STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TONY ORLANDA SINGLETON,

APPELLANT

APPELLATE CASE NO. 2019-001391

AMENDED INITIAL BRIEF OF APPELLANT

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III. Did the trial judge err in failing to charge the jury on third party guilt where there was undisputed evidence of third party guilt presented, the requested instruction guided the jury on how to examine the evidence presented, and ensure the jury did not shift the burden of proof to Appellant?

STATEMENT OF THE CASE

On February 6, 2017, a Hampton County grand jury indicted Appellant for criminal sexual conduct with a minor in the first degree (2016-GS-25-137). R. *(indictment). On August 5-7, 2019, the state, represented by Hunter Swanson, called the case to trial before the Honorable Carmen T. Mullen and a jury. Tr. 1-2. Trasi Campbell represented Appellant. Tr. 2. The jury found Appellant guilty as charged. Tr. 230, ll. 10-14. Judge Mullen sentenced Appellant to life imprisonment. Tr. 238, ll. 2-7; R. *(sentence sheet).

On August 14, 2019, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in allowing a photograph of the complaining witness when she was ten years old where the photograph was not relevant to any matter in the case and the danger of unfair prejudice posed by the photograph substantially outweighed its probative value.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

Prior to trial, defense counsel objected to the state's proposed introduction of a photograph of the complaining witness taken when she was ten years old. Tr. 42, ll. 9-13. Defense counsel argued the photograph was not relevant and if it were relevant, then the probative value was substantially outweighed by the danger of unfair prejudice. Tr. 42, ll. 9-13. The state explained the proposed exhibit was "simply a photograph of [Minor] at age ten." Tr. 42, ll. 16-19. The state intended to introduce the photograph when Minor testified. Tr. 42, ll. 16-19. Judge Mullen noted that the state initially sought to introduce two photographs of Minor, one of which showed Minor wearing a birthday hat. Tr. 42, ll. 20-23. Judge Mullen determined the birthday hat photograph "didn't look appropriate." Tr. 42, ll. 20-24. Instead, she determined "[t]hat one was adequate." Tr. 42, l. 24. She thought "this one was, by far, the best." Tr. 42, ll. 24-25. Thus, she found the photograph was "appropriate" and admitted it. Tr. 42, l. 25 – Tr. 43, l. 1.[1]

[1] Defense counsel renewed her objection to the photograph during the trial. Tr. 105, ll. 19-21.

Minor was thirteen years old at the time of the trial. Tr. 102, ll. 8-11. She claimed that "around November of 2015," she was raped. Tr. 103, ll. 5-7. She further explained "he had stick his pee pee in [her] boo." Tr. 103, ll. 12-14. Upon further questioning, Minor claimed "he had stuck his male private into [her] female private." Tr. 103, ll. 20-22. After eliciting this testimony, the state questioned Minor about the photograph, which was marked as State's Exhibit #3. Tr. 105, ll. 9-10; State's Exhibit #3. Minor told the jurors the photograph was of her at ten-years old on the first day she got her hair done. Tr. 105, ll. 9-16.

When questioned more on the timing of the photograph, Minor indicated it was taken on "[a]lmost the first day of school." Tr. 106, ll. 3-4. She then indicated it was probably taken in January, not in August as she originally said. Tr. 106, ll. 5-14.

Discussion

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly

bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004).

The photograph of Minor at ten years old made no matter in controversy more or less probable. Minor, who was thirteen-years old at the time of the trial, claimed she was sexually assaulted when she was ten-years old. Her mother, grandmother, and nurse told the jurors that she was ten-years old when she became pregnant. Quite simply, the photograph of Minor was not relevant to any issue in the case – disputed or undisputed.

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424,

429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Applying this analytical framework to the present case reveals the photograph of Minor at ten-years old was used for the sole purpose of inciting the passions and prejudices of the jurors. There was no dispute that Minor was sexually assaulted when she was ten-years old. The only dispute was who committed the assault. The case was a classic "whodunit." Minor's appearance at ten-years old was not an issue in the case. Instead, the photograph served only to upset the jurors regarding the loss of innocence of a ten-year old child. The low probative value of the photograph was substantially outweighed by the danger of unfair prejudice posed by the photograph.

