STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS JONES,

APPELLANT

APPELLATE CASE NO. 2011-205206

FINAL BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to give requested jury instructions regarding testimony against the defendant by a witness given for personal advantage or for the hope of lenient treatment from the prosecution?

STATEMENT OF THE CASE

Appellant Travis Jones was indicted by the Charleston County grand jury for attempted armed robbery, assault and battery with intent to kill (ABWIK), and possession of a deadly weapon during the commission of a violent offense. R. 5, line 4—R. 6, line 8; R. 319 (Indictments). Appellant's case proceeded to trial before the Honorable Deadra L. Jefferson and a jury from November 28, 2011 to December 1, 2011. R. 1. Andrew David Grimes and Cody Groeber represented Appellant, while Chad Simpson, Marian Askins, and Kelley Flynn represented the State. R. 1.

Before the start of trial, the gun possession charge was dropped, and the State proceeded on the counts of attempted armed robbery and ABWIK. R. 8, line 4—R. 9, line 1; R. 12, lines 17-23. The jury found Appellant guilty of both attempted armed robbery and ABWIK. R. 301, lines 17-25. The trial court imposed concurrent sentences of twelve years incarceration. R. 316, line 12—R. 317, line 1.

STATEMENT OF THE FACTS

Clevon Terrell Rogers (Codefendant) worked at Bojangles in North Charleston along with others, including Charles Hamilton (Hamilton), while Appellant formerly worked at the same restaurant. R. 26, lines 12-24; R. 41, lines 1-15; R. 59, line 21—R. 60, line 22. Codefendant worked the morning shift on February 4, 2008, and Hamilton worked both morning and night shift that day. R. 28, lines 3-25; R. 61, line 22—R. 62, line 25. Prior to arriving at work, Hamilton cashed his tax return check and had approximately $3000 to $4000 in cash on him; other employees—including Codefendant—knew of this fact. R. 37, lines 1-9; R. 44, lines 8-25; R. 77, line 14—R. 78, line 5; R. 93, lines 5-11. From at least one to five occasions that day, Codefendant asked Hamilton to lend him $1000.[1] R. 37, lines 10-15; R. 53, line 8—R. 54, line 4; R. 94, lines 1-22.

Appellant was visiting Codefendant at Bojangles during Codefendant's shift. At approximately 3:00 pm, Codefendant left, and then returned about one hour later. At approximately 7:00 pm, Appellant and Codefendant left again. R. 28, lines 5-25; R. 30, line 13—R. 31, line 14; R. 37, line 20—R. 38, line 21. At approximately 8:00 pm or 9:00 pm, Appellant and Codefendant purportedly called Shade Carden (Carden), a coworker, and invited her to a room they allegedly rented at the Motel 6 across the street from Bojangles. R. 31, lines 15-21; R. 48, line 18—R. 49, line 25.

At approximately 10:00 pm or 10:30 pm, Hamilton took the trash out back to the dumpster after the restaurant closed. R. 30, lines 2-12; R. 55, lines 21-23; R. 64, lines 10-

[1] Although Codefendant testified that he only asked Hamilton once to borrow $1000, Hamilton testified that Codefendant harassed him approximately 5 times to borrow the money. R. 94, lines 1-22; R. 202, lines 2-25.

25; R. 78, lines 9-16. While Hamilton was at the dumpster area, he was approached by a masked individual who demanded Hamilton's money. R. 80, line 15—R. 82, line 11. The masked assailant shot Hamilton through the hand when he did not hand the money over.[2] R. 82, lines 12-24. Hamilton ran, and was shot three more times in the lower back, fell to his stomach, and turned over onto his back. R. 83, line 8—R. 84, line 7. From there, Hamilton saw a second person; Hamilton was patted-down by the armed assailant and asked again where the money was located. The second robber then asked, "why did you shoot him?" Hamilton later testified that he believed the voice was Codefendant's. R. 84, line 21—R. 85, line 25. Shortly after, the two robbers left without Hamilton's money. R. 87, lines 3-25. William Smalls (Smalls), the Bojangles manager at the time, called 911, and Appellant was later taken to the hospital and treated for his wounds. R. 59, lines 9-24; R. 66, lines 17-25; R. 105, lines 13-25; R. 107, lines 11-20.

North Charleston Police Officer Jason Monroe (Monroe) was first to respond. According to Monroe, a witness named Mr. Compose approached him, and stated that two black males dressed in camouflage ran from the parking lot right after he heard shots fired. R. 115, lines 10-13; R. 119, line 9—R. 120, line 8. Also, six spent .22 caliber shell casings were recovered from the scene by Andrew Coker, also of the North Charleston Police Department. R. 135, lines 5-17; R. 138, lines 8-9; R. 145, line 25—R. 146, line 9.

Codefendant testified at Appellant's trial in the State's case-in-chief. He admitted that he was arrested for the present offenses, and that he already pled guilty to ABWIK and attempted armed robbery. Codefendant further admitted he was not yet sentenced, but that

[2] Hamilton testified that the gun used was a .22 caliber handgun. R. 91, lines 16-21.

he was hoping for leniency as consideration for his testimony. R. 151, lines 7-13; R. 165, line 10—R. 166, line 24. Although Codefendant inculpated himself in the offenses, he placed the vast majority of blame on Appellant. For instance, Codefendant blamed Appellant: (1) for asking him if he wanted to rob Hamilton; (2) for doing most of the planning of the robbery; (3) for having the .22 pistol; (4) for being the individual wearing the mask; (5) for shooting Hamilton; and (6) for going through Hamilton's pockets after shooting him. R. 155, 17—R. 158, line 21; R. 162, line 2—R. 163, line 24..

The jury found Appellant guilty of ABWIK and attempted armed robbery. R. 301, lines 17-25. The trial court imposed concurrent sentences of twelve years incarceration. R. 316, line 12—R. 317, line 1. This appeal follows.

ARGUMENT

The trial court reversibly erred by failing to give requested jury instructions regarding testimony against the defendant by a witness given for personal advantage or for the hope of lenient treatment from the prosecution.

The trial court reversibly erred by failing to charge the jury regarding Appellant's requested jury instruction number 1, which addressed the testimony of a witness who provides evidence for personal advantage or hope of lenient treatment. Appellant's codefendant, Clevon Rogers (Codefendant) provided testimony that was the product of a proffered deal with the prosecution in the hope of lenient treatment. As a result, the jury should have been instructed that the witness' testimony was affected by interest or by prejudice against Appellant. Such a charge was especially pertinent where, as here, the only evidence produced by the State allegedly placing Appellant at the scene and committing the charged offense was the Codefendant's testimony. Therefore, Appellant was prejudiced by the trial court's refusal to provide the instruction on the basis that it constituted a charge on the facts.

The purpose of jury instructions is to enlighten the jury as to applicable law so that a just, fair and proper verdict can be reached. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); see also State v. Blurton, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) ("The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict."). It is error to give instructions which are calculated to confuse or mislead a jury. Blurton, 352 S.C. at 208, 573 S.E.2d at 804 (quoting Leonard, 292 S.C. at 137, 355 S.E.2d at 273). The law to be charged must be determined from the evidence presented at trial. Id.; see also State v. Lindler, 276 S.C. 304, 307, 278 S.E.2d 335, 337 (1981).

In a criminal case, the judge must charge on all material issues raised by the indictment and evidence. State v. Fair, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946). It is reversible error to decline a criminal defendant's requested jury instruction where it (1) is a correct statement of the law, (2) was not substantially covered by other instructions, and (3) was important enough to the case that its omission impaired the defendant's ability to defend himself. United States v. Frazier-El, 204 F.3d 553, 562 (4th Cir. 2000) (quoting United States v. Queen, 132 F.3d 991, 1000 (4th Cir. 1997)). See also United States v. Dornhofer, 859 F.2d 1195, 1199 (4th Cir. 1988), cert. denied, 490 U.S. 1005 (holding that a trial court may not refuse a defense theory instruction if it has evidentiary support and is an accurate statement of the law).

As the United States Supreme Court made clear in On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967 (1952), a defendant is entitled to "careful instructions" to the jury when the State utilizes accomplices as witnesses due to the serious questions of the credibility of such witnesses:

> The use of informers, accessories, accomplices, false friends, or any other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.

Id. 343 U.S. at 757, 72 S.Ct. at 973-74 (emphasis added); see also Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256 (2004) ("This Court has long recognized the 'serious questions of credibility' informers pose." (citing On Lee, 343 U.S. at 757, 72 S.Ct. 967)); Hicks v. United States, 150 U.S. 442, 452, 14 S.Ct. 144, 147 (1893) ("It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices."); United States

v. Luck, 611 F.3d 183, 187 (4th Cir. 2010) ("In other words, the jury needs to be instructed to scrutinize informant testimony more carefully than other witnesses, even biased witnesses, because of the potential for perjury born out of self-interest.");[3] United States v. Herndon, 693 F.2d 57, 58 (8th Cir. 1982) (approving of the trial court's special jury instruction regarding testimony of co-conspirators).[4] But see, State v. Bamberg, 270 S.C. 77, 82, 240 S.E.2d 639, 641 (1977) ("The judge's decision to refuse the additional credibility charge was within his discretion. Appellants have failed to show any prejudice resulting from his decision. Accordingly, this exception is without merit.") (emphasis added); cf. State v. Bennett, 40 S.C. 308, 18 S.E. 886, 887 (1894) ("We know of no law which subjects the evidence of a detective to other rules than those applied to other

---

[3] The "informant instruction" discussed in Luck was as follows:

> The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or prejudice against a defendant.

Id. 611 F.3d at 186-87 (quoting United States v. Brooks, 928 F.2d 1403, 1409 (4th Cir. 1991).

[4] The instruction given by the trial court in Herndon was as follows:

> The testimony of a co-conspirator who provides evidence against a defendant for personal advantage must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the testimony by such a co-conspirator has been affected by interest, or by prejudice against defendant.

Herndon, 693 F.2d at 58.

witnesses."). Therefore, when the State chooses to utilize betrayal witnesses, such as accomplices or accessories, then the defendant is entitled not only to vigorously cross-examine such witnesses, but also to special jury instructions warning the jury as to their testimony.

In the present case, the State chose to utilize the testimony of Codefendant, the alleged accomplice of Appellant. Thus, Codefendant clearly represents a member of the class of "informers, accessories, accomplices, false friends, or any other betrayals" whose testimony is particularly warned about by the United States Supreme Court. As a result, Appellant was entitled to have the issue of Codefendant's credibility "submitted to the jury with careful instructions." On Lee, 343 U.S. at 757, 72 S.Ct. at 973-74.

Appellant specifically requested "careful instructions" regarding this issue in his requests to charge. Specifically, Appellant made the following request in Request to Charge No. 1:

> The testimony of a witness who provides evidence against the Defendant for personal advantage or for the hope of lenient treatment from the prosecution must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness's testimony has been affected by interest or by prejudice against the Defendant.

R. 237, lines 7-15; R. 325 (Court's Exhibit 2, Request to Charge 1-4 by Defense). Appellant made the alternative request in Request to Charge No. 2:

> The testimony of a co-conspirator who provides evidence against a defendant for personal advantage must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the testimony by such a co-conspirator has been affected by interest, or by prejudice against defendant.

R. 237, lines 7-15; R. 325 (Court's Exhibit 2, Request to Charge 1-4 by Defense). Yet, the trial court rejected the requests, ruling that the instructions were cumulative, and that they were not factually applicable to Appellant's case.[5] R. 235, line 2—R. 236, line 21. The court further held that it was going to "give an instruction regarding credibility, and believability, motive, prejudice, [and] bias," and that "there is more than significant latitude to argue regarding the credibility of the co-defendant's testimony and what weight, if any, it should be given by the jury." R. 236, lines 7-14. This was erroneous.

First, as previously indicated, the concerns expressed by the United States Supreme Court and several United States Circuit Courts of Appeals touched upon the credibility—specifically the lack thereof—of betrayal witnesses. This class of witnesses includes not only informants, but also accessories, accomplices, and co-conspirators; in short, the requested instruction was applicable to Appellant's case. Indeed, such an instruction would have served to "enlighten the jury and to aid it in arriving at a correct verdict." Blurton, 352 S.C. at 207, 573 S.E.2d at 804. Thus, Appellant was entitled to have the issue of Codefendant's credibility "submitted to the jury with careful instructions," and the trial

[5] The trial court also expressed concern regarding Request to Charge No. 3. Specifically, the trial court was concerned that that particular requested instruction would amount to an impermissible charge on the facts "because it points out that testimony and actually has the Court commenting regarding that person's testimony." R. 235, line 23—R. 236, line 3; R. 236, line 24—R. 237, line 6. See, e.g., S.C. Const. Art. V, § 21; see also State v. Green, 167 S.C. 359, 166 S.E. 359, 359-60 (1932) ("The purpose of the section of the Constitution is to prevent the trial judge from intimating to the jury his opinion of the case and participating in any matter with the jury's finding of fact."). As indicated by the On Lee line of cases across multiple jurisdictions, jury instructions addressing betrayal witnesses is simply explaining to the jury how the law views testimony from that category of witnesses. As a result, Appellant's requests to charge—especially No. 1 and No. 2— were not charges on the facts because they do not intimate the trial court's opinion of the case or have the judge participate with the jury's findings.

court's refusal to do so was erroneous. See, e.g., On Lee, 343 U.S. at 757, 72 S.Ct. at 973-74.

Second, the trial court's reliance on Counsel's advocacy to the jury was an improper substitute. Succinctly stated, "arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936 (1978) (emphasis added) (citing United States v. Nelson, 498 F.2d 1247 (5th Cir. 1974)). "Even assuming, arguendo, that the statements of law by counsel during the course of a trial were legally correct, the adversarial nature of our trial system mandates that the jury have a complete statement of the law from the trial judge. Arguments of counsel simply cannot substitute for instructions by the court." State v. Woomer, 276 S.C. 258, 267, 277 S.E.2d 696, 701 (1981) (citing Taylor, 436 U.S. 478, 98 S.Ct. 1930), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Thus, the trial court's ruling that Counsel could argue to the jury his concerns regarding the credibility of Codefendant's testimony failed to protect Appellant's right to have the jury properly instructed. Id. 436 U.S. at 489, 98 S.Ct. at 1936 ("It was the duty of the court to safeguard [Appellant's] rights, a duty only it could have performed reliably." (citing Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692 (1976))).

Third, the trial court's jury instruction was inadequate, as it failed to inform the jury with "careful instructions" regarding the heightened credibility issues of betrayal witnesses, such as accessories and accomplices. The trial court's jury instruction, in pertinent part, is as follows:

> In addition, in determining the question of the credibility or believability of witnesses who has testified, you may believe one witness as against several witnesses or

> several witnesses as against one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. If you have a good and sound reason, you may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider, as I've explained whether any witness has exhibited to you any interest, any bias, any prejudice or other motive in this case. You may consider the demeanor of a witness, that is the manner and appearance of the witness from the witness stand. You can believe as much or as little of each witness' testimony as you think appropriate. Throughout this process, Ladies and Gentlemen, you have but one objective, to seek the truth regardless of its source.
>
> I instruct you that a person who has a past criminal record is competent to testify during a trial. A past record does not affect the ability of that witness to testify. The past record may only be considered by you, if at all, in determining the witness' believability or credibility. Remember, Ladies and Gentlemen, you are the sole judges of the facts in this case and of the believability of any and all of the witnesses.

R. 282, line 4—R. 283, line 3 (emphasis added). As indicated, the trial court's generic instruction includes only vague references to any interests or bias' exhibited by any witness, and is devoid of any "careful instructions" to the jury regarding accessories, accomplices, or co-conspirators. Thus, the jury was never properly instructed on this specific issue even though Appellant was entitled to the charge. Accordingly, the trial court's erroneous ruling was not cured by the generic jury instruction regarding credibility.

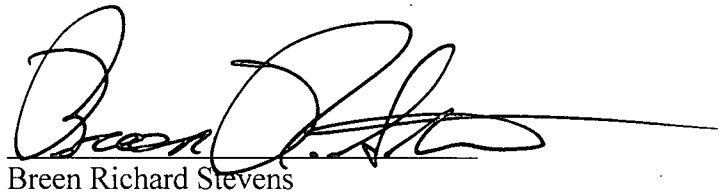
Finally, Appellant was prejudiced by the trial court's error. The State's case hinged entirely upon the testimony of Codefendant, a betrayal witness against Appellant. It was Codefendant who: (1) identified Appellant was the alleged mastermind; (2) placed Appellant at the scene; (3) placed a gun in Appellant's hand and pulling the trigger; and (4) placed Appellant rummaging through Hamilton's pockets in an unsuccessful attempt to take

money. In sum, it was the betrayal witness of Codefendant that provided the heart of the State's evidence as to both ABWIK and attempted armed robbery. Yet, the jury was insulated from hearing the proper instruction regarding betrayal witnesses, such as Codefendant, even though Appellant was entitled to "careful instructions" regarding that specific issue. As a result, Appellant was prejudiced by the trial court's error. He therefore respectfully requests reversal of his convictions, and remand for a new trial.

CONCLUSION

For the foregoing reasons, Appellant Travis Jones respectfully requests reversal of his convictions, and remand for a new trial.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of April, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 25, 2013.

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
APR 25 2013
SC Court of Appeals

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS JONES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of April, 2013.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of April, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.