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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Frank R. Addy, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

DEMORRIS OCTSWAVIOUS ANDREWS,

APPELLANT.

APPELLATE CASE NO. 2018-001395

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by refusing to instruct the jury that "the testimony of an informer who provides evidence against the defendant for pay, for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness" when (1) there was evidence to support the charge given the only direct evidence against Appellant was the testimony of a jailhouse informant who claimed Appellant confessed to the murder and (2) the general credibility of witnesses instruction given to the jury did not adequately cover the law?

STATEMENT OF THE CASE

A Greenwood County grand jury indicted Appellant on January 16, 2018 for murder, armed robbery, and possession of a weapon during the commission of a violent crime. R. 617. His case was called to trial on July 16, 2018 before the Honorable Frank R. Addy, Jr., and a jury. R. 1. Assistant Solicitors C. Yates Brown and Josh Thomas represented the state. R. 1. Carson Henderson represented Appellant. R. 1.

On July 20, 2018, the jury found Appellant guilty as indicted. R. 604, ll. 13-25. He was sentenced to thirty-five years for murder, thirty years concurrent for armed robbery, and five years consecutive for the weapons offense. R. 612, ll. 14-25.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

"It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (quoting Clark, 339 S.C. at 390, 529 S.E.2d at 539) (internal quotation marks omitted). "If there is any evidence to support a charge, the trial court should grant the request." Id. (citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)). "The requesting party must have been prejudiced by the trial court's failure to give the instruction in order to warrant reversal on appeal." Id. at 195-196, 624 S.E.2d at 445 (citing Clark, 339 S.C. at 390, 529 S.E.2d at 539).

STATEMENT OF FACTS

Shortly before 5:00 pm on October 25, 2016, Barry Warren, a known drug dealer, was shot and killed inside his home at 8 Gilliam Court in Greenwood. There were no witnesses to the murder. Warren was shot once in the neck with a .380 caliber bullet. R. 432, ll. 12-22; R. 421, ll. 11-20. Law enforcement collected two cartridge casings and two fired bullets from inside Warren's bedroom. R. 218, l. 9 – 220, l. 24; R. 222, ll. 12-21; R. 223, ll. 2-20. There was a trail of blood leading from Warren's bedroom to where his body was found just inside the front door of his home. R. 216, l. 6 – 218, l. 20.

Keith Jackson, known as Train Head, Mary Helen Carter, known as Ms. Helen, and two others were playing cards in front of Warren's house under a large tree at the time of the shooting. Jackson, who was incarcerated on a pending third degree burglary warrant at the time of trial, testified that he arrived outside Warren's house just as Warren had finished playing a game of cards. R. 62, l. 16 – 63, l. 6. Warren asked if anyone wanted a beer or a cigarette and then went inside his house. R. 65, l. 23 – 66, l. 24; R. 67, ll. 4-14.

Jackson began shuffling the cards as it was his turn to play. While he was shuffling, Jackson claimed Appellant walked by the card table and asked the score of the game. Jackson told Appellant that the game had not started yet and then began dealing the cards. R. 66, l. 24 – 67, l. 3. As he was dealing, Jackson heard a "pop, pop" noise, which he believed were firecrackers because the children who lived nearby were "always shooting firecrackers." R. 67, ll. 14-19. Shortly after he heard the noise, he claimed he saw Appellant run around the corner of 9 Gilliam Court, which was the duplex immediately to the right of Warren's home, and down the

path that leads to Dallas Court.[1] R. 67, l. 20 – 68, l. 16; R. 71, ll. 1-10. Neither he nor anyone around him paid any attention to the noise until Warren came to the front door and announced he had been shot. Jackson did not believe Warren until he heard Warren collapse near the door. R. 77, ll. 12-21.

After he realized Warren had been shot, Jackson threw the cards into the air and ran. He claimed he ran into Kelsey Watson, known as Blade, and his girlfriend, Nicole Reid, as they were walking up the path towards Warren's house. R. 84, l. 2 – 85, l. 8. Jackson allegedly told them, "Smiley [Appellant] shot Barry [Warren]." However, Jackson did not recall making this statement at the time of trial. R. 74, l. 23 – 75, l. 19. Reid ultimately called 911. R. 77, ll. 22-25. Jackson stated Watson and Reid should have seen Appellant running around the house at 9 Gilliam Court and down the path to Dallas Court because they would have crossed paths given where Watson and Reid were standing. R. 102, l. 23 – 103, l. 15.