II. In violation of Appellant's right to a fair trial, the trial judge erred in failing to grant a mistrial where the complaining witness had an emotional outburst during defense counsel's opening statement, which required complaining witness to be escorted from the courtroom.

Standard of review

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

Relevant facts

Immediately following her opening statement, defense counsel moved for a mistrial based upon the emotional outburst of Minor that occurred during her opening statement. Tr. 67, l. 22 – Tr. 68, l. 1. Counsel noted the outburst "created a disturbance" and "[i]t was audible." Tr. 68, ll. 5-7. In order to investigate the disturbance, defense counsel turned around during her opening. Tr. 68, ll. 7-8. She saw Minor being "carted off out of the courtroom by two individuals." Tr. 68, ll. 8-10. Counsel noted that judge warned the gallery about the emotional nature of the case and expressed that she would not tolerate any emotional outbursts or behavior in the courtroom during the trial. Tr. 68, ll. 11-13. Based upon Minor's visual and audible display of emotion during

defense counsel's opening, the defense requested a mistrial. Tr. 68, ll. 11-16. Counsel noted that due to the "level of emotion that was just demonstrated," there was no way to cure the prejudice through an instruction and that continuing the trial would deny Appellant his right to a fair trial. Tr. 68, ll. 17-22.

The state essentially conceded the facts as recounted by defense counsel. Tr. 68, l. 25 – Tr. 69, l. 6. The state's sole argument was that it was "unfair to expect a 13-year-old rape victim to always be able to keep her emotions in check." Tr. 69, ll. 2-3. According to the state, Minor was "led out of the courtroom as soon as it *got out of control*." Tr. 69, ll. 4-5 (emphasis added). Further, the state noted it was "obviously" an "emotionally charged situation." Tr. 69, ll. 5-6. Agreeing that the case was "emotionally charged," Judge Mullen noted that "the state has a responsibility to know who their victims are, and be able to know if they can sit through testimony." Tr. 69, ll. 7-14. The judge was concerned that Minor's outburst occurred during defense counsel's opening statement. Tr. 69, ll. 14-15. She noted that it was "not unusually for victims, child victims, to only be brought in during their testimony and that is all." Tr. 69, ll. 15-17. Nonetheless, Judge Mullen denied the request for a mistrial. Tr. 70, ll. 24-25. She instructed everyone "to tread lightly." Tr. 70, l. 25 – Tr. 71, l. 1.

As explained, Judge Mullen initially agreed with both the state and defense counsel that Minor had an emotional outburst during the opening statement of the defense. However, when defense counsel requested a new trial on this basis, Judge Mullen changed course. According to Judge Mullen, "during the defendant's opening statement, [Minor] began crying." Tr. 239, ll. 1-5. At this juncture, the judge indicated she would not characterize it as an outburst. Tr. 239, ll. 5-6. Instead, she claimed "[s]he just began crying, and she was not removed from the courtroom by [the judge]." The judge noted "[t]he victim's advocate, in her wisdom, just gently took her and

walked her out of the courtroom as she should, and did a good job doing it." Tr. 239, ll. 6-10. In the judge's view at the end of the trial, she did not find Minor's outburst to have been "outwardly disruptive." Tr. 239, ll. 11-12.

Discussion

"The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution." State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). "[T]he very heart of a 'fair trial' embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment." Id. at 303, 295 S.E.2d at 631.

As mentioned, although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). While a mistrial should be granted only when "absolutely necessary" and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." Id. Another way of describing when a mistrial must be granted is when there is "manifest necessity." State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930). "The less than lucid test is ... whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 32-33, 301 S.E.2d 471, 472 (1983).

The South Carolina Supreme Court held a mistrial was in order where "spectators filled the courtroom seats to capacity and even stood against the walls," there were several outbursts of laughter from the spectators requiring an admonition from the judge, a juror reported that one spectator glared

at her with "'obvious disgust,'" and the jurors overheard a spectator making opinionated remarks. Stewart, 278 S.C. at 301-302, 295 S.E.2d at 629-630. The Court held it was error for the trial judge to deny the motion for a mistrial "without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice." Id. at 302, 295 S.E.2d at 630. Further, the Court held the judge's reliance on his instructions to the jury to disregard improper spectator conduct was insufficient to assure Stewart received a fair trial. Id. at 304, 295 S.E.2d at 631.

In another case involving disorder in the court, the Court held a defendant was entitled to a new trial where there was "no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled to, a fair, impartial, and legal, trial." State v. Gens, 107 S.C. 448, 93 S.E. 139, 140 (1917). In this transporting liquor case, several ladies held large posters condemning liquor traffic before the jury during part of the trial. The ladies sat directly in front of the jury and to the left of the judge. Id. at 448, 93 S.E. 139. The Court held:

> The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge.

Id. Despite the jurors indicating they were not influenced in any manner by the posters, the Court held the trial judge should have set aside the verdict. Id.

On the other hand, in State v. Hughes, 336 S.C. 585, 596-597, 521 S.E.2d 500, 506 (1999), the Court found a trial judge did not abuse his discretion in denying a motion for a mistrial where the deceased's mother "loudly exited the courtroom" followed by her sister during the cross-examination of a medical expert. The trial judge noted that the mother's conduct "could be interpreted as a 'negative comment' on the defense evidence," the disruption was short and "the jury already knew

how she felt since she had testified as a victim impact witness" in the capital sentencing proceedings. Id. The Court found the jury "likely understood her outburst as an expression of [her] grief," about which she had already testified. Id.

Similarly, in State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996), this Court held that the displays of emotion – audible crying by spectators – in the courtroom during the alleged victim's testimony did not require a mistrial. When defense counsel moved for a mistrial, the trial judge stated "he did not believe that any displays of emotion so far would have tainted the jury." To ensure additional emotional outbursts would not prejudice the jury, the judge cleared the courtroom and instructed the jury that the courtroom had been cleared due to the display of emotion by observers. Id. Further, the judge implored the jurors that they were not to draw any inferences from this fact as neither side had done anything improper and reminded the jurors that they were to base their verdict on the testimony and evidence presented, not on emotion. Id.

In another case involving an emotional outburst, the Court held no mistrial was required where the deceased's sister had a minor outburst while testifying when asked to identify the defendant. State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996). The Court held the emotional outburst was ameliorated by the trial judge dismissing the jury and calling a recess as soon as the outburst occurred to give the witness an opportunity to calm down. Id. at 93, 470 S.E.2d at 105. Further, the Court was persuaded that the outburst had little effect on the jury because it occurred at the beginning of the trial and was "very limited in time and in scope." Id. As in Hughes, the Court surmised that the sister's outburst was an expression of grief and the jury likely understood that. Id. While finding the curative measures here sufficient, the Court warned that some cases involving a witness's or spectator's outburst "may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction." Id. at 93, 470 S.E.2d at 106.

The trial judge erred in failing to order a mistrial based on Minor's extreme emotional outburst during defense counsel's opening statement. Although the trial judge was aware of Minor's disruptive behavior and admonished the state regarding Minor's behavior, the trial judge never instructed the jury concerning how to consider, if at all, Minor's behavior. Minor's sobbing began during defense counsel's opening statement. Despite Minor's conduct, the judge never told the jury not to consider her conduct in their deliberations. Minor's sobbing and being carried out of the courtroom by others during defense counsel's opening statement were a far cry from the deceased's mother "loudly" exiting the courtroom in Hughes, supra. The conduct on display at Appellant's trial was not limited to crying by spectators as in Jones, supra, where the judge cleared the courtroom and instructed the jury not to draw an adverse inference from clearing the courtroom and to decide the case based only on the evidence presented. Despite the Court warning in Anderson, supra, that in some cases, a witness's or spectator's outburst "may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction," no instructs were given here. See Anderson, 322 S.C. at 93, 470 S.E.2d at 106.

