STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Court Of General Sessions
The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2022-001036

THE STATE, Respondent,

v.

WENDY MICHELLE GREEN, Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in its instruction to the jury, because the "real possibility" language was preceded by instructions requiring jurors be firmly convinced of defendant's guilt.

STATEMENT OF THE CASE

Wendy Green was indicted by a Laurens County Grand Jury in April 2022, for trafficking methamphetamine. Green was represented by Catherine T. West, Esquire, and Tristan M. Shaffer, Esquire. She proceeded to a jury trial on July 11, 2022, before the Honorable Daniel D. Hall. Green was convicted as charged and sentenced to ten years' imprisonment. A timely notice of intent to appeal was filed on July 20, 2022. This appeal follows.

STANDARD OF REVIEW

"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). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An erroneous jury instruction is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction. Harris v. Univ. of S.C., 391 S.C. 518, 706 S.E.2d 45 (Ct. App. 2011). When an appellate court reviews an alleged error in a jury charge, it "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Id.

STATEMENT OF FACTS

Appellant was traveling in the backseat of a vehicle at around 9:30 PM when it was stopped by Officer Williams and Officer Parham for having an improper tag light. (R. 45). Deputy Williams obtained consent from the driver, Catherine Clark, to search the vehicle. (R. 51). Deputy Williams asked her to step out of the vehicle and searched her person. (R. 52). Next, Deputy Parham asked passenger Jeffery Green to step out of the vehicle and searched his person. (R. 163). While the traffic stop took place, Wendy Green (Appellant) was in the backseat putting a dog on a leash. (R. 165). Appellant was asked to step out of the vehicle and exited while holding the dog. (R. 165). She exited the vehicle with her back towards Officer Parham. (R. 165). Appellant did not put the dog on the ground, but rather gave the dog to Clark. (R. 166). After the dog changed hands, Deputy Parham saw a white crystal substance and pipe on the ground. (R. 166). Appellant was then arrested. (R. 67). Later, the substance was identified as methamphetamine and weighed 11.53 grams. (R. 223).

Prior to jury instructions, Appellant objected to the "real possibility" language in the proposed jury charge. (R. 245). The Judge stated "I note your objection. I'm going to charge as I have it." (R. 247). The Judge instructed the jury as follows:

> The Defendant has pled not guilty to this indictment. And that puts the plea -- that plea puts the burden on the State to prove the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove her innocence. I charge you that it is an important rule of the law that the Defendant in a criminal trial, no matter what the seriousness of the charges may be will always be presumed to be innocent of the crime for which the indictment was issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.
>
> This presumption of innocence does not end when you begin your deliberations. But it accompanies the Defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt.
>
> The presumption of innocence is like a robe of righteousness placed around -- about the shoulders of the Defendant, which remains with the

> Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt. The presumption of innocence is not a mere legal theory. It is not just a legal phrase. It is a substantial right which every defendant is entitled, unless you, the jury, are satisfied from the evidence of the Defendant's guilt beyond a reasonable doubt. What is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The burden -- the State has the burden of proving the Defendant guilty beyond a reasonable doubt.
>
> Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or preponderance of the evidence. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you **firmly convinced** of the Defendant's guilt. 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 the consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find the Defendant guilty. If, on the other hand, you think there's a **real possibility** that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find her not guilty.

(R. 317-319) (emphasis added). During deliberations, the jury asked for a definition of reasonable doubt. (R. 330). The court repeated the same instructions. (R. 335). During the second instruction, one juror made notes of the definition given including the terms "real possibility", "firmly convinced of guilt", and "hesitate to act." (R. 356). Earlier on in the case, the court had instructed jurors to not take notes. (R. 28). The Judge instructed the juror to hand the notes taken over to the bailiff. (R. 339).

ARGUMENT

The trial court did not err in its instruction to the jury because the "real possibility" language was preceded by instructions requiring jurors be firmly convinced of defendant's guilt.

South Carolina courts have previously approved near identical jury instructions. In State v. McHoney, the following jury instruction was approved by the South Carolina Supreme Court:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.... If based upon your consideration of the evidence you are **firmly convinced** that the defendant is guilty of the crime charged, then you must find him guilty. If on the other hand you think there is a **real possibility** that he is not guilty, you must give him the benefit of that doubt and find him not guilty.

State v. McHoney, 344 S.C. 85, 98, 544 S.E.2d 30, 36–37 (2001) (emphasis added). The court noted "real possibility" language does not lessen the burden of proof in the context of preceding language requiring jurors to be "firmly convinced" of defendant's guilt. Id. Lastly, the court found nothing in the instruction to indicate the defendant had the burden of proof. Id. In State v. Darby, the Court also found "real possibility" language did not lessen the government's burden of proof. State v. Darby, 324 S.C. 114, 116, 477 S.E.2d 710, 711 (1996). Similarly in State v. Lowery, this Court approved the charge "if, based on your consideration of the evidence, you are **firmly convinced** that the defendant is guilty ... you must find him guilty. If, on the other hand, you think that there is a **real possibility** he is not guilty, you must give him the benefit of the doubt and find him not guilty." State v. Lowery, 332 S.C. 261, 265, 503 S.E.2d 794, 797 (Ct. App. 1998) (emphasis added).

In U.S. v. Porter, the Fourth Circuit Court of Appeals upheld a trial court's use of a "real possibility" and "firmly convinced" instruction. States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987). The Court noted that the terms real possibility and firmly convinced were "unnecessary

Concepts." Id. Nonetheless, the Court stated, "the instructions taken as a whole properly described the prosecution's burden and the protection the law affords the accused." Id. These instructions are not only accepted in South Carolina, but they are widely accepted across the nation. Justice Ginsburg's concurrence in Victor v. Nebraska, explains "the 'firmly convinced' standard for conviction ... [is] enhanced by the juxtaposed prescription that the jury must acquit if there is a real possibility that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly." Victor v. Nebraska, 511 U.S. 1, 27 (1994) (Ginsburg, J., Concurring).

Further, the United States Court of Appeals for the Tenth Circuit found the firmly convinced language, used with the insistence a jury must acquit in the presence of a real possibility that the defendant is not guilty, was a correct statement of the reasonable doubt standard. United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995). The United States Court of Appeals for the Fifth Circuit has also approved the jury charge noting "the modifier 'real' merely indicates that the jury is not to acquit a defendant if it can conceive of any possibility that the defendant is not guilty." United States v. Williams, 20 F.3d 125, 131 (5th Cir. 1994).

The jury charge given by the trial court containing "real possibility" language was proper and did not shift the burden of proof. The instructions are to be considered in their entirety. Foster v. Greenville Hosp. Sys., at 497, 575. Like, McHoney and Lowery, the "real possibility" language in the instructions were preceded by language requiring jurors to be "firmly convinced" of Appellant's guilt. (R. 319). Since the court comprehensibly defined the reasonable doubt standard, the trial court did not err.

Even if the trial courts instructions were improper, Appellant was