

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Aiken County
The Honorable Doyet A. Early, Circuit Court Judge
Appellate Case No. 2018-001440

The State,

Respondent,

v.

Brandon Jewel Lee,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court's limited reference to "true facts" during the jury charge was in the context of the credibility determination, was not connected to the complete and accurate reasonable doubt charge that preceded it, and did not confuse the jury regarding its role as factfinder; however, even if the circuit court's limited reference to "true facts" was error, it was harmless beyond a reasonable doubt in light of the evidence and the totality of the jury charges.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In 2017, the Aiken County Grand Jury indicted Appellant Brandon Jewel Lee on one count of first degree burglary and one count of unlawful possession of a prescription drug, arising from the burglary of an Aiken County residence on April 2, 2017. The case was called for a jury trial on July 24, 2018, before the Honorable Doyet A. Early, III, Circuit Court Judge.

During preliminary instructions to the jury, the circuit court stated the jury was the judge of facts, and the jurors' responsibility was to listen to the testimony, determine the credibility of the witnesses, and determine which evidence convinces them it is true. The court further instructed the jury it was to take the facts it determined to be the true facts, apply them to the law as charged by the court, and determine whether or not the State had met its burden of proving guilty beyond a reasonable doubt. (Trial Transcript [TT], pp. 39-41; Record on Appeal [R.], pp. 11-13).

The victim testified she went out with friends the evening of April 2, 2017, and returned to her home after dark. When she opened her garage door, one of her dogs ran out to her, which was unusual because she left them inside the house that day. Inside her garage, she noticed boxes that were neatly stacked up when she left were strewn around. She entered the house to grab her dog's leash and called out for her other dog.

When her second dog came toward her, a man came running out from the master bedroom, ran through her sunporch and out the porch screen door. The man had items in his hands, and the victim saw items strewn all over the floor. The doors to an entertainment wall unit were open and the contents were pulled out. Various items, including her laptop, Playstation, Xbox, a camera case, a new Coach bag, bags of jewelry and a limited edition bottle of Patron in a plexi-glass case, were stacked up next to the back door. Coins in small envelopes collected by her husband, which were kept inside the master bedroom closet, were scattered around on the sunporch floor. Most of

the rooms in the house, including the bathroom, had been ransacked and left in disarray, and a prescription bottle of generic Xanax was missing from a basket in the bathroom. (TT, pp. 58-91; R., pp. 30-63).

A deputy with the Aiken County Sheriff's Office Bloodhound Tracking Team testified he was called to the scene of the burglary, and deployed a tracking K-9. The dog picked up a scent from the yard outside the sunporch door, and followed it until he lost it at the street. Along the track, officers found wallets containing identification and credit cards, and several small coin envelopes. (TT, pp. 99-130; R., pp. 71-102).

An Aiken County Sheriff's Office forensic investigator testified she processed the scene and lifted a partial palm print from the Patron bottle's plexi-glass case, which was subsequently identified as Appellant's palm print. She also processed the wallets and coin envelopes found along the track followed by the tracking dog. One of the wallets contained a debit card, credit cards, and a South Carolina ID card belonging to Brandon J. Lee. The other wallet contained a South Carolina driver's license and a debit card belonging to Avery Hermon Snipes. (TT, pp. 145-168, 169-173; R., pp. 117-140, 141-145).

An Aiken County Sheriff's Office investigator testified he and another officer observed Appellant walking through a Walgreen's parking lot looking into car windows. They also noticed Appellant's shorts appeared to be heavy with items in the pockets and he kept adjusting his shorts. When Appellant left the Walgreen's parking lot and continued the same pattern in another business parking lot, the officers stopped him. Appellant told the officers he had a knife on him, and during a safety frisk, the officers found a prescription bottle with the victim's name on it that contain generic Xanax. (TT, pp. 175-179; R., pp. 147-151).

Appellant testified he was at his house with Avery Snipes on April 2, 2017, and Snipes called his friend Scott Terwilliger, who picked them up to go buy drugs at Appellant's friend's house. After they bought methamphetamine from Appellant's friend, Terwilliger drove them to a house Appellant thought was Terwilliger's residence.

They entered the residence and started doing drugs. Appellant took some Xanax he had with him, as well as some Percocet (painkiller), while Snipes and Terwilliger did the methamphetamine. At one point, Snipes and Terwilliger started "acting kind of strange." Appellant went into the bathroom and saw a prescription bottle containing generic Xanax, which he stole. Appellant testified he left the house about five minutes later, walked to a gas station and called a friend, who was subsequently killed in a car accident and unavailable to testify at trial, to come pick him up. (TT, pp. 213-227; R., pp. 185-199).

During the jury charges, the court thoroughly and accurately charged the law regarding reasonable doubt and the State's burden to prove guilt beyond a reasonable doubt. The court then reminded the jury of its role as factfinder and "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." In the context of the jury's responsibility, the court charged the jury it had to determine the credibility of the witnesses. When instructing the jury as to the elements of the charged offenses, the court instructed the jury it had to determine the State proved each element beyond a reasonable doubt. (TT, pp. 274-286; R., pp. 246-258).

At the conclusion of the jury charges, Appellant objected to inclusion of the phrase "true facts." The circuit court overruled the objection in light of the specific language instructing the jury that once it determined the true facts, the jury had to determine whether or not the State had proven the case beyond a reasonable doubt. (TT, p. 287; R., p. 259).

The jury convicted Appellant on both charges, and the circuit court sentenced him to concurrent sentences of twenty-two years incarceration on the first degree burglary conviction, and two years incarceration on the unlawful possession of a prescription drug. This appeal followed.

STANDARD OF REVIEW

When reviewing ambiguous jury instructions, the appellate court must consider the instructions as a whole, and determine if there is a reasonable likelihood the jury applied the challenged instruction in a way that violates the Constitution. State v. Aleskey, 343 S.C. 20, 538 S.E.2d 248, 252 (2000) (*citing* Estelle v. McGuire, 502 U.S. 62 (1991) and Boyde v California, 494 U.S. 370 (1990)).

ARGUMENT

The circuit court's limited reference to "true facts" during the jury charge was in the context of the credibility determination, was not connected to the complete and accurate reasonable doubt charge that preceded it, and did not confuse the jury regarding its role as factfinder; however, even if the circuit court's limited reference to "true facts" was error, it was harmless beyond a reasonable doubt in light of the evidence and the totality of the jury charges.

Appellant contends the circuit court erred because the reference to "true facts" in the jury charge unconstitutionally shifted the State's burden of proof to Appellant because it was related to the reasonable doubt charge. This argument is meritless.

The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 355 S.E.2d 270, 273 (1987). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003). A jury charge that is substantially correct and covers the law does not require reversal. *Id.* at 583. "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

As support for his contention, Appellant relies on State v. Patterson, 425 S.C. 500, 823 S.E.2d 217 (2019), State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), and Aleksey, which cautioned trial judges to refrain from using language suggesting the object of a trial is to find the truth. Each case is distinguishable from this case.

During the trial judge's preliminary instruction in Patterson, the trial judge told the jury the trial was "a search for the truth," which the defendant argued "was prejudicial in that they impermissibly shifted the burden of proof from the State." Citing Beaty, the Court of Appeals found the remarks were erroneous, but further found the error was harmless in light of the evidence

and totality of the jury charges, including an accurate definition of reasonable doubt. 823 S.E.2d at 223-224.

In Beaty, during the judge's preliminary instructions to the jury, he described the trial as "a search for the truth in an effort to make sure that justice is done," stated the jurors' oath required them to "listen to the evidence and reach a fair and just verdict," and [i]n determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable." The Supreme Court found such phrases could be "understood to place an obligation on the jury, independent of the burden of proof," to render a verdict based solely on what the jury believes serves its "perception of justice." The Court concluded, however, that the defendant had not shown sufficient error associated with the trial judge's statements to warrant reversal. 813 S.E.2d at 505-506.

In Aleskey, the trial judge instructed the jury it had "one single objective and that is to seek the truth." Citing State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), the Supreme Court found that jury instructions on either reasonable doubt or circumstantial evidence charging the jury to "seek the truth are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" 538 S.E.2d at 251-252. The Court affirmed, finding the disputed language did not appear in either the complete and proper reasonable doubt or circumstantial evidence charges, but was included in the context of the jury's role to determine credibility, and there was no reasonable likelihood the jury applied the disputed remarks in a manner inconsistent with the State's beyond a reasonable doubt burden of proof. *Id.* at 252-253. Significantly, the Court declined "to hold any mention of 'the truth' in jury charges is unconstitutional. *Id.* at 252, n. 2.

In this case, during preliminary remarks to the jury, the circuit court stated, without objection:

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.

(TT, p. 41, R., p. 13).

In charging the jury at the conclusion of the evidence, the circuit court thoroughly and accurately charged the law regarding the State's burden to prove its case beyond a reasonable doubt. Then, in the context of determining the credibility or believability of the witnesses, the court reminded the jury of its role was 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.” (TT, pp. 274-278; R., pp. 246-250).

The court charged the jury regarding expert testimony, the criminal intent requirement, and the elements of first degree burglary, second degree burglary and unlawful possession of a prescription drug without a prescription. As to each element, the court reiterated the State's burden to prove the element beyond a reasonable doubt. (TT, pp. 278-283; R., pp. 250-255).

At the conclusion of the jury charges, Appellant's counsel objected to the “true facts” language in the charge. The court responded that the jury had to determine the credibility of the witnesses and the true facts, and “based on that they have to determine whether or not the State has proven the case to them beyond a reasonable doubt.” (TT, p. 287; R., p.259).

As in Aleksey, the challenged language in this case was given in the context of the jury's role to determine the credibility of the witnesses. The language was “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." 538 S.E.2d at 253. Thus, the circuit court's references to "true facts" did not unconstitutionally shift the burden of proof to Appellant. Taken to its logical conclusion, Appellant's contention of error in this case will necessarily result in the exclusion of any reference to the truth in jury charges, which the Supreme Court expressly declined to do in Aleskey.

Even is the references to "true facts" was error, however, it was harmless beyond a reasonable doubt. The State presented evidence showing Appellant was in the victim's home the night of the burglary, and he fled when the victim entered the home. Appellant's palm print was on an item that had been removed from its original location, and his wallet, South Carolina ID card, debit card and credits cards were discovered along the route the K-9 found leading from the home's back door to the street. Appellant admitted he had been in the victim's home that day, but gave the fantastical explanation he entered the home with two other people thinking one of them owned the home.

Considering the jury charges as a whole and the evidence presented, there simply is no reasonable likelihood the jury focused on and applied the challenged instruction in a manner inconsistent with the State's burden to prove its case beyond a reasonable doubt. Accordingly, Appellant's conviction should be affirmed.

CONCLUSION

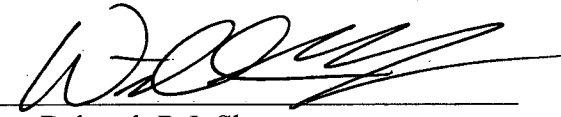
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellant Court Filings."

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