The trial court failed to grant a mistrial where the ends of justice required one. Minor's sobbing and emotional outburst tainted the proceedings. While some emotion is to be expected in these types of cases, Minor's conduct was extreme. Minor's conduct deprived Appellant of the fair trial he deserved and that the Constitution demands. The taint of her performance could be removed in no other way except a mistrial.

III. The trial judge erred in failing to charge the jury on third party guilt where there was undisputed evidence of third party guilt presented, the requested instruction guided the jury on how to examine the evidence presented, and ensure the jury did not shift the burden of proof to Appellant.

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.

Relevant facts

It was undisputed that Appellant's son, Malik S., and a neighborhood boy, Ja'Maris M., had sexually assaulted Minor. Tr. 104, ll. 1-3; Tr. 117, ll. 20-25; Tr. 119, ll. 11-15. See also Tr. 60, ll. 2-8 (state's opening statement acknowledging that Minor told the forensic interviewers that two other boys touched her). Tr. 61, l. 24 – Tr. 62, l. 2 (defense counsel's opening statement informing the jurors that "[t]wo other teens, Tony's son, his biological son, and a neighborhood kid both had sexual intercourse with [Minor]"). In fact, when Minor learned she was pregnant, she told the nurse that she had been touched by someone around her same age. Tr. 98, ll. 12-14.

The lynchpin of the state's case against Appellant was its DNA analyst who claimed her tests revealed Appellant was the biological father of the fetus aborted by Minor. Tr. 138, ll. 7-9. Further, the DNA analyst claimed she had excluded Appellant's son, Malik S., as the biological father, despite the undisputed evidence that he had sexually abused Minor. Tr. 138, ll. 10-12.

During the cross-examination, the DNA analyst admitted that the profiles she generated of Appellant's DNA and Malik's DNA showed overlapping numbers. Tr. 145, ll. 18-23; Tr. 147, ll. 5-7. This overlap was due to Appellant passing on to Malik half of his DNA. Tr. 151, ll. 18-23. Despite the degree of overlap between the two, the analyst claimed she "was still able to exclude Malik as the biological father of the fetus based on the 15 locations that [she] did test." Tr. 147, ll. 8-14. She based her exclusion on two markers. Tr. 147, ll. 15-17.

Regarding the evidence of third party guilt, the state cautioned the jury to not "get clouded or confused by the fact that [Minor] was also victimized by [Appellant]'s son." Tr. 202, ll. 8-9. The state called the undisputed evidence of Malik's sexual assault on Minor a "red herring." Tr. 202, ll. 11-12.

Not surprisingly, the evidence of Malik's guilt was the centerpiece of defense counsel's closing argument. Counsel recounted the DNA analyst's testimony that Appellant's DNA and Malik's DNA "overlapped." Tr. 206, ll. 4-7. Counsel also highlighted the testimony from the nurse who noted that Minor confided that she had been touched sexually by someone her own age. Tr. 205, ll. 22-25. Further, she warned the jurors about the potential for human and mechanical errors in DNA testing. Tr. 209, l. 11 – Tr. 210, l. 17.

Fearful that defense counsel's argument may sway the jurors, the state used its argument in reply to implore the jurors to rely upon the "SLED professional DNA analyst." Tr. 213, ll. 9-14. The state called defense counsel's warning about human error "ridiculous" where a "SLED professional DNA analyst" was concerned. Tr. 213, ll. 9-14. According to the solicitor, the "SLED professional DNA analyst" would not act in some "willy nilly" way. Tr. 213, ll. 9-14.

