).

ANALYSIS

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

To carry out that purpose, a trial judge is required to charge the jury on the current and correct

⁵ Specifically, regarding the evaluation of witness credibility, the trial judge instructed the jury as follows: "[N]ecessarily you must determine the credibility of witnesses who have testified, and again, credibility simply means believability. It becomes your duty as jurors to analyze and evaluate the evidence and determine which evidence convinces you of its truth. In determining the believability of witnesses who have testified you can 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 testimony of a witness in [its] entirety or reject it in [its] entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice or other motive in this case, and you may also consider the appearance and manner of a witness while on the witness stand." (Tr. pp. 650-651).

⁶ Notably, before the evidentiary phase of trial even got underway, the trial judge had already explained to the jurors they would have to determine the believability of the witnesses who testified during the trial and could consider factors such interest, bias, and prejudice in making that determination. (Tr. pp. 56-57).

⁷ At the end of the jury instructions, the trial judge specifically noted defense counsel had objected to his failure to present the requested instruction regarding informant credibility, and defense counsel indicated he did not have any objections to the jury instructions as presented beyond that previously-raised objection. (Tr. p. 661).

South Carolina law applicable to the case based on the evidence presented. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003); see State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented). In doing so, the trial judge is only required to instruct the jury on the substance of the law and does *not* have to use any particular verbiage. State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). However, a trial judge in a South Carolina state court—unlike a trial judge in a federal court—is constitutionally prohibited from making any comments that could be construed as offering an opinion on the facts of the case. See S.C. Const. art. V, § 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”); compare Quercia v. United States, 289 U.S. 466, 469 (1933) (“In a trial by jury *in a federal court*, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.” (emphasis added and citations omitted)), with State v. Smith, 288 S.C. 329, 331, 342 S.E.2d 600, 601 (1986) (“The trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of the witnesses, the guilt of the accused or as to controverted facts.”). Importantly, so long as the trial judge’s jury instructions are substantially correct, adequately cover the applicable law, and do not run afoul of our state’s constitutional prohibition against comments on the facts, those instructions are considered to be

appropriate and not erroneous. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) (“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.”); see also State v. Deas, 202 S.C. 9, 14, 23 S.E.2d 820, 822 (1943) (“Of course, under our Constitution and practice the jury are the sole judges of the facts in criminal trials and it is error for the Judge to communicate his views of them to the jury.”).

In the case sub judice, the trial judge, through his jury instructions, identified the correct burden of proof for the jury, accurately explained the burden of proof rested solely on the State, thoroughly defined the concept of reasonable doubt, and correctly conveyed Appellant was presumed to be innocent. Additionally, the trial judge directly instructed the jurors they were the sole judges of the facts during the trial. Furthermore, the trial judge thoroughly advised the jurors on evaluating the credibility of the witnesses, including by explaining they could consider a witness’s interest, bias, or motive when deciding whether to accept the witness’s testimony. Viewing those jury instructions together as a whole, the trial judge’s jury instructions correctly conveyed the relevant and applicable South Carolina law to the jurors and afforded the jurors the appropriate test for resolving the issues raised by the evidence in Appellant’s case. See Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 (“A jury charge is correct if it contains the correct definition of the law when read as a whole.”); see also Burkhart, 350 S.C. at 263, 565 S.E.2d at 304 (“Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.”). As a result, the trial judge’s jury instructions were sufficient and proper. See Rye, 375 S.C. at 123, 651 S.E.2d at 323 (“A trial court’s decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.”); see also State v. Rabon, 275 S.C. 459, 462, 272

S.E.2d 634, 636 (1980) (“The Constitution of this State requires that the trial judge declare the law, but no particular verbiage is necessary. It is sufficient if the precepts stated to the jury adequately cover that law which is applicable.”).

In arguing to the contrary, Appellant—while relying upon several federal appellate court decisions—contends the trial judge’s jury instructions were somehow not sufficient because they did not contain specific verbiage informing the jurors the testimony of an informant had to be examined with greater care than the testimony of any other witness. See United States v. Luck, 611 F.3d 183, 186-187 (4th Cir. 2010) (holding—in a sharply-divided decision—trial counsel was constitutionally ineffective for failing to request a jury instruction indicating the testimony of a paid informant must be examined and weighed with greater care than the testimony of a regular witness in light of the fact *paid* informants testified during Luck’s trial and their testimony was not corroborated by other evidence); see also Quercia, 289 U.S. at 470 (recognizing a federal trial judge—pursuant to federal law—has the privilege “to comment on the facts” so long as the judge does not do so in an arbitrary or uncontrolled manner). Thus, in essence, Appellant is arguing the trial judge reversibly erred by not stepping into the role of defense counsel and persuading the jurors to treat the testimony of just one of the witnesses who testified during trial as inherently more suspect *as a matter of law* than the testimony of any of the other witnesses. See United States v. Paradies, 98 F.3d 1266, 1287 (11th Cir. 1996) (holding the trial judge properly rejected a proposed jury instruction that was partisan in nature and would have placed the defense’s “desired factual findings into the mouth of the court” (citations and internal quotations omitted)); United States v. Barham, 595 F.2d 231, 245 (5th Cir. 1979) (finding the trial judge correctly rejected a requested jury instruction proposed by defense counsel because the instruction was “more in the nature of a jury argument than a charge” and

noting such an argument “was for defense counsel to make, not the Judge”). Importantly though, the trial judge would have erred had he given such a jury instruction because it would have constituted an impermissible comment on the facts that would have violated the South Carolina Constitution’s bar on judges in our state commenting to the jury on the facts of a case. See S.C. Const. art. V, § 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”); see also State v. Hartley, 307 S.C. 239, 240-241, 414 S.E.2d 182, 183-184 (Ct. App. 1992) (rejecting a contention the trial judge erred by refusing to give a requested charge where that requested charge would have constituted an impermissible comment on the facts).

Significantly, in State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976), our Supreme Court addressed an appellate challenge to a trial judge’s refusal to present a jury instruction indicating the testimony of a co-defendant “should be carefully scrutinized” in a case in which a co-defendant testified on behalf of the prosecution. Upon considering the matter, the Supreme Court determined the trial judge’s general witness credibility instruction, which advised the jurors it was their duty to pass upon the credibility of the witness testimony and which alerted the jurors they could reject any part of the testimony if they found reason for doing so, was adequate such that the trial judge did not err by declining to present the specific co-defendant jury instruction requested by Collins. Id. at 573, 225 S.E.2d at 193. Furthermore, the Supreme Court instructed: “Any further instruction on [that] point might have invaded the province of the jury to draw inferences from the evidence.” Id. Ultimately though, the Supreme Court reversed Collins’s armed robbery conviction based on other unrelated errors with the trial judge’s jury instructions. Id. at 570-571, 225 S.E.2d at 191-192.

More recently, in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), our Supreme Court addressed the propriety of a jury instruction that—similar to the instruction requested in

Appellant’s case—directly commented on the potential strength of certain evidence presented. Specifically, the trial judge in Cheeks’s case—over objection—instructed the jury actual knowledge of the presence of crack cocaine is strong evidence of a defendant’s intent to control its disposition or use. Id. at 327, 737 S.E.2d at 484. After analyzing that particular jury instruction on appeal, the Supreme Court found it to be violative of the constitutional prohibition on comments on the fact because the use of the word “strong” necessarily constituted a comment on the weight of the evidence. Id. at 329, 737 S.E.2d at 484. Based on that finding, the Supreme Court instructed “the bench to no longer use the ‘strong evidence’ charge, which is derived from a statement on the sufficiency of the evidence [from an appellate decision].” Id. Furthermore, the Supreme Court noted:

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.

Id. at 328, 737 S.E.2d at 484. Ultimately though, the Supreme Court affirmed Cheeks’s convictions after finding he was not prejudiced by the giving of the improper instruction based on the overwhelming evidence of guilt presented in his case. Id. at 329, 737 S.E.2d at 484.

Subsequent to the decision in Cheeks, our Supreme Court reiterated the significance of the South Carolina Constitution’s prohibition against comments on the facts in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). In that case, the trial judge instructed the jury on the statutory non-corroboration language from Section 16-3-657 of the South Carolina Code of Laws simply by informing the jurors the testimony of a victim in a sexual assault case need not be corroborated, which was an unquestionably accurate statement of law. Id. at 497, 787 S.E.2d at 482; see S.C. Code Ann. § 16-3-657 (“The testimony of the victim need not be corroborated in

prosecutions under Sections 16-3-652 through 16-3-658.”). On appeal, the Supreme Court found that particular jury instruction to be unconstitutionally erroneous and reversed. Stukes, 416 S.C. at 496, 787 S.E.2d at 481. In reversing, the Supreme Court concluded a jury instruction on the statutory language of Section 16-3-657 was confusing and “violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case.” Id. at 499, 787 S.E.2d at 483. Specifically, the Supreme Court explained:

[I]t is not within the province of the court to express an opinion to the jury on its view of the facts. By addressing the veracity of a victim’s testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak. Moreover, it is inescapable that this charge confused the jury. Specifying this qualification applies to one witness creates the inference the same is not true for the others.

Id. at 499-500, 787 S.E.2d at 483 (footnote omitted).

Like the jury instructions found to be unnecessary and improper in Collins, Cheeks, and Stukes, the informant instruction requested by defense counsel would have singled out just one portion of the evidence presented during the trial—the testimony of Sanders, who came forward to the police and informed on Appellant—and classified that singled-out evidence as being inherently suspect as a matter of law by pointedly stating it required greater scrutiny than the testimony of any other witness. Significantly, by singling out that evidence and expressing an opinion about its purported need for greater scrutiny, such a jury instruction naturally could have been—and logically would have been—construed as expressing the trial judge’s opinion on that specific evidence to the jury and, as a result, would have constituted an impermissible and unconstitutional comment on the facts. See Collins, 266 S.C. at 573, 225 S.E.2d at 193 (explaining a jury instruction indicating the testimony of a co-defendant should be carefully

scrutinized “might have invaded the province of the jury to draw inferences from the evidence”); cf. Stukes, 416 S.C. at 499, 787 S.E.2d at 483 (“By addressing the veracity of a victim’s testimony in its instruction, the trial court emphasizes the weight of that evidence in the eyes of the jury.”); Cheeks, 401 S.C. at 328-329, 737 S.E.2d at 484 (“[C]harging 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.”); Hartley, 307 S.C. at 241, 414 S.E.2d at 184 (“[T]he trial judge was requested, in effect, to charge that particular evidence (*i.e.*, evidence of lack of motive) is entitled to receive weight or consideration. The requested charge is clearly a charge on a fact that the jury was to determine.”). Likewise, by suggesting an informant’s testimony required greater scrutiny than the testimony of any other witness, the requested instruction would have improperly encroached upon the jury’s exclusive role of determining and resolving the credibility of the witnesses. See State v. Needs, 333 S.C. 134, 144, 508 S.E.2d 857, 862 (1998) (“[T]he resolution of the credibility of the witness is within the province of the jury.”); State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977) (instructing it is “axiomatic” the credibility of witness testimony—including testimony from accomplices testifying on behalf of the prosecution—is a matter for the jury to decide); see also United States v. Scheffer, 523 U.S. 303, 313 (1998) (“A fundamental premise of our criminal trial system is that the *jury* is the lie detector.” (internal quotations omitted)); cf. State v. Green, 412 S.C. 65, 77, 770 S.E.2d 424, 431 (Ct. App. 2015) (“Green’s request to charge the jury that identification by a person of a different race may be less reliable than identification by a person of the same race would have been improper because it would have asked the jury to place less weight on Victim’s testimony because he was of a different race than Green.” (internal quotations and brackets omitted)).

Moreover, such an instruction had a high potential to confuse the jury based on the fact it would have addressed just one type of witness testimony alone, which could have potentially misled the jurors into believing the testimony of the other witnesses who testified during the trial did not necessarily require the same level of careful consideration or scrutiny in order to be accepted and believed. See State v. Pauling, 264 S.C. 275, 278, 214 S.E.2d 326, 327 (1975) (“It is . . . well settled that the weight and sufficiency of the evidence is for the jury. It is the province of that body to weigh the evidence and decide on its sufficiency in reaching a verdict.”); State v. Battle, 408 S.C. 109, 119, 757 S.E.2d 737, 742 (Ct. App. 2014) (“The task of determining the weight of the evidence lies within the exclusive province of the jury.”); cf. Stukes, 416 S.C. at 499, 787 S.E.2d at 483 (“Specifying this qualification applies to one witness creates the inference the same is not true for others.”); State v. Cheeks, 408 S.C. 198, 200, 758 S.E.2d 715, 716 (2014) (finding a “strong evidence” jury instruction to be improper where it “unduly emphasized the evidence” and “deprived the jury of its prerogative to draw inferences and to weigh evidence”). Accordingly, the requested charge was simply not constitutionally permissible or proper under South Carolina law. See S.C. Const. art. V, § 21 (prohibiting trial judges from instructing the jury on matters of fact).

For all those reasons, the trial judge, who otherwise presented instructions that fully provided the jurors with all the relevant law needed for them to be able to properly decide Appellant’s case, correctly declined to present a jury instruction that would have improperly singled out the testimony of just one of the witnesses who testified during trial and commented on the potential weight of that testimony since such an instruction would have constituted a confusing, problematic, impermissible, and unconstitutional comment on the facts. See State v. Thorne, 237 S.C. 248, 251, 116 S.E.2d 854, 855 (1960) (“The Judge must be careful to avoid

expressing, or even intimating, any opinion, as to the facts, and if he does so, whether intentionally or unintentionally, a new trial must be granted. Under our Constitution the jury is the exclusive judge of the facts, and the true meaning and real object is that the jury must be left to form its own judgment, unbiased by any expressions, or even intimations, of opinion by the Judge.”); see also Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 (recognizing a jury charge is correct if it correctly defines the relevant and applicable law when read as a whole); cf. Wright, 269 S.C. at 417-418, 237 S.E.2d at 766 (finding the trial judge did not err by declining to present a special cautionary instruction about testimony from accomplices in light of the fact the trial judge presented a general instruction on witness credibility and correctly instructed the jury to “weigh the credibility of [the accomplices’] testimony as they would that of the other witnesses”); State v. Edwards, 127 S.C. 116, ___, 120 S.E. 490, 491 (1923) (finding the trial judge correctly refused to instruct the jury the absence of a motive may be sufficient to raise a reasonable doubt because such an instruction would have constituted an impermissible comment on the facts). Appellant’s convictions should be affirmed.

CONCLUSION

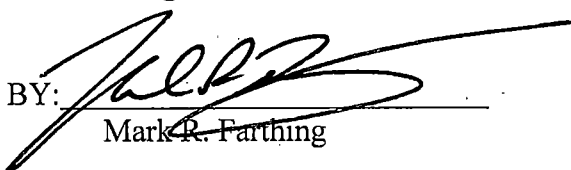
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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November 8, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2018-001395

RECEIVED
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SC Court of Appeals

THE STATE,

Respondent,

vs.

DEMORRIS OCTSWAVIOUS ANDREWS,

Appellant.

PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 8th day of November, 2019.



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ALAN WILSON
ATTORNEY GENERAL

November 8, 2019

RECEIVED

NOV 08 2019

SC Court of Appeals

Lara M. Caudy, Esquire
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RE: State v. Demorris Octswavious Andrews – Appellate Case No. 2018-001395

Dear Mr. Caudy:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Senior Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Advocacy Division