Kelsey Watson, who was incarcerated on a federal firearms offense at the time of trial, testified that he and Reid were sitting on the right side of 9 Gilliam Court near the start of the path that leads to Dallas Court when he heard "a little muffled pop." R. 130, l. 1 – 131, l. 12. Watson and Reid had just returned from a nearby restaurant where they had purchased food and were sitting in chairs eating together. Watson testified that he did not think anything of the "muffled pop" until a few minutes later when Keith Jackson ran over and exclaimed, "Smiley [Appellant] shot Barry [Warren]." R. 131, l. 7 – 132, l. 20.

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[1] Jackson told law enforcement during a recorded interview on November 2, 2016 that he saw Appellant run out of Warren's house and around the corner of 9 Gilliam Court after he heard the "pop, pop" noise. During his testimony before the jury, Jackson explained that he "probably" said he saw Appellant run "out the house," but he meant "around the house." R. 71, l. 1 – 72, l. 9.

Despite Jackson's claim that he saw Appellant run around the house at 9 Gilliam Court and down the path that leads to Dallas Court immediately after he heard the gunshots, Watson denied seeing Appellant or anyone else run around the house. R. 133, l. 22-24; R. 143, l. 20 – 144, l. 2; R. 148, l. 10 – 149, l. 3; R. 149, ll. 17-18; R. 153, ll. 12-13. However, Watson was certain he would have seen anyone who ran in that direction because he was sitting right there. R. 148, ll. 20-25.

Nicole Reid testified consistent with Watson. She explained that as she and Watson were sitting down eating on the side of 9 Gilliam Court, she heard a noise that sounded like "doors were slamming." R. 160, ll. 11-24. Shortly thereafter, Keith Jackson called Watson over to where he was standing and told Watson that "Smiley [Appellant] just shot Barry [Warren]." R. 161, ll. 14-20; R. 180, l. 7 – 182, l. 2. Reid also asserted she did not see Appellant or anyone else run around the side of 9 Gilliam Court where she and Watson were sitting. R. 165, ll. 1-4; R. 188, ll. 5-24; R. 192, l. 24 – 193, l. 4.

Watson claimed that earlier in the day before the shooting, he saw Appellant show Jackson a loaded magazine clip. R. 129, ll. 7-22. However, Jackson vehemently denied that Appellant showed him a clip that day and there was no other evidence to support Watson's allegation. R. 93, ll. 6-16; R. 102, ll. 14-22.

Dwayne Sanders was the key witness for the state. He claimed that, while he and Appellant were incarcerated together in the Greenwood city jail in April 2017, Appellant confessed to the murder. During his recorded statement to law enforcement on April 6, 2017, Sanders claimed Appellant told him it was Jason Logan's idea to rob Barry Warren and that Jason was outside on Gilliam Court at the time of the shooting. Logan was supposed to distract the people playing cards while Appellant committed the robbery. Sanders testified that

Appellant went inside Warren's house and talked to him for a few minutes before he shot Warren three times as Warren walked around the couch in the living room. After he shot Warren, Sanders claimed Appellant said he took a Crown Royal bag and fled the house.[2] When he got outside, Appellant did not see Logan. According to Sanders, Appellant said he tried to give the gun to someone behind the houses on Gilliam Court, but the person refused to take the gun. Appellant then "got a ride to the westside" of town. R. 358, l. 6 – 362, l. 7.

At the time of his recorded statement in April 2017, Sanders was incarcerated for first degree burglary. On May 19, 2017, two months after he gave a statement to the police, the solicitor's office dismissed Sanders' first degree burglary charge, which carried up to life without parole, and Sanders pled guilty to malicious injury to real property, a thirty day misdemeanor offense. R. 363, l. 14 – 367, l. 3.

Sanders' testimony concerning Appellant's alleged confession was almost entirely uncorroborated. In fact, law enforcement knew most of what Sanders claimed Appellant said was false. For example, the physical evidence showed Warren was shot in his bedroom, not in the living room where the couch was located and that only two bullets were fired, not three as Sanders claimed. R. 218, l. 9 – 220, l. 24; R. 222, ll. 12-21; R. 223, ll. 2-20. Additionally, investigators verified Jason Logan's alibi and knew it was impossible for him to have been on Gilliam Court at the time of the shooting. R. 456, ll. 2-10; R. 482, ll. 5-18. Moreover, Sanders' testimony was the only evidence whatsoever to support the armed robbery indictment.

Appellant gave two recorded statements to the police in which he denied any involvement in the murder. R. 301, ll. 3-12; R. 397, ll. 8-22.

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[2] Barry Warren's fiancé testified that Warren kept drugs in a Crown Royal bag on the television stand inside his bedroom. R. 34, l. 23 – 35, l. 17.

After nearly seven hours of deliberating and previously announcing it was deadlocked, the jury found Appellant guilty of murder, armed robbery, and possession of a weapon during the commission of a violent crime. R. 591, l. 13 – 604, l. 25. Significantly, while they were deliberating, the jury requested to hear Dwayne Sanders' recorded statement where he claimed Appellant confessed to the murder. R. 592, ll. 16-24.

ARGUMENT

The trial judge abused his discretion by refusing to instruct the jury that "the testimony of an informer who provides evidence against the defendant for pay, for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness" when (1) there was evidence to support the charge given the only direct evidence against Appellant was the testimony of a jailhouse informant who claimed Appellant confessed to the murder and (2) the general credibility of witnesses instruction given to the jury did not adequately cover the law.

How the Issue was Presented Below

During the charge conference, Appellant requested the trial judge charge the jury concerning the credibility of an informant pursuant to United States v. Luck, 611 F.3d 183 (4th Cir. 2010). Specifically, defense counsel requested the judge charge the jury with the following language:

> The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.

R. 499, ll. 16-23; See United States v. Luck, 611 F.3d 183, 186-187 (4th Cir. 2010).

Defense counsel asserted the instruction was directed toward Dwayne Sanders, who was incarcerated with Appellant in the Greenwood city jail, and claimed Appellant confessed to the murder in April 2017. Counsel argued Sanders personally benefited from providing law enforcement with Appellant's alleged confession since Sanders' pending first degree burglary charge, which carried up to life without parole, was dismissed shortly after he spoke to the police, and he ultimately pled guilty to a thirty day misdemeanor offense. R. 502, ll. 12-23. Counsel further argued Sanders' testimony was uncorroborated and parts of it law enforcement knew were

not true. For example, law enforcement knew Jason Logan was not present when Barry Warren was killed even though Sanders claimed Appellant told him Logan acted as the lookout. The police also knew that only two shots were fired, not three as Sanders claimed Appellant said, and that Warren was shot in his bedroom, not in the living room by his couch as Sanders alleged Appellant stated. R. 502, l. 24 – 503, l. 7. Lastly, defense counsel emphasized that the only evidence whatsoever of armed robbery was from Sanders' testimony concerning Appellant's alleged confession. R. 504, ll. 1-3.

The assistant solicitor objected to the proposed instruction arguing it was a comment on the facts and that the judge's standard charge on the credibility of witnesses "covered everything." R. 501, ll. 3-17. He distinguished this case from Luck by arguing Luck concerned the credibility of a paid informant where there was no evidence to corroborate his testimony. However, in this case, the solicitor claimed Dwayne Sanders was not a professional paid informant and there was evidence to corroborate his testimony concerning Appellant's alleged confession. R. 499, l. 25 – 500, l. 8.

The trial judge agreed with the solicitor that the instruction appeared to be a comment on the facts similar to the instruction prohibited in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).[3] R. 501, l. 18 – 502, l. 2. He also found the case was distinguishable from Luck. The judge emphasized that Luck concerned a narcotics prosecution involving two paid informants who allegedly purchased cocaine base from Luck, and that there was no evidence to corroborate the informants' testimony given that the recording of the alleged controlled buy was "too muffled or too unclear." R. 503, ll. 14-25. He further emphasized that Luck was a federal post-conviction relief action and that the Fourth Circuit's holding that Luck's counsel was ineffective for failing to request

[3] Our Supreme Court held in Stukes that instructing the jury "the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence" was an impermissible charge on the facts and, therefore, unconstitutional. 416 S.C. at 499-500, 787 S.E.2d at 483.

the stated instruction did not implicate any substantive due process rights. R. 504, ll. 4-16. Lastly, the trial judge asserted, "I'm hesitant to say you need to judge the credibility of a particular witness with more of a jaundiced eye than you should some other witness." R. 504, ll. 19-22. Consequently, the judge declined to give the requested instruction. R. 505, ll. 5-16.

Discussion

In United States v. Luck, 611 F.3d 183, 186-187 (4th Cir. 2010), the Fourth Circuit Court of Appeals addressed the "informant instruction" and wrote:

> Luck argues that his trial counsel was ineffective because he failed to request an "informant instruction" consisting of the following:
>
> > The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.
>
> United States v. Brooks, 928 F.2d 1403, 1409 (4th Cir. 1991) (quoting Devitt & Blackmar, Jury Practice and Instructions § 17.02 (3d ed.1977)). He argues that this Court should follow several circuits in holding that this instruction is always mandatory, or at the least, that in this case counsel was ineffective for failing to request the instruction.

Id.

The Court in Luck concluded it did not need to decide when an informant instruction is necessary because, "This case presents the classic case of a professional informant paid for his services, which in turn makes it the obvious case for an informant instruction." Id. at 188 (citing United States v. Garcia, 528 F.2d 580, 588 (5th Cir. 1976) (remarking, in an analogous case where the government's main witness was a professional, paid witness, that there was "more than the usual need for a cautionary instruction")). The Court ultimately reversed Luck's

conviction and remanded for a new trial finding that counsel was ineffective in failing to request the informant instruction and that Luck was prejudiced by counsel's deficient performance.

Although the Court in Luck did not find it necessary to decide when the informant instruction was necessary, the Court noted that other circuits found the instruction necessary when the informant's testimony is uncorroborated. The Court wrote:

> Among the other circuits that have considered this question, there is a consensus that an informant instruction is necessary when the informant's testimony is uncorroborated by other evidence. See United States v. Bosch, 914 F.2d 1239, 1247 (9th Cir. 1990); United States v. Hill, 627 F.2d 1052, 1054-55 (10th Cir. 1980); United States v. Garcia, 528 F.2d 580, 587-88 (5th Cir. 1976); United States v. Griffin, 382 F.2d 823, 828 (6th Cir.1967)

Id. at 187-188.

While the trial judge in Appellant's case generally instructed the jury about the credibility of witnesses, under the facts of this case, the instruction was not adequate. See R. 580, l. 22 – 581, l. 13. As the Court wrote in Luck:

> These courts have explained that an informant instruction is necessary because **a general witness credibility instruction is not sufficiently cautionary for informants because of special concerns about the incentive that they have to fabricate information for their own benefit**. See United States v. Williams, 59 F.3d 1180, 1183-84 (11th Cir. 1995) (stating that sole function of an informant instruction is to make jury aware that an informant's testimony is to be viewed with caution); Garcia, 528 F.2d at 588 ("When the case is close and the witness particularly unreliable . . . this Court has declared that the failure to give a cautionary instruction amounts to plain error."); see also On Lee v. United States, 343 U.S. 747, 757-58, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."). In other words, **the jury needs to be instructed to scrutinize informant testimony more carefully than other witnesses, even biased witnesses, because of the potential for perjury born out of self-interest.** See Alexandra Natapoff, Snitching 77 (2009) ("[W]hen defendants do go to trial, numerous exonerations reveal just how often juries believe lying criminal informants, even when juries know that the informant is being compensated and

> has the incentive to lie. A report by the Center on Wrongful Convictions at Northwestern School of Law describes fifty-one wrongful capital convictions, each one involving perjured informant testimony accepted by jurors as true.").

Id. (emphasis added).

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d 578, 697 S.E.2d at 583 (citing State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citing State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003)). "The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (citing State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989)); See Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citing State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989)) (stating that appellate courts should "consider the court's jury charge as a whole in light of the evidence and issues presented at trial"). When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. Cole, 338 S.C. at 101, 525 S.E.2d at 512-513 (citing State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996)).

Viewing the evidence in the light most favorable to Appellant, the general credibility of witnesses charge given did not adequately cover the law and the failure to give the requested informant instruction constituted an abuse of discretion. Just as Luck, this case is a classic example of when an informant instruction is necessary. The only direct evidence against Appellant was the testimony of Dwayne Sanders who claimed Appellant confessed to the murder

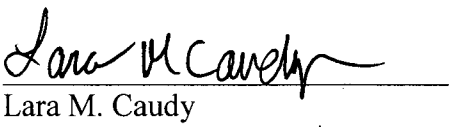
while the two were incarcerated together in the Greenwood city jail. Sanders' testimony was the only evidence whatsoever of armed robbery. Not only was Sanders' testimony not corroborated, most of what he claimed Appellant said law enforcement knew was not true. For example, the physical evidence showed Warren was shot in his bedroom, not in the living room where the couch was located and that only two bullets were fired, not three as Sanders claimed. R. 218, l. 9 – 220, l. 24; R. 222, ll. 12-21; R. 223, ll. 2-20. Additionally, investigators verified Jason Logan's alibi and knew it was impossible for him to have been on Gilliam Court at the time of the shooting. R. 456, ll. 2-10; R. 482, ll. 5-18. Consequently, the trial judge abused his discretion by refusing to give the requested informant instruction.

Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of December, 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."

December 6, 2019.

Lara M. Caudy
Appellate Defender

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

ATTORNEY FOR APPELLANT