During the charge conference, defense counsel requested a jury instruction on third party guilt. Tr. 191, ll. 9-10; R. *(Defendant's Exhibit #2). Specifically, defense counsel requested the judge instruct the jury as follows:

> The defendant contends that there is evidence before you indicating that someone other than he may have committed the crime, and that evidence raises a reasonable doubt with respect to the defendant's guilt.
>
> In this regard, I charge you that a defendant in a criminal case has the right to rely on any evidence produced at trial that has a rational tendency to raise a reasonable doubt with respect to his own guilt.
>
> I have previously charged you with regard to the state's burden of proof, which never shifts to the defendant. The defendant does not have to produce evidence that proves the guilt of another, but may rely on evidence that creates a reasonable doubt.
>
> In other words, there is no requirement that this evidence proves or even raises a strong probability that someone other than the defendant committed the crime.
>
> You must decide whether the state has proven the defendant's guilt beyond a reasonable doubt, not whether the other person or persons may have committed the crime.

R. *(Defendant's Exhibit #2). Judge Mullen indicated she was inclined to instruct the jury on third party guilt, but wanted the charge that was "standard in the bench book." Tr. 191, ll. 9-15. In fact, she indicated she "had a third-party guilt[] charge," and only "need[ed] to lay [her] hands on it." Tr. 192, ll. 7-8. Judge Mullen determined that there was evidence of third party guilt in the case because "it was alleged that two other people had, had or had, had sex with the child." Tr. 192, ll. 10-14. Again, she indicated "that a third party guilt[] charge [was] appropriate" in the case, but "[i]t just ha[d] to be from the bench book from South Carolina." Tr. 192, ll. 16-19. Based upon the lack of such an instruction in the bench book, Judge Mullen found a third party guilt instruction was "not appropriate to be charged by the court." Tr. 197, ll. 3-5.

However, the following day, Judge Mullen indicated she had "gone through everything" and "[t]here [was] no third party guilt charge in the bench book in South Carolina." Tr. 196, ll. 21-25. As a result, she refused to instruct the jury regarding the evidence presented.

Discussion

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). The law to be charged is determined from the evidence presented at trial. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996); see also State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict." State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944). "If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). When a requested instruction is supported by the evidence and correctly states the applicable law, the judge is duty-bound to give it. Brown v. Smalls, 325 S.C. 547, 554-555, 481 S.E.2d 444, 448 (Ct. App. 1997) (citing Singletary v. South Carolina Dep't of Educ., 316 S.C. 153, 447 S.E.2d 231 (Ct. App. 1994)); see also State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (1996). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." Id. at 555, 481 S.E.2d at 448; see also State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding that a

"trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence").

The South Carolina appellate courts have had few opportunities to address the propriety of third party guilt instructions. In State v. Tindall, 379 S.C. 304, 313, 665 S.E.2d 188, 193 (Ct. App. 2008), this Court held Tindall was not entitled to a jury instruction on third party guilt where the evidence offered raised only a conjecture as to the guilt of a third party. In other words, an instruction on third party guilt was unnecessary because there was no evidence to support the charge. Id. Additionally, this Court held the trial judge's instruction on "mere presence" "adequately charged the law as determined from the evidence presented at trial." Id. at 313-314, 665 S.E.2d at 193-194. The South Carolina Supreme Court reversed this Court's opinion in State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), but did not address the request for a jury instruction on third party guilt.

More recently, a majority of the Supreme Court declined to reach the issue in State v. Simmons, Op. No. 27959 (S.C. Sup. Ct. filed Mar. 25, 2020) (Shearouse Adv. Sh. No. 12 at 14). Specifically, the Court explained that it would not address the issue because Simmons was entitled to a new trial based upon a separate ground. State v. Simmons, Op. No. 27959 (S.C. Sup. Ct. filed Mar. 25, 2020) (Shearouse Adv. Sh. No. 12 at 26 n. 1). Nevertheless, the dissent addressed the request for a jury instruction on third party guilt. According to the dissent, Simmons was not entitled to the requested jury instruction because he did not present the requisite evidence to establish third party guilt. State v. Simmons, Op. No. 27959 (S.C. Sup. Ct. filed Mar. 25, 2020) (Shearouse Adv. Sh. No. 12 at 31) (Beatty, J., dissenting). Further, the dissent concluded that the requested instruction, which was not reproduced in the opinion, was an impermissible charge on

the facts. Id. Finally, the dissent held the proposed instruction was unnecessary because the instructions given made clear that the state had the burden of proof. Id.

In light of the paucity of binding authority on the subject, an examination of cases regarding analogous instructions is helpful to resolve Appellant's issue on appeal.

One obvious place to start is with South Carolina's jurisprudence governing jury instructions regarding the defense of alibi. The South Carolina Supreme Court ordered a new trial where a judge refused to charge a jury on the law of alibi. State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980). Robbins was charged with robbing a store. Id. at 374, 271 S.E.2d at 319. He testified that he had been at the store on the night it was robbed, but this was prior to 10 p.m. Id. at 375, 271 S.E.2d at 320. The store was robbed at 10:45 p.m. Id. Robbins testified that he was at home when the robbery allegedly took place. Id. The Court explained that "[a] charge on the defense of alibi is not required when an accused person merely denies committing the criminal act." Id. However, an alibi instruction is necessary when the accused claims to have been elsewhere at the time of the commission of the criminal act. Id. Because Robbins "was submitting to the court that he was elsewhere at the time of the robbery," he was entitled to an alibi instruction. Id. at 376, 271 S.E.2d at 320.

The failure of trial counsel to request an alibi instruction where the evidence supports such a charge violates the Sixth Amendment right to the effective assistance of counsel. The South Carolina Supreme Court held "[i]t is well settled that counsel's rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness." Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1984) (citing Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992)). The failure to give an alibi charge, where the defendant claims to be at another place,

is reversible error." Riddle, 308 S.C. at 363, 418 S.E.2d at 309. In Roseboro v. State, 317 S.C. 292, 293-295, 454 S.E.2d 312, 313 (1995), the Court found trial counsel's intentional failure to request an alibi instruction "because he felt the alibi testimony 'did not come off too well in front of the jury'" was deficient performance prejudicing the defendant. Trial counsel testified at the PCR hearing that he made a tactical decision not to request an instruction as to alibi "to focus the jury's attention on the state's failure to meet its burden of proof rather than place more emphasis on the alibi testimony by requesting an alibi charge." Id. at 293-294, 454 S.E.2d at 313. The Court found counsel's strategy "invalid" under an objective standard of reasonableness because "[a]n alibi charge places no burden on a criminal defendant but emphasizes that it is the state's burden to prove the defendant was present and participated in the crime." Id. at 294, 454 s.E.2d at 313. According to the Court, the prosecutor's "disparagement" of the defendant's alibi during closing argument further rendered counsel's strategy unreasonable because an alibi charge would have corrected any impression the defendant had any burden of proof at trial. Id.

Recently, the Court, in a divided opinion, held defense counsel's failure to request an alibi instruction was deficient performance, but found the failure did not prejudice the defendant in light of the jury charge as a whole. Gibbs v. State, 403 S.C. 484, 495-496, 744 S.E.2d 170, 176 (2013). The majority concluded that the jury charge requiring the state to prove identity beyond a reasonable doubt defeated the defendant's argument concerning prejudice. Id. In a powerful dissent, Chief Justice Toal and Justice Beatty concluded defense counsel's failure was prejudicial to Gibbs. Id. at 496, 744 S.E.2d at 176 (C.J. Toal, dissenting). The dissent explained the evidence of Gibbs' guilt was not overwhelming and the identity of the assailant was conflicting. Further, the alibi charge was necessary to correct any indication by the state in closing that Gibbs had any

burden of proof and to rebuff the prosecutor's disparagement of Gibbs' alibi witnesses. Id. at 498-499, 744 S.E.2d at 177-178.

Another obvious useful area of the law in which to seek guidance is the law governing self-defense instructions. The trial court must charge self-defense if there is any evidence in the record "from which it can be reasonably inferred" that the accused acted in self-defense. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002); State v. Wigington, 375 S.C. 25, 649 S.E.2d 185, 188 (Ct. App. 2007). To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978).

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the South Carolina Supreme Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

Further, the South Carolina Supreme Court has long held that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a "body of common law self-defense" and trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Fuller, 297 S.C. at 443, 377 S.E.2d at 330.

