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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRYL DOUGLAS BRADLEY, JR.

APPELLANT

APPELLATE CASE NO 2020-000524

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

- 1. The trial judge erred in refusing to declare a mistrial when the investigator testified that she knew it was Appellant the witness identified from a photo line-up because the investigator was familiar with Appellant, indicating the she knew Appellant from prior criminal acts.**

During the direct-examination by the State of Investigator Jennifer Snider with the Beaufort County Sheriff's office the following questioning took place:

Q: Okay. Was she able to pick someone out?

A: Yes, she picked out number three and identified that as Mr. Bradley.

Q: Okay. Law Enforcement identified that as Mr. Bradley?

A: Yes. I was familiar with Mr. Bradley, so I knew that that was Mr. Bradley.

(Tr. p. 167, lines 9-15). Appellant immediately objected. An off the record discussion was held and the judge stated that he would place his ruling on the record at the appropriate time. (Tr. p. 167, lines 16-20).

Outside of the presence of the jury, Appellant moved for a mistrial based on the investigator's comment that she was familiar with Appellant. (Tr. p. 170, lines 8-16). Counsel for Appellant argued, "Your Honor, I would make a motion for a mistrial introducing the possibility, because this is a law enforcement officer, into the minds of the jurors that this law enforcement officer is somehow familiar with Mr. Bradley through her profession as a law enforcement officer, which would cast him in a light that is terribly unfavorable, prejudicial, can't be cured by some instruction to the jury, and we would move for a mistrial." (Tr. p. 170, lines 8-16). The judge denied the motion stating:

Thank you. Ms. Campbell, I understand your motion, and your motion for mistrial is respectfully denied. The witness said, Ms. Snider, that she was familiar with him. She didn't say from her duties of law enforcement. Obviously she could have known him from all sorts of circumstances, other than that. I don't think that it gave grounds from that testimony for a mistrial.

You promptly made an objection. It was not a statement solicited by the State in their question, it was volunteered. And I don't think it rises to the level of legal prejudice necessary to declare a mistrial in this case. Therefore, your motion is respectfully denied.

(Tr. p. 170, line 17 – p. 171, lines 1-5). Appellant did not request a curative instruction and none was given by the judge. The trial judge erred in refusing to grant the mistrial based on the admission of improper character evidence from the implication of prior bad acts.

The clear implication is that the criminal investigator was familiar with Appellant because Appellant had been involved in prior criminal acts. The investigator's comment was not a vague reference to fingerprints as in State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999), where the Court noted it was questionable if the jury even understood the implication of the fingerprint evidence. The investigator's comment was not a vague reference to an outstanding warrant made in a prosecutor's opening statement as in State v. Wiley, 387 S.C. 490, 496, 692 S.E.2d 560, 563 (Ct. App. 2010). The investigator's comment that she was familiar with Appellant constitutes improper character evidence by implying that Appellant had been involved in prior criminal acts.

The prejudice resulting from the improper testimony is far greater than in State v. Moultrie, 316 S.C.547, 451 S.E.2d 34 (Ct. App. 1994), where an officer testified that he knew the defendant by sight and name after another witness testified, without a contemporaneous objection, that the defendant had been arrested three times before and another witness testified, without objection, that he and the defendant sold drugs on a regular basis. In the present case there was no other testimony about prior bad acts. In State v. Hurell, 424 S.C. 341, 818 S.E.2d 21 (Ct. App. 2018), the defendant's sister inadvertently testified that the defendant had been in prison as a result of a prior conviction. At the time of the improper reference, the defendant

moved for a mistrial but then withdrew the motion. During jury deliberations the jury sent a note asking about the sister's testimony but then sent a second note asking the judge to disregard the first note. The defendant then moved for a mistrial and that motion was denied. In contrast, the motion for a mistrial in the present case was made immediately following the improper testimony and was not withdrawn. In State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012), the Court of Appeals found the issue was waived but then addressed the merits and wrote, "We find the single reference to the schedule three drug charge contained in the indictments read at the beginning of trial does not constitute sufficient prejudice to justify a mistrial." 400 S.C. at 270, 734 S.E.2d at 320. The mistrial motion was not waived in the present case. Additionally, the investigator's improper testimony was not simply a reference to a charge in an indictment at the beginning of trial but rather an implication of prior bad acts.

During cross-examination the State questioned Appellant about a petite larceny charge when he was thirteen years old. (Tr. p. 285, line 25 – p. 286, lines 1-16). Reference to this minor juvenile offense, that Appellant did not recall, does not cure the prejudice from allowing the investigator to testify that she was familiar with Appellant, indicating that he had been involved in more serious prior criminal acts. Additionally, the jury would not have inferred that Investigator Snider was familiar with Appellant as a result of the investigation of the current charges when she testified that her only involvement in the case was to show the photo line-up. (Tr. p. 165, line 24 – p. 166, line 1).

The trial judge erred in refusing to grant a mistrial based on the admission of improper character evidence. The investigator's testimony that she was familiar with Appellant implied that Appellant had been involved with prior criminal acts. Rule 404(b) of the South Carolina Rules of Evidence provides: "Evidence of other crimes, wrongs, or acts is not admissible to

prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” The prior bad acts implied by the investigator’s testimony does not meet an exception pursuant to the rule. The error was not harmless under the facts of this case where credibility of the witnesses was a critical factor for the jury’s determination. Appellant denied an attempted robbery but admitted that he was frustrated the witness changed her mind about having consensual sex so Appellant simply demanded the money he was owed. (Tr. p. 280, line 7 – p. 281, lines 1-13). The improper character evidence adversely affected Appellant’s credibility. A mistrial was necessary.

2. The trial judge erred in refusing to declare a mistrial after he instructed the jury that, “I have now charged you with the law in order to help guide you to a just result in this case.”

The judge’s charge to the jury, “I have now charged you with the law in order to help guide you to a just result in this case,” is not a correct statement of the law. South Carolina appellate courts have consistently instructed trial courts to remove from their jury instructions any suggestion that a criminal jury’s duty is to return a verdict that is just or fair to all parties and to refrain from telling juries that their role is to search for the truth. State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018); State v. Daniels, 401 S.C. 251, 257, 737 S.E.2d 473, 476 (2012); State v. Patterson, 425 S.C. 500, 511, 823 S.E.2d 217, 223–24 (Ct. App. 2019); State v. Aleksey, 343 S.C. 20, 26, 538 S.E.2d 248, 251 (2000). The Beaty case clarified that the “just or fair” and “search for the truth” language should not be used in preliminary comments to the jury or during jury instructions writing:

However, we agree with Appellant that a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. 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. “We instruct trial judges to avoid these terms and any others 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.


The improper instruction in the present case came at the conclusion of the judge’s charge on the law. (Tr. p. 355, lines 24-25). The improper instruction applied to all of the law previously given in the charge, including reasonable doubt and circumstantial evidence. In Patterson this Court found that the trial judge’s opening remarks to the jury that a trial is a search for the truth were error but found that the error did not warrant reversal because the improper comments came at the beginning of trial “rather than during the charge on the State's burden of proof at the end, which, we believe, is when such a statement would have the most prejudicial effect. See Daniels, 401 S.C at 256, 737 S.E.2d at 475 (‘Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt.’).” Patterson, 425 S.C. at 512, 823 S.E.2d at 224. In contrast, in the present case the improper comment, “I have now charged you with the law in order to help guide you to a just result in this case,” was made at the conclusion of the judge’s charge on the law where the statement had the most prejudicial effect. The improper comment served to dilute the State’s burden of proof beyond a reasonable doubt. The error requires reversal.

Due Process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). The Due Process Clause of the Fourteenth

Amendment “safeguard[s] against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 1935, 56 L.Ed.2d 468 (1978). The charge to the jury, “I have now charged you with the law in order to help guide you to a just result in this case,” unconstitutionally diluted the State’s burden of proof beyond a reasonable doubt. A constitutionally deficient reasonable doubt instruction cannot be harmless error. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993). The improper comment in the present case resulted in a constitutionally deficient reasonable doubt instruction and requires reversal.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and sentences and remand for a new trial.


Kathrine H. Hudgins
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ATTORNEY FOR APPELLANT

This 7th day of June, 2021.

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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 Initial Reply Brief of Appellant in the above referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Reply Brief of Appellant has been served on Darryl Douglas Bradley, #382519, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of June, 2021.


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