STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No: 2012-213383

THE STATE,

Respondent,

v.

BENJAMIN J. NEWMAN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant for trafficking in marijuana, 10 pounds or more, but less than 100 pounds, first offense and trafficking in cocaine, 400 grams or more. (R.* Indictments.) On October 15-17, 2012, Appellant proceeded to trial before a jury. Robert T. Williams, Esquire, represented Appellant, and Assistant Solicitors Samuel R. Hubbard and Dale Scott represented the State. The jury found Appellant guilty of both charges, and the Honorable Alexander S. Macaulay sentenced him to ten years' imprisonment on the marijuana charge and twenty-five years' imprisonment on the cocaine charge, to be served concurrently. (Tr. 446-47; 457.)

On October 23, 2012, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On June 5, 2011, the Lexington County Multi-Agency Narcotics Enforcement Team (NET) arranged a drug exchange with Appellant, a suspected drug dealer. (Tr. 10, lines 12-14; Tr. 11, line 4-Tr. 12, line 15.) A confidential informant (CI) made arrangements to introduce an undercover agent to Appellant who agreed to exchange fifty pounds of marijuana for twenty-five ounces of cocaine. (Tr. 223, lines 7-23; Tr. 228, lines 10-21.) Immediately following the exchange, a SWAT team entered following the use of a flash-bang.[1] (Tr. 238, lines 2-6.) The CI and the undercover agent got down on the floor, and Appellant ran out the back door. (Tr. 238, lines 7-15.) Appellant was apprehended and arrested for trafficking marijuana and cocaine. (Tr. 92, lines 22-24; R.* Indictments.)

Pretrial, Appellant moved to suppress the evidence. (Tr. 4, line 15.) The State called NET officer Brannon Slice. (Tr. 9, line 16-18.) He testified he entered the residence where the drug deal occurred after the SWAT team arrived, at which time he saw marijuana sitting on a table. (Tr. 19, lines 21-25.) Agent Slice estimated he waited approximately 15-20 minutes for the search warrant. (Tr. 27, lines 10-22.) He testified that no searching of the residence took place until the officers were notified the search warrant was signed. (Tr. 29, lines 5-10.)

NET Agent Dennis Tracy testified next. (Tr. 32, lines 7-25.) He testified he was the one who typed the search warrant and took it to Judge Reinhart to be signed. (Tr. 36, line 18-Tr. 37, line 5.) He explained that afterwards, he called and notified Agent Paige Tucker that the judge had signed it and he was on his way back to the residence. (Tr. 40,

[1] According to Agent Nicholas Carver, a flashbang is a very loud device that is used to discombulate the occupants in a situation like this. (Tr. 238, lines 2-5.)

lines 17-20.) He testified that when he arrived back at the residence, agents were searching. (Tr. 48, lines 18-25.)

The State then called Agent Nicholas Carver, an undercover NET agent who participated in the drug deal while wearing a recording device. (Tr. 79, line 18-Tr. 80, line 22; Tr. 82, lines 2-7.) After he made the drug exchange with Appellant, he testified that he could have arrested Appellant right then because the drug deal occurred in his presence and he was in the residence by consent. (Tr. 89, line 23-Tr. 90, line 17.) Agent Carver testified no one was searching the house during the time he was removed from the home; rather, they were clearing out the house and removing the people. (Tr. 93, lines 5-17.) He verified he heard Agent Setree's voice on the audiotape from the incident. (Tr. 93, lines 18-20.) He explained Agent Setree was telling him what he could have done better because Carver was new. (Tr. 93, line 21-Tr. 94, line 5.) Specifically, Agent Carver testified there was no search going on, but that Agent Setree was making sure and telling him, "[W]e don't do that[;] that's not what we do." (Tr. 94, lines 6-10.) He testified that when the officers came in to make the arrest, the marijuana was readily visible. (Tr. 94, lines 15-17.) Agent Carver explained that everyone was concerned about where the cocaine went and thought Appellant might have grabbed it when running out the back door. (Tr. 94, line 20-Tr. 95, line 7.) Carver testified that the officers were looking around the backyard for Appellant and the cocaine. (Tr. 95, lines 8-11.) He testified the officers ultimately discovered the cocaine in the book bag he had brought the marijuana in, which was lying open on the floor next to the kitchen island. (Tr. 95, lines 15-24.)

On cross-examination, Agent Carver stated no one was searching between the time he was taken out of the house and the time he returned, which was approximately

five minutes. (Tr. 106, lines 12-22.) Carver testified nobody was searching while they were waiting for the search warrant. (Tr. 107, lines 13-23.) He testified that on the recording, Agent Setree is heard correcting Officer Lance, a SWAT team member, because he "looked over something." (Tr. 107, line 24-Tr. 108, line 9.) He testified that Agent Setree told the officer, "Don't do that." (Tr. 108, lines 5-6.)

The next to testify was Agent Brian Setree of the NET. (Tr. 110, line 24.) He testified that no one in the house was searching following Appellant's arrest. (Tr. 113, line 24-Tr. 114, line 1.) He explained that the cocaine was on the kitchen counter and then was no longer there and that the SWAT team was looking for it in the backyard because they thought Appellant had taken it when he ran. (Tr. 114, line 19-Tr. 115, line 4.) Setree testified he was heard on the recording calming the SWAT team down by telling them not to worry about the cocaine because they were getting a search warrant. (Tr. 115, lines 14-19.) He further testified he was critiquing what they do and why they do things a certain way in the portion of the recording when he was speaking to Agent Carver. (Tr. 115, lines 20-23.) He testified he told other officers, "Don't worry about looking for this cocaine. We'll find this cocaine." (Tr. 117, lines 2-3.) Setree clarified that no one was going through any cabinets or looking under any furniture. (Tr. 117, lines 4-5.) He explained that because the drug transaction had already gone down at that point, the cocaine had essentially already been seized and the search warrant was to be used to recover any other evidence related to the case. (Tr. 117, lines 5-10.) He testified that because two felonies were conducted in the presence of a police officer, the only reason they even needed the search warrant was to search for things tying Appellant to the residence. (Tr. 117, lines 11-17.) The trial court listened to the recording from the

audio recording device worn by Agent Carver during the drug transaction. (Tr. 15, line 25-Tr. 16, line 1; Tr. 17, lines 22-25; Tr. 127-129.)

Appellant argued officers searched prior to obtaining a search warrant. (Tr. 130, lines 1-10.) The State clarified that it was only introducing the drugs and possibly some letters with Appellant's name on them, but that it would not try to introduce other items found such as guns and bullets. (Tr. 131, lines 1-6.) Appellant argued the issue was whether the cocaine was seized incident to arrest or during a search. (Tr. 131, lines 7-14.) The trial court pointed out that the CI and undercover agent were invited into the house and that the contraband was in clear view. (Tr. 131, lines 15-22.) Appellant then specifically stated, "Your Honor, but there are other exhibits which they're intending to introduce aside from that." (Tr. 132, lines 6-8.) The State again stated it would only introduce envelopes with Appellant's name on them. (Tr. 132, lines 12-16.) The trial court noted that was not contraband but was merely identification. (Tr. 132, line 25-Tr. 133, line1.) The trial court determined the cocaine and marijuana would be admitted and cautioned the State to let him know if it intended to introduce anything else so he could rule on it outside the presence of the jury. (Tr. 136, lines 5-15.) The trial court denied the motion to suppress. (Tr. 136, lines 20-23.)

At trial, the State called Brannon Slice, the NET agent who planned the controlled drug exchange. (Tr. 160, line 19-25; Tr. 163, lines 14-24.) He explained how he placed a wire on the CI and an audio recording device and videotaping device on Agent Carver. (Tr. 173, line 24-Tr. 174, line 4.) He testified he mistakenly did not turn on the video recorder. (Tr. 174, line 4.) After Appellant objected to Agent Slice's testifying to what was found in the residence, a proffer was presented and the trial court allowed him to

testify that he found a duffle bag of marijuana, a bale of marijuana on the counter, and cocaine in a bag in plain view. (Tr. 187, line 17-Tr. 200, line 15.)

Next, the State called Agent Nicholas Carver. (Tr. 220, line 25.) Agent Carver explained his undercover role as a drug dealer. (Tr. 223, lines 7-13.) He testified Appellant told him he wanted 1000 pounds of marijuana next time and explained to Carver how to keep the cocaine in a brick. (Tr. 232, lines 12-14; Tr. 233, line 21-Tr. 234, line 3.) Agent Carver testified Appellant was supposed to trade twenty-five ounces of cocaine for the fifty pounds of marijuana but added two extra ounces. (Tr. 235, lines 4-17.) He testified that when the SWAT team activated the flash-bang device, he and the CI got on the floor and Appellant ran out the back door. (Tr. 238, line 238, lines 2-15.) He stated the cocaine was on the edge of the counter when the bust took place but was not there afterwards. (Tr. 240, lines 6-12.) He testified the cocaine ended up in the open book bag that had contained the marijuana before it was removed. (Tr. 240, lines 13-23.) Agent Carver testified officers were looking in the backyard for the cocaine at first. (Tr. 242, line 23-Tr. 243, line 4.) He verified that as an officer, he could have arrested Appellant on his own immediately after the drug exchange. (Tr. 253, lines 19-21.)

On cross-examination, Appellant asked Agent Carver whether the audio recording indicated the officers were searching the house prior to obtaining the search warrant, and he said no one was searching prior to issuance of the search warrant. (Tr. 282, line 20-Tr. 283, line 4.) He clarified the officers were looking for a known item that could not be located but had already been identified during a transaction that took place in front of an officer. (Tr. 283, lines 6-12.)

Next, the State called Agent Brian Setree. (Tr. 287, line 20.) Agent Setree testified he was the senior NET agent involved in the drug transaction on June 5, 2011.

(Tr. 288, line 18-Tr. 289, line 9.) He testified regarding what he was heard saying on the audio recording. (Tr. 292, lines 7-11.) Setree testified that he thought the video recorder was on and admitted saying the video should have been turned off. (Tr. 292, lines 16-25; Tr. 293, lines 15-22.) On the stand, he admitted the audio recorder was left on even though it should have been turned off after the bust. (Tr. 294, lines 14-23.) Agent Setree testified he could be heard on the audiotape telling the SWAT agents, who were panicked because the cocaine was no longer on the counter, not to worry about the cocaine because they were getting a search warrant for the residence anyway. (Tr. 295, lines 6-25.) He testified he told them, "[I]f it's not in plain view on the inside of the residence, don't worry about it. We'll find it once we obtain the search warrant." (Tr. 296, lines 1-5.) Agent Setree also testified to being present when Agent Barnes saw the cocaine in the book bag in plain view because the bag was open. (Tr. 297, lines 7-14.)

The State called D. I. Blackwell, a deputy sheriff with the Lexington County Sheriff's Department, who analyzed the marijuana and testified it weighed fifty-one pounds. (Tr. 315, line 22-Tr. 329, line 4.) The next to testify was Paige Barnes (formerly Tucker), another NET agent. (Tr. 329, line 21-Tr. 330, line 10; Tr. 333, line 19-Tr. 334, line 7.) She testified she found the cocaine in an open book bag after looking near the counter where she was told by Agent Carver it had been before. (Tr. 332, lines 4-25; Tr. 333, 1-4.) She testified she waited for the search warrant for about thirty minutes. (Tr. 334, lines 16-24.)

Finally, the State called Emily Homer Conrad, a chemist with the Lexington County Sheriff's Department. (Tr. 344, lines 4-16.) She was qualified as an expert in forensic analysis of drugs, to include cocaine. (Tr. 346, line 17-Tr. 347, line 6.) She testified the cocaine was sealed in a Best evidence kit when she received it from Candy

Kyzer, an evidence custodian for the Lexington County Sheriff's Department, on June 6, 2011. (Tr. 347, line 13-Tr. 349, line 1.) She testified the two packages in the Best kit were cocaine and weighed 709 grams and 42.34 grams. (Tr. 350, line 19-Tr. 351, line 3.)

At the close of the State's evidence, Appellant moved for a directed verdict, arguing:

> Your Honor, we would move for directed verdict of not guilty. The evidence taken in the light most favorable to the State and viewed in favor of the State would be insufficient as a matter of law for this jury to return a verdict of guilty in regards to either indictment, that is, trafficking in marijuana and the other being trafficking in cocaine.

(Tr. 361, line 21-Tr. 362, line 2.) The trial court denied the motion. (Tr. 363, line 10.) Ultimately, the jury found Appellant guilty of both charges, and the trial court sentenced him to ten years' imprisonment on the marijuana charge and twenty-five years' imprisonment on the cocaine charge, to be served concurrently. (Tr. 446-47; 457.)

ARGUMENTS

I.

The trial court properly denied Appellant's motion to suppress the drug evidence because it was seized lawfully as the result of a transaction that took place in the presence of a law enforcement officer and was found under the plain view exception to the Fourth Amendment rule prohibiting warrantless searches.

Appellant argues the trial court erred in denying his motion to suppress the drug evidence because it was obtained as a result of an unlawful search. Specifically, he argues officers searched prior to the procurement of a search warrant in violation of the Fourth Amendment. On the contrary, the drug evidence was obtained as the result of the drug deal taking place in the presence of an officer who was inside the residence by Appellant's consent and, thus, no search warrant was required to seize the drugs. Furthermore, the drugs were discovered in plain view, so no search was conducted to locate them. The officers did not begin searching the residence until one of the officers reported back that a judge had signed the search warrant and, because the drugs had already been seized by then, the drugs were not obtained as part of this lawful search. Therefore, the trial court properly denied Appellant's motion to suppress the drug evidence.

In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added); State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). The appellate court

will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court *must* affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (emphasis added).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

The Fourth Amendment's exclusionary rule prohibits unreasonable searches and seizures. U.S. Const. amend. IV; see also S.C. Const. art. I, § 10. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). "Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). However, a warrantless search may be constitutional if it falls within a recognized exception. Id. at 331-32, 457 S.E.2d at 621. South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile

exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Additionally, exigent circumstances can justify a warrantless search of a home which would otherwise be unreasonable. State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009). Under the plain view exception, "a law enforcement officer who is lawfully in a position to view [an] object" may seize it. State v. Abdullah, 357 S.C. 344, 352, 592 S.E.2d 344, 349 (Ct. App. 2004). The plain view doctrine applies when "'(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating [nature of the] evidence was immediately apparent to the seizing authorities.'" Id. at 352-53, 592 S.E.2d at 349 (quoting State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990)). The United States Supreme Court has eliminated the requirement that the discovery be inadvertent, as long as the seizure meets the other two requirements. Id. at 353 n.5, 592 S.E.2d at 349 n.5 (citing Horton v. California, 496 U.S. 128, 130 (1990)).

A police officer may, without a warrant, arrest a person who commits a crime in his presence. State v. Tyndall, 336 S.C. 8, 16, 518 S.E.2d 278, 282 (Ct. App. 1999) (citing State v. Mims, 263 S.C. 45, 208 S.E.2d 288 (1974) (officer has power and authority to arrest without warrant those who have committed violation of criminal laws of this State within view of such officer)).

Here, ample evidence exists to support the trial court's denial of Appellant's motion to suppress the drug evidence. The trial court held a thorough suppression hearing, during which multiple witnesses testified. Initially, Agent Nicholas Carver, the undercover agent who participated in the drug deal, testified he could have arrested Appellant immediately following the deal because it occurred in his presence and he was

inside the residence by consent. However, he also testified that no one was searching the house during the time he was removed, that officers were merely clearing out the house and removing the people, and that no one was searching while they all waited for the search warrant. Agent Carver explained that officers were merely looking around the backyard for both Appellant and the cocaine after Appellant fled. He testified that when the officers entered the residence, the marijuana was readily visible. Agent Brannon Slice also testified that when he first entered the residence following the SWAT team's arrival, the marijuana was sitting on a table in plain view. He further testified no searching took place until Agent Dennis Tracy called on the way back from obtaining the judge's signature and notified the officers the search warrant had been issued by the judge. Agent Tracy verified he had made that telephone call and that when he reached the residence, officers were searching.

Agent Brian Setree also verified that no one was searching the house following Appellant's arrest. However, he did state that SWAT officers were looking for the cocaine in the backyard because they thought Appellant had grabbed it when he ran. He admitted he told the SWAT team not to worry about finding the cocaine because they were getting a search warrant. He testified that even when he said something on the audiotape about "looking for the cocaine," no one was going through cabinets or looking under any furniture. Agent Setree pointed out that because two felonies were conducted in the presence of Agent Carver, the search warrant was not necessary to obtain the drugs but would likely be used to look for items that might connect Appellant to the residence.

First, the testimony demonstrates the drug evidence was obtained without the need for a search warrant because the transaction occurred in the presence of Agent Carver, who had the authority to arrest Appellant as soon as the exchange took place.

Second, the marijuana was in plain view when the officers lawfully entered the residence when attempting to arrest Appellant during the drug bust. In addition to the lawful entry to arrest, Agent Carver was lawfully in the residence by consent. Under either scenario, the initial intrusion that afforded the plain view was lawful. Similarly, the cocaine was located in plain view in an open book bag without having to search underneath items or manipulate items. Thus, the drug evidence fell within the plain view exception to the exclusionary rule and was properly admitted. See Abdullah, 357 S.C. at 353 n.5, 592 S.E.2d at 349 n.5 (noting the United States Supreme Court has eliminated the requirement that the discovery be inadvertent, as long as the seizure meets the other two requirements that the initial intrusion was lawful and the incriminating nature of the evidence was immediately apparent).

In sum, the trial court properly denied Appellant's motion to suppress the drug evidence, determining the drugs were obtained lawfully because the exchange occurred in the presence of an officer who was invited into the house and the drugs were in plain view. (Tr. 131, lines 15-22.) Therefore, this Court should affirm the trial court's denial of Appellant's motion to suppress the drug evidence.

II.

Appellant's specific arguments regarding a lack of evidence establishing more than a suspicion, dominion or control, and mere presence are not preserved for review, but even if preserved, the trial court properly denied Appellant's motion for a directed verdict because the State presented sufficient evidence to establish Appellant's guilt on both trafficking charges.

Appellant argues the trial court erred in denying his directed verdict motion because the State did not present evidence sufficient to (1) prove more than a suspicion of guilt, (2) establish Appellant had dominion or control over the alleged drug evidence, or (3) establish more than mere presence. However, Appellant did not make these specific arguments at trial; rather, he simply stated the evidence would be insufficient to return a guilty verdict. Accordingly, these particular arguments are not preserved for appellate review. In any case, the State did present sufficient evidence showing Appellant was guilty of both crimes. Thus, the trial court correctly denied the directed verdict motion and allowed the case to be submitted to the jury for resolution.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in a light most favorable to the State. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). An appellate court must find a case is properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. Weston, 367

S.C. at 292-93, 625 S.E.2d at 648. An appellate court may reverse a trial court's denial of a motion for a directed verdict if there is no evidence to support the trial court's ruling or if the ruling is based on an error of law. State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). **"[U]nless there is a total failure of evidence** tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

"In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below." State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998). See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal.").

The only grounds Appellant argued in his motion for directed verdict at trial were as follows:

> Your Honor, we would move for directed verdict of not guilty. The evidence taken in the light most favorable to the State and viewed in favor of the State would be insufficient as a matter of law for this jury to return a verdict of guilty in regards to either indictment, that is, trafficking in marijuana and the other being trafficking in cocaine.

(Tr. 361, line 21-Tr. 362, line 2.) He did not argue the State raised only a mere suspicion of his guilt, nor did he argue the State failed to establish Appellant had dominion or control over the alleged drug evidence or failed to establish more than mere presence. Thus, these specific issues are not preserved for review. See Kennerly, 331 S.C. at 455,

503 S.E.2d at 221 (noting issues not raised to the trial court in support of a directed verdict motion are not preserved for appellate review).

Addressing the merits, the trial court properly denied the directed verdict motion because sufficient evidence existed to establish Appellant's guilt as to both charges, raising much more than a mere suspicion. Agent Carver testified about his role as the undercover drug dealer who exchanged fifty pounds of marijuana for twenty-seven ounces of cocaine. The audiotape provided evidence of Appellant's participation in the drug deal. Appellant was even heard asking for 1,000 pounds of marijuana for the next deal. He is also heard giving Agent Carver two extra ounces of cocaine and telling him how to work with the cocaine when he unwraps it. The State called D. I. Blackwell, a deputy sheriff with the Lexington County Sheriff's Department, and Emily Homer Conrad, a chemist with the department, to testify regarding the weight of the drugs: 51 pounds of marijuana and a total of 751.34 grams of cocaine.

In regard to proving dominion or control over the drugs, Agent Carver established this element when he testified about how the drug exchange took place. Further evidence of that transaction was provided on the audiotape. The details of the drug deal itself demonstrate Appellant's dominion and control over the drugs when he invited Agent Carver and the CI into the home and engaged in a drug transaction by taking the fifty pounds of marijuana in exchange for twenty-seven ounces of cocaine. In regard to Appellant's mere presence argument, as noted earlier, this was not argued at trial. Regardless, it is clear from the testimony and the audiotape that Appellant was an active participant in the drug deal and was not merely present. Thus, this argument has no merit. Notably, mere presence was part of the jury instructions per Appellant's request. (Tr. 385, lines 1-8; Tr. 426, lines 2-19.)

In sum, sufficient evidence existed to support the denial of Appellant's directed verdict motion, and the trial court properly submitted the case to the jury for its resolution. Contrary to what is required before a directed verdict should be granted, Appellant's case did not present a complete failure of evidence of his guilt. See State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) ("Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury.").

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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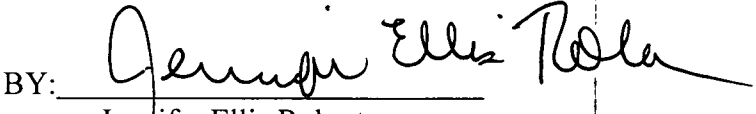
Assistant Attorney General

BY: 
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July 8, 2013