In Fuller, the defendant solicited a prostitute. Id. at 441, 377 S.E.2d at 329. However, when the pair arrived at the prostitute's trailer, they discovered it was occupied. The defendant then left. Id. When the defendant later returned to the prostitute's trailer, he found a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. Two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot allowing him to drive away. Unbeknownst to the defendant, the street was a dead end. Id. at 442, 377 S.E.2d at 330. Due to the men blocking his escape, the defendant ultimately crashed his car against a rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing both. Id. No gun was found on the men. Id.

The trial judge only instructed the jury on the basic elements of self-defense. Id. The Court held it was error to only give the general charge when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The Court found the trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that the defendant had the right to act on appearances. Id. at 443-

44, 377 S.E.2d at 330-31(citing State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955)). Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." Id. (citing State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)). Third, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." Id. (citing State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920)).

The South Carolina Supreme Court held a trial judge erred in failing to charge on the specific elements of self-defense that were applicable to the defendant's theory in State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). As stated by the Court, "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. The Court found the instruction given in Day incomplete because the trial judge failed to instruct the jury that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased's drug consumption. Id.; see also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978) (including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would provide a basis for the defendant to judge the conduct of his adversary more harshly than otherwise).

With those principles in mind concerning analogous legal concepts, a review of third party guilt jurisprudence and its purpose in a criminal trial dictates that a trial court instruct a jury on third party guilt where supported by the evidence. South Carolina's third party guilt evidence rule provides that

> The evidence offered by an accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. … [B]efore such testimony can be received, there must be such proof of connection

> with it, such a train of facts and circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941).

One commentator, Thomas Lundy, explained that "[w]hen the defense relies on a theory of third party guilt, the jury may improperly view the trial as a question of whether or not the third party has been proven guilty. Hence, it is crucial that the instructions caution the jurors against shifting the burden of proof to the defendant." Thomas Lundy, Jury Instruction Corner, Champion September/October 2003, at 42. Lundy explained that "[b]ecause the defendant has a right to an instruction on his or her theory of the case, … there should be a right to instruction on third party guilt when appropriate." Id. In short, "a defendant who relies on the defense theory of third party culpability should be permitted to obtain instruction upon this theory notwithstanding the fact that it may be generally encompassed within the general instruction on the prosecution's burden to prove guilt beyond a reasonable doubt." Id. at 42-43. Lundy explained "[t]he most important role of a third party guilt instruction is to assure the jurors understand that the defense has no burden to prove that the third party is guilty." Id. at 43. The "third party evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." Id. As presented earlier, Lundy described "the function of the third party guilt instruction" as "analogous to an instruction on alibi – it must assure that the jurors do not place the burden on the defense to prove its theory of the case." Id.

The trial judge erred in refusing to instruct the jury regarding third party guilt where the state and Appellant presented evidence of the guilt of a third party – Malik – and the instruction was

necessary to ensure the jury knew how to evaluate the evidence, particularly regarding placing the burden of proof on the prosecution. The requested instruction served to explain the type of evidence presented. Additionally, the requested instruction would ensure the jury did not shift the burden of proof to the defendant in light of the evidence presented. Due to the presentation of third party guilt evidence, it was necessary to ensure the jury understood their job during deliberations was to evaluate the state's evidence against Appellant and not to focus on whether there was evidence of Malik's guilt proven beyond a reasonable doubt. The question for the jury was not whether Appellant or Malik was guilty. However, without clarifying instructions, the jury could not determine what it was supposed to do with the evidence of third party guilt or on whom to place the burden of proof in light of the evidence of third party guilt presented.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial based upon the egregious errors committed by the trial judge.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of September, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TONY ORLANDA SINGLETON,

APPELLANT

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 Amended Initial Brief of Appellant and Designation of Matter 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), which is dspencer@scag.gov, and a copy of the Amended Initial Brief of Appellant and Designation of Matter have been served on Tony Orlanda Singleton, #381026, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 30th day of September, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT