

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Sep 01 2021
SC Court of Appeals

Appeal from Aiken County

Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 2021-UP-302

THE STATE,

RESPONDENT,

V.

BRANDON JEWEL LEE,

PETITIONER

APPELLATE CASE NO. 2018-001440

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Brandon Jewel Lee petitions the Court for rehearing and respectfully submits that this Court misapprehended the significance of the trial judge using the “true facts” language while instructing the jury on their role as fact finder, not on their role in determining witness credibility, a critical distinction between the present case and State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). During the instruction to the jury on their role as the finders of fact the trial judge twice told the jury to determine the “true facts.” At the conclusion of the jury instructions the judge once again instructed the jury to determine the true facts. Counsel respectfully submits that the present case is distinguished from Aleksey, where the prohibited “seek

the truth language” was used in the judge’s instruction on witness credibility. There is a difference between credibility determinations and factual determinations of proof beyond a reasonable doubt. The jury makes credibility determinations by determining if a witness is telling the truth. The jury in a criminal case makes factual findings not by determining the truth but by determining if the State proved guilt beyond a reasonable doubt. The “true facts” language is prohibited because, “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.” State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018).

Additionally, in failing to distinguish the present case from Aleksey, counsel respectfully submits that this Court overlooked the fact that the prohibited language in Aleksey was followed by “an additional exhortation to bear in mind the State’s heavy burden of proof.” Aleksey, 343 S.C. at 29, 538 S.E.2d at 252-53. The judge’s improper remarks in the present case were not followed by an additional exhortation to bear in mind the State’s heavy burden of proof. Instead, in the present case the judge told the jury to determine the true facts **and** determine if the State met its burden. The charge is confusing and dilutes the State’s burden of proof. Viewing the instruction as a whole, there is a reasonable likelihood the jury applied the improper instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. Counsel respectfully seeks rehearing.

In his opening remarks to the jury the trial judge stated:

As I told you earlier, you’re the judges of the facts so it is your responsibility and your job to listen to the testimony and determine the credibility or the believability of the witnesses, determine which evidence convinces you that it’s true, which - - which evidence do you determine to be real, **true facts** in this case; you take those **true facts**, you apply it to the law as I give it to you, and then you’ll be in a position to determine whether or not based on those **true facts and**

the law that the State has met its burden of proving the defendant's guilt to you beyond a reasonable doubt. And I will explain to you what reasonable doubt is when I instruct or charge you on the law.

(R. p. 13, lines 3-15)(emphasis added).

During the judge's charge on the law he instructed the jurors:

In a criminal case, because of the presumption of innocence, when the parties come into court, the scales of justice are tipped way in favor of the defendant. He is presumed to be innocent. And for the State to prove him guilty beyond a reasonable doubt, the scales have to tip in this manner.

So the burden is greater in a criminal case than it is in a civil case. It's beyond a reasonable doubt as opposed to the preponderance or the greater weight of the evidence. Our courts have said proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Obviously, there are very few things in the world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crimes charges, you must find him guilty. If, on the other hand, you think there's a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

As I told you when we selected you to serve there are two judges try every case. I'm the trial judge, the judge of the law; you're the judges of the facts. My role is to rule on the admissibility of the evidence and to instruct you on the law. **Your role is to determine what the true facts are in the case and to determine whether or not the State has proven its case to you beyond a reasonable doubt.** So please don't infer from anything I have said, done, frowned, smiled, raised my eyebrows, yawned, stretched, whatever, that I have any opinion about the facts. I cannot. That is your sole duty. You're the sole finders of the facts and **you determine what the true facts are in the case and whether or not the State has proven the case to you beyond a reasonable doubt.**

Now, if you do that, obviously, you have to determine the credibility or the believability of the witnesses. It's not what I think, it's not what the defense lawyer thinks is telling the truth, or the State, prosecutor who's telling the truth, it is your sole duty as the judges of the facts to determine the credibility of the witnesses who have testified in this case.

(R. p. 248, line 20 – p. 249, 250, lines 1-4)(emphasis added).

