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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BRIAN WILLIE BENSON LEWIS,

APPELLANT.

APPELLATE CASE NO. 2017-000482

Appeal from Greenville County

Honorable Brian M. Gibbons, Circuit Court Judge

Unpublished Opinion No. 2020-UP-246

PETITION FOR REHEARING

On August 19, 2020, this Court affirmed the trial judge's decision to instruct the jury that "a reasonable doubt is that doubt which would make an honest, conscientious juror searching for the truth in a case to hesitate to act." State v. Lewis, Op. No. 2020-UP-246 (S.C. Ct. App. Filed August 19, 2020). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

This Court relied on State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) for the proposition that "jury instructions should be considered as a whole, and if as a whole they are free

from error, any isolated portions which may be misleading do not constitute reversible error." However, Aleksey dealt with a jury instruction regarding the *credibility of witnesses* in which the judge concluded his remarks by stating: "Ladies and gentlemen, throughout this entire process, you have but one single objective, and that is to seek the truth, to seek the truth regardless of from what source that truth may be derived." Aleksey, 343 S.C. at 26, 538 S.E.2d at 251. The Aleksey Court noted that, prior to its instruction on the credibility of witnesses, the "trial court gave a lengthy, complete, and proper instruction on reasonable doubt, the presumption of innocence, and the State's burden of proof." Id.

Unlike in Aleksey, the trial judge in this case did not give a "proper instruction on reasonable doubt." Instead, the trial judge incorrectly defined reasonable doubt as "doubt which would make an honest, conscientious juror searching for the truth in a case to hesitate to act." R. 456, ll. 20 – 25. That was not the definition of reasonable doubt and it was error for the trial judge to charge it.

This Court ignored the Aleksey Court's acknowledgement that "[j]ury 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.'" Aleksey, 343 S.C. at 26-27, 538 S.E.2d at 251 quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68. This Court also ignored the fact that, unlike in this case, in Aleksey the "seek the truth" language did not appear in the trial court's reasonable doubt instruction. As the Aleksey Court stated:

> As an abstract concept, "seeking the truth" suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard. *Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt.*

Id. at 28, 538 S.E.2d at 252 (emphasis added). This was exactly the manner in which the trial judge in this case used the "seeking the truth" language. By defining reasonable doubt in this manner, not only did the judge give a legally incorrect definition of reasonable doubt, he also all but ensured the jury would use this language in an unconstitutional manner – shifting the burden of proof to the defendant.

This Court also cited State v. Pradubsri, 420 S.C. 629, 640-41, 803 S.E.2d 724, 730 (Ct. App. 2017) where this Court found no reversible error because the trial judge's instructions "referenced the 'beyond a reasonable doubt' standard at least twenty times." Like in Pradubsri, the trial judge in this case made numerous "references" to the beyond a reasonable doubt standard. However, what this Court overlooked was that the trial judge only *defined* reasonable doubt once, and incorrectly.

Whether the trial judge said the words "reasonable doubt" one time or one hundred times is immaterial if the judge only defines those words on a single occasion, as the trial judge did here. In fact, the trial judge's full reasonable doubt instruction acknowledged this:

> *So what is reasonable doubt? I've said that word seventeen times. What does that mean?* A reasonable doubt is that doubt which would make an honest, conscientious juror *searching for the truth* in a case to hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.
>
> Proof beyond a reasonable doubt can also be described as proof that leaves you firmly convinced of the Defendant's guilt.

R. 456, l. 20 – 457, l. 7 (emphasis added). By putting the "searching for the truth" language in this context, the trial court was telling the jury that every time he "referenced" the reasonable doubt standard, he meant "searching for the truth." When viewed in this context, it can more properly be said that on every occasion in which the trial judge made a reference to the term "reasonable

doubt," he was referencing his legally incorrect definition of reasonable doubt and reminding the jury that "reasonable doubt" meant to "search for the truth."

Finally, this Court's opinion ignored both State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998) and State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018). The Needs Court "strongly urge[d]" trial courts to avoid using any "seek" language in their jury instructions on reasonable doubt and circumstantial evidence because "[s]uch language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant." Needs, 333 S.C. at 155, 508 S.E.2d at 867-68.

Twenty years later in Beaty, the Supreme Court *again* instructed trial judges not to include terms such as "search for the truth," "find the true facts," or any other terms "that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt." Beaty, 423 S.C. at 34, 813 S.E.2d at 506. In Beaty, the trial judge's improper comments came in his opening remarks to the jury, not in his charge on the law at the close of the trial. In addition, the Beaty Court noted that the judge's improper comments "were not linked to either the reasonable doubt or the circumstantial evidence charges." Id. Because of this, the Beaty Court found the error harmless. However, the Court clearly reiterated that it is error for trial judges to include "searching for the truth" language in their comments to the jury: "These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice." Id.

This Court's opinion ignored the specific facts and circumstances of this case, including the context in which the trial judge used the "search for the truth" language. The trial judge erred

when he defined reasonable doubt incorrectly and improperly by couching it in terms of "searching for the truth." Our Supreme Court has repeatedly found this to be improper and has repeatedly instructed trial judges not to do this. The trial judge in this case even acknowledged that the language was improper, stated that he would not use it in his jury charge because of the Supreme Court's decision in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), and then still proceeded to disregard Supreme Court precedent by giving an incorrect and improper definition of reasonable doubt. R. 415, ll. 1 – 7. None of these facts were addressed by this Court in its opinion.

Based upon the specific points overlooked and/or misapprehended by this Court in its opinion discussed above, Appellant requests this Court to rehear the matter.

s/Adam Ruffin_______________
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of September, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon David Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Brian Willie Benson Lewis, #355387, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 2nd day of September, 2020.

s/Adam Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT