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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Aiken County
Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 2021-UP-302 (S.C. Ct. App. Filed August 18, 2021)

Lower Court Case No. 2017-GS-02-01447

THE STATE,

RESPONDENT,

V.

BRANDON JEWEL LEE,

PETITIONER

APPELLATE CASE NO. 2018-001440

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 1, 2021.

QUESTION PRESENTED

Did the Court of Appeals err in finding that trial judge's jury instruction as a whole did not constitute reversible error when the judge instructed the jury that their role is to determine the true facts in the case?

STATEMENT OF THE CASE

In August of 2017, the Aiken County Grand Jury indicted Petitioner, Brandon Jewel Lee, for burglary first degree and unlawful possession of a prescription drug (Xanax) without a prescription, indictments #2017-GS-20-1447, 1448. On July 24, 2018, Petitioner proceeded to jury trial before the Honorable Doyet A. Early, III. Barry L. Thompson, II, and Brianne P. Steiner represented Petitioner at trial. Ashley A. Hammack and John L. Furse prosecuted the case. The jury found Petitioner guilty of both charges. Judge Early sentenced Petitioner to twenty-two (22) years for burglary and two (2) years concurrent for the prescription drug charge. A timely notice of intent to appeal was served on July 30, 2018, and the direct appeal perfected. On March 2, 2021, a three-judge panel of the South Carolina Court of Appeals heard oral arguments in the case. On August 18, 2021, in an unpublished per curiam opinion, the Court of Appeals affirmed the convictions. A timely petition for rehearing was filed on September 1, 2021, and then denied on October 1, 2021. This petition for writ of certiorari follows.

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant certiorari to clarify that the use of the "true facts" language in a jury instruction is not harmless when the language dilutes the State's burden of proof beyond a reasonable doubt.

ARGUMENT

The Court of Appeals erred in finding that trial judge's jury instruction as a whole did not constitute reversible error when the judge instructed the jury that their role is to determine the true facts in the case.

The jury found Petitioner guilty of the burglary of Carol Gardner's home off of Whiskey Road in Aiken, South Carolina on April 2, 2017. Petitioner testified that he thought the house belonged to Scott Terwilliger when he and Terwilliger and Petitioner's friend Avery went inside the house to "party." (R. p. 186-191). Petitioner testified that they walked in the door. (R. p. 191, lines 1-3). Petitioner admitted to stealing a bottle of Xanax pills from a bathroom inside the house he believed belonged to Terwilliger. (R. p. 193, lines 1-16). Petitioner testified that he started to feel uncomfortable and left Avery and Terwilliger at the house right after 3:00 PM. (R. p. 194, lines 1-19). Petitioner testified that when he left the house Avery still had Petitioner's phone. (R. p. 194, lines 21-24).

When Carol Gardner returned to her house she found a man inside. (R. p. 36, line 21 – p. 37, lines 1-14). Gardner testified that when the man saw her, he left through her back door. (R. p. 37, lines 16-25). Gardner put her dogs on leashes, went out her garage door and called 911. (R. p. 38, lines 1-12). An officer was dispatched to her house at 8:16 PM. (R. p. 67, lines 12-13). The parties stipulated that on the day in question, April 2, 2017, sunset was at 7:48 "and the nighttime, twilight was at 8:13." (R. p. 208, lines 12-25). The judge charged the jury with the lesser included offense of burglary second degree but instructed the jury that, "Our law describes nighttime as this: It is the period of time between sunset and sunrise, during which there is not enough daylight to recognize a person's face except by artificial light or moonlight. Nighttime is

the period of time between sunset, sunrise, during which there is not enough light, daylight, to recognize a person's face except by artificial light. So that's what you have to prove to prove burglary in the first degree." (R. p. 254, line 21 – p. 255, lines 1-4). Earlier in the trial there was a discussion about the definition of night time. (R. pp. 110-111). There was, however, no objection to the definition of night time given to the jury by the judge.[1]

Investigator Mary Francis O'Grady with the Aiken County Sheriff's Office collected evidence from Gardner's house. Investigator O'Grady testified that she found a wallet in Gardner's back yard with Petitioner's ID card and other cards belonging to Petitioner. (R. p. 129, line 7- p. 130, lines 1-7). Additionally, the investigator found a wallet with Avery Herman Snipes Junior's driver's license and other cards belonging to Avery Snipes. (R. p. 136, line 25 – p. 137, lines 1-11). The investigator also found a driver's license belonging to John Michael Franklin Hozey. (R. p. 135, line 11 – p. 136, lines 1-4). The investigator was able to lift a partial palm print from a bottle of Patron Tequila inside the house. (R. p. 123, line 1 – p. 124, 125 lines 1-5). The print matched a palm print card belonging to Petitioner. (R. p. 145, lines 3-14). When police stopped and searched Petitioner the next day, they found a bottle of Xanax prescribed for Carol Gardner. (R. p. 149, lines 4-24).

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

[1] The failure to object to the definition of night time given or request an alternate definition may need to be addressed in post-conviction relief. The parties stipulated that twilight was at 8:13. The police were dispatched at 8:16 PM. The judge noted that twilight may be a relevant factor. (R. p. 111, lines 1-4).

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 sold 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 instruction 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 the 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.

(App. p. 256, lines 12-23)(emphasis added).

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 of 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. 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 decide if the State proved the case beyond a reasonable doubt unconstitutionally dilutes the State's burden. Based on the facts of this case, the instruction suggests that the jury should decide whose version is true, the State's version or Petitioner's version. 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 contrast, in the present case the improper comments were made during the charge on the State's burden of proof at the **end** of the trial where the statement had the most prejudicial effect. The error 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. In contrast, in the present case the charge to the jury to determine the true facts was linked to a reasonable doubt charge. The error requires reversal.

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). Importantly, as noted by the Court in Aleksey, the trial judge instructed the jury on reasonable doubt, then on the presumption of innocence, then on the State's burden of proof, then on the jury's role as fact finders and then on credibility of the witnesses stating, "Obviously you do not determine the truth or falsity of a matter by counting up the number of witnesses who may have testified on one side or the other. 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. Now, all of these things, ladies and gentlemen, you will consider, bearing in mind that you must give the defendant the benefit of every reasonable doubt." Aleksey, 343 S.C. at 26, 538 S.E.2d at 251.

In contrast, in the present case the charge to the jury to determine the true facts came after the reasonable doubt charge and during the instruction on the jury's role as fact finder rather than during the credibility of witnesses charge as in Aleksey. The 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). While the "determine the true facts" instruction was given during the instruction to the jury on their role as finders of fact and not during the instruction on reasonable doubt, the jury was instructed to find the **true** facts and determine if the State proved the case beyond a reasonable doubt, linking the "true fact" language to reasonable doubt. 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 diverting the jury from its obligation to determine whether the State presented facts that prove 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.

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 the Court of Appeals 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 the Court of Appeals 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). While witness credibility determinations may be part of the jury's role as the finder of fact, 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 presented facts that prove guilt beyond a reasonable doubt. The instruction in the present case is distinguished from the instruction in Aleksey where the "seek the truth" language was used in the credibility of witnesses charge.

In the present case the trial judge used the "true facts" language twice 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. 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. the instruction suggests that the jury should decide whose version is true, the State's version or Petitioner's version. Again, the instruction is confusing and diverts the jury from its obligation in a criminal case to determine whether the State presented facts that prove guilt beyond a reasonable doubt. Additionally, the remarks in Aleksey were followed by an "exhortation to bear in mind the

State's heavy burden of proof." Such an exhortation is missing in the instruction in the present case. Instead, the judge in the present case again used the "true facts" language at the conclusion of the charge. The instruction as a whole failed to properly convey the law to the jury.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

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Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of November, 2021.