At the conclusion of the jury charge the judge told the jury:

The verdict has to be unanimous. All twelve of you must agree as to each one, the drugs and the burglary. Obviously, you're not back there to punish any enemy or reward any friends, you're back there to carefully deliberate what has been presented to you. You determine what the **true facts** were from the testimony and not what the lawyers argued or what I've said or anything else, but what you determine the **true facts** to be from the witnesses. Take the **true facts, apply it to law of burglary, and the drug case, and decide whether or not the State has met that burden of proving him guilty beyond a reasonable doubt.**

(R. p. 256, lines 12-23).

Petitioner took exception to the instruction based on State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018). (R. p. 259, lines 6-14). The judge ruled stating, "Well, I understand that, but their job is to determine the credibility of the witnesses, determine what the true facts are, but I added once they do that then based on that they have to determine whether or not the State has proven the case to them beyond a reasonable doubt, so I – I cured that and I stand by my charge. Thank you." (R. p. 259, lines 15-21). The trial judge erred. Adding the instruction to determine whether or not the State proved the case beyond a reasonable doubt **after** instructing the jury to determine the true facts does not cure the error. While the jury is to determine the credibility of the witnesses, the instruction to the jury that their role is to determine the true facts was not given in reference to the credibility of witnesses instruction. Instructing the jury to determine the true facts and then decide if the State proved the case beyond a reasonable doubt unconstitutionally dilutes the State's burden. The improper instruction requires reversal.

In State v. Patterson, 425 S.C. 500, 511, 823 S.E.2d 217, 223–24 (Ct. App. 2019), this Court wrote:

Our supreme court has consistently cautioned against using language that suggests the object of a trial is to find "the truth." See State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) ("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."); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (holding while it was improper for

the trial court to charge the jury “that a criminal jury's duty is to return a verdict that is ‘just’ or ‘fair’ to all parties,” the issue was unpreserved); State v. Aleksey, 343 S.C. 20, 28 n.2, 538 S.E.2d 248, 252 n.2 (2000) (“Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of ‘the truth’ in jury charges is unconstitutional.”); State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998) (noting jury 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”). Accordingly, we believe the trial court erred in making such statements in its comments to the jury, and we take the opportunity to reiterate our supreme court's instructions that trial courts should “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.” Beaty, 423 S.C. at 34, 813 S.E.2d at 506.

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 the present case the judge not only used the prohibited determine the “true facts” language in the opening remarks to the jury, (R. p. 13, lines 3-15), but also in the charge on the law at the end where the statement has the most prejudicial effect, using the prohibited “true facts” language three separate times. The error in the present case requires reversal.

While the trial judge in the present case did not have the benefit of the Patterson case at the time of trial in July of 2018, the trial judge did have the benefit of the Court’s instruction in the Beaty case. In Beaty the Court wrote:

However, we agree with Petitioner 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.

State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018)(n.#2 omitted) *cf.* State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties). In Beaty the Court found error in the Judge's preliminary comments to the jury that a trial is a search for the truth as well as comments about “find true facts” and a “true and “just verdict.” The Court, however, found the error did not warrant reversal because, “the remarks were not linked to either the reasonable doubt or circumstantial evidence charge as was condemned in Aleksey.” Beaty, 423 S.C. at 34, 813 S.E.2d at 506. The prohibited determine the “true facts” remarks in the present case warrant reversal because the remarks were linked to the reasonable doubt charge.

In the present case the trial judge used the prohibited determine the “true facts” language in his opening remarks to the jury. Then, during the charge to the jury the trial judge first instructed the jury on the presumption of innocence, (R. pp. 246-247), then on reasonable doubt, (R. pp. 248-249), then on the jury's role as fact finders when he said, **“Your role is to determine what the true facts are in the case and to determine whether or not the State has proven its case to you beyond a reasonable doubt.** So please don't infer from anything I have said, done, frowned, smiled, raised my eyebrows, yawned, stretched, whatever, that I have any opinion about the facts. I cannot. That is your sole duty. You're the sold [*sic*] finders of the facts and **you determine what the true facts are in the case and whether or not the State has proven the**

case to you beyond a reasonable doubt.” (R. p. 249, lines 13-22)(emphasis added). The judge then concluded the charge on the law using the prohibited determine the “true facts” language. (R. p. 256, lines 12-23).

“[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error.” State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). “The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.” Id. (citing Estelle v. McGuire, 502 U.S. 62 (1991)). Viewing the jury instruction in the present case as a whole, the “true facts” language unconstitutionally diluted the State’s burden of proof beyond a reasonable doubt requiring reversal.

The improper determine the “true facts” remarks were given during the instruction to the jury on their role as finders of fact and was linked to the reasonable doubt instruction. As a result, there is a reasonable likelihood the jury applied the improper instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The charge is confusing and dilutes the State’s burden of proof by telling the jury to determine the true facts **and** determine if the State met its burden. The charge diverted the jury from its obligation to determine whether the State proved guilt beyond a reasonable doubt. There is a reasonable likelihood the jury understood from the improper instruction that they were to choose between the theory presented by the State and the theory presented by Petitioner rather than simply determining if the State met its burden of proof beyond a reasonable doubt.

In Aleksey the Court found no reversible error because the charge to “seek the truth” was given with the credibility of witnesses charge rather than the reasonable doubt charge. “There is

not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof.” State v. Aleksey, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252–53 (2000)(n. #3 omitted). The present case is distinguished from Aleksey. In the present case the prohibited determine the “true facts” remarks were given during the instruction to the jury on their role as finders of fact and then again at the conclusion of the charge, not during the charge on credibility of the witnesses. Additionally, the judge’s remarks in the present case did not include an additional exhortation to bear in mind the State's heavy burden of proof. The use of the prohibited language in the charge to the jury on their role as fact finders requires reversal.

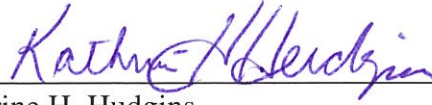
Due Process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). The Due Process Clause of the Fourteenth Amendment “safeguard[s] against dilution 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 “to determine the true facts” 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 charge requires reversal.

In affirming the convictions this Court wrote, “We find the circuit court's jury instructions as a whole to be comparable to the instructions given in Aleksey, in which our

supreme court concluded that the instructions as a whole “properly conveyed the law to the jury.” 343 S.C. at 29, 538 S.E.2d at 253.” State v. Lee, No. 2018-001440, 2021 WL 3662393, at *3 (S.C. Ct. App. Aug. 18, 2021). In footnote #2 this Court wrote, “Lee argues the present case is distinguishable from Aleksey because the challenged language in Aleksey was in the instruction on the jury's role in determining witness credibility and here, the challenged language was in the instruction on the jury's role as the finders of fact. However, we view the jury's role in determining witness credibility as a subset of the jury's role as the finders of fact. Therefore, this is a distinction without a difference.” State v. Lee, No. 2018-001440, 2021 WL 3662393, at *3 (S.C. Ct. App. Aug. 18, 2021). Respectfully, the instruction in the present case is not comparable to the instruction in Aleksey.

Counsel respectfully submits that this Court misapprehended the significance of the trial judge using the prohibited “true facts” language while instructing the jury on their role as fact finder, not on their role in determining witness credibility, a critical distinction between the present case and Aleksey. There is a difference between credibility determinations and factual determinations of proof beyond a reasonable doubt. The jury makes credibility determinations by determining if a witness is telling the truth. The jury in a criminal case makes factual findings not by determining the truth but by determining if the State proved guilt beyond a reasonable doubt. The judge in the present case instructed the jury to determine the true facts **and** determine if the State met its burden of proof beyond a reasonable doubt. This instruction is confusing and diverts the jury from its obligation in a criminal case to determine whether the State proved guilt beyond a reasonable doubt. Additionally, counsel respectfully submits that this Court overlooked the fact that the “exhortation to bear in mind the State’s heavy burden of proof” included in the instruction in the Aleksey instruction is missing in the instruction in the present case. The

instruction as a whole failed to properly convey the law to the jury. Based on the above arguments counsel for Petitioner respectfully seeks rehearing and asks this Court to reverse the convictions.



Kathrine H. Hudgins
Appellate Defender
Counsel for Petitioner

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

This 1st day of September, 2021.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Doyet A. Early, Circuit Court Judge

RECEIVED

Sep 01 2021

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BRANDON JEWEL LEE,

PETITIONER

APPELLATE CASE NO. 2018-001440

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 Deborah R. J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Brandon Jewel Lee, #366541, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 1st day of September, 2021.



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER