STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Jocelyn Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN FITZGERALD ANDERSON,

APPELLANT

APPELLATE CASE NO 2018-001596

FINAL REPLY BRIEF OF APPELLANT

M. Abigail Young Bechtol, Esquire
864 Lowcountry Blvd., Suite A
Mount Pleasant, SC 29464

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

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I. Recent trends and guidance by the Supreme Court support a generalized jury charge on the consideration of good character.

Respondent maintains in its initial brief that any charge instructing the jury on the consideration it may grant to evidence of good character would be an impermissible comment on the facts of the case in violation of the South Carolina Constitution and applicable caselaw. Resp. Br. P. 10-17. To the contrary, a recent opinion by the Supreme Court of this state supports a right to have the jury charged on good character, even if the potential character charge is more vague and general than the one Appellant sought here. Recently, the Supreme Court of this state issued an opinion shedding light on the proper way for courts to address jury charges related to evidence of good character in *Pantovich v. State*, Op. No. 27915 (S.C. Sup. Ct. filed Aug. 7, 2019) (Shearouse Adv. Sheet No. 32 at 43). In that post-conviction relief ("PCR") opinion, the Supreme Court discussed the state's trend away from permitting charges that instruct a jury how to interpret and apply evidence beginning with *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). *Pantovich*, Op. No. 27915 at 47-49. At his trial, Pantovich requested the trial court charge the jury as to how it may use evidence of his good character in rendering its verdict and specifically requested a lengthy charge containing general and specific instructions on the interpretation of good character evidence. *Pantovich*, Op. No. 27915 at 45. The portion of the requested charge on which the Supreme Court focused when rendering its decision as to whether Pantovich was entitled to PCR was the more specific portion of the charge, deemed the "good character alone" charge. *Id.* The "good character alone" portion of the charge is that derived from *State v. Green*, 278 S.C. 239, 294 S.E.2d 335 (1982) that Appellant sought to have charged to the jury in this case and that to which Respondent takes issue.

The Supreme Court in *Pantovich* ruled that the specific language in the "good character alone" charge specifying that evidence of a defendant's good character may "in and of itself" create doubt of guilt goes too far against the modern trend of limiting jury charges. *Pantovich*, Op. No. 27915 at 48. Though the Supreme Court declined to utilize the appeal of a PCR proceeding to posit a new substantive rule, it did declare the "good character alone" charge to be "improper". *Id.* at 47-48. However, rather than suggest that no defendant can ever be entitled to a charge that a jury may consider evidence of his or her good character when rendering a verdict, the Court in *Pantovich* held that the defendant was entitled to a "more balanced" good character charge without the offending "in and of itself" language[1]. *Id.* at 49.

Of course, the Supreme Court's recent decision in *Pantovich* comports with the preceding caselaw in South Carolina holding that instructions on the weight or strength to be applied to certain evidence are improper. Further, many of the cases discussed in *Pantovich* are also cited in Respondent's brief in support of its position that a good character charge here would contravene the South Carolina Constitution and pertinent law by improperly commenting on or offering an opinion related to the facts of the case. Resp. Br. p. 10, 14-15. However, the *Pantovich* opinion confirms that the cases cited by Respondent do not support the proposition that any good character charge would be an improper comment on the facts, but rather confirm that a charge without the "in and of itself" language of the "good character alone" charge is proper when a defendant has put forth evidence of his good character.

Respondent relies on several cases that serve to limit the instructions a trial court may give to a jury regarding the weight or sufficiency of certain evidence. Resp. Br. p. 10, 14-

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[1] As an example of an acceptable charge, the Court cited *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995) and quoted the instruction given in that case: "The defendant has introduced evidence of his character. More specifically, the defendant has introduced reputation and/or opinion evidence about his truthfulness, honestly and law-abidingness. You should consider character evidence with and in the same manner as all the other evidence in the case." *Pantovich*, Op. No. 27915 at 49.

15. It is crucial to note that the key distinction between those cases and the holdings of *Pantovich* are that all of the cited cases address specifically the weight, sufficiency, strength, or veracity afforded to testimony, evidence, or credibility. For example, Respondent refers to *State v. Smith*, 288 S.C. 329, 342 S.E.2d 600 (1986) in which the court held that a trial judge may not indicate his opinions of the "weight or sufficiency" of the evidence, credibility of witnesses, guilt of the accused, or controverted facts. Smith at 331, 34 S.E.2d at 601. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) likewise concludes that a trial judge may not refer to the "veracity" of a victim's testimony when charging the jury. *Stukes* at 499, 787 S.E.2d at 483. *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013) held that a charge that refers to something as "strong" evidence of intent places an improper emphasis on that evidence. *Cheeks* at 328-329, 737 S.E.2d at 484. *State v. Pauling*, 264 S.C. 275, 214 S.E.2d 327 (1975) and *State v. Battle*, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014) confirm that the weight and sufficiency of evidence is solely a determination for the jury.

The aforementioned cases are distinguishable from the *Pantovich* opinion and the charge requested in this case because the charges at issue in those cases specifically comment on the weight a jury should assign certain evidence. Here, a charge that a jury may consider evidence of good character in the same manner as other evidence proactively avoids assigning weight or emphasizing good character evidence. By stating that a jury may consider good character evidence and placing it on an equal playing field with all other evidence, the trial court effectively refuses to comment on the weight a jury should assign to the defendant's good character. Arguably, even the "good character alone" charge of *Green* could be read as not imposing a certain weight on good character evidence; the key words of the aforementioned opinions ("weight", "veracity", "strength", etc.) are not present.

Admittedly, Appellant is in a slightly different position at the time of filing this reply as it was at trial and at the initiation of this appeal. At trial, the court should have granted Appellant's request for a good character charge pursuant to *State v. Green* and Appellant's conviction should be reversed and remanded based on the error. However, given that the Supreme Court's position on the good character charge was updated three months after Appellant filed its initial brief via the *Pantovich* opinion, it is clear that, on remand, the good character charge should be more general and omit the "in and of itself" language with which the Supreme Court took issue.

II. Whitni Jones's testimony constitutes sufficient evidence to warrant a good character charge.

Respondent contends that, regardless of its propriety, there is not sufficient evidence for Appellant to seek a jury charge on good character evidence. Resp. Br. p. 12-14. However, the testimony by Appellant's former girlfriend Ms. Jones clearly posits her opinion of Appellant as a "good person" (R. p. 201, line 23-p. 202, line 3), and that testimony, though brief, if sufficient to constitute character evidence. *See* Rule 405(a), SCRE (evidence of character may be made by testimony in the form of an opinion).

In addition to Ms. Jones's categorization of Appellant as a "good person" and despite Respondent's cite to the Second Circuit case *United States v. Bendetto*, 571 F.2d 1246, 1249-1250 (2nd Cir. 1978) (finding that character evidence is not admissible in the form of a recitation of good or bad acts), it is worth taking a harder look at South Carolina caselaw involving the use of good acts and whether or not they constitute character evidence.

In *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000), the Court of Appeals held that the trial court's refusal to instruct the jury that it may consider the defendant's good character when making its decision was prejudicial error when it was clear that the jury struggled

to convict. *Harrison* at 175, 539 S.E.2d at 76. At Harrison's trial, Harrison and another witness testified as to Harrison's community involvement and listed several good acts he had done. *Id.* at 168, 539 S.E.2d at 73. In its opinion, the Court of Appeals stated that Harrison's witness Minnie Cutler testified "*in essence*[] as to Harrison's good character and good reputation." *Id* (emphasis added). However, when describing Ms. Cutler's testimony, the Court refers only to her recitation of Harrison's good acts – not his reputation or her personal opinion on his character. *Id.* One may reasonably conclude that if the record contained any testimony by Ms. Cutler relating to her opinion of Harrison's character or his reputation, the Court would have referred to it in its discussion of the character evidence proffered at trial. Though it may appear to contradict the premise that a mere recitation of prior acts does not constitute character evidence, a logical conclusion is that the Court of Appeals found the testimony about Harrison's prior good acts to be representative of his character traits and reputation and properly considered as character evidence.

Given the conclusions drawn from *Harrison*, the record in this case contains more than sufficient evidence to require a jury charge on the consideration Appellant's good character. Appellant's former girlfriend Whitni Jones testified to Appellant's prior good acts, including the favors and assistance he would offer Ms. Robinson when she was in need. R. p. 223, line 16-p 224, line 15. Though additional evidence of Appellant's good character is unnecessary because of her opinion that he was a good person, the acts described by Whitni Jones lend further credence to Appellant's good character and should have served as reason to charge the jury on good character evidence.

CONCLUSION

Despite Respondent's contentions, the current trend of the law in South Carolina supports a jury charge on good character, and the record contains sufficient character evidence to warrant a charge. This Court should reverse the trial court's rulings and remand the matter for a new trial.

By: M Mc

M. Abigail Young Bechtol, Esquire
864 Low County Blvd., Suite A
Mount Pleasant, SC 29464
(864) 328-6407
abechtol@seguilawfirm.com

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
P.O. Box 11433
Columbia, SC 29211
(803) 734-1955
rdudek@sccid.sc.gov

ATTORNEYS FOR APPELLANT

This 15th day of November, 2019.

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 Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 15, 2019

M. Abigail Young Bechtol
864 Lowcountry Blvd., Suite A
Mount Pleasant, SC 29464
(864) 328-6407
abechtol@seguilawfirm.com

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330
rdudek@sccid.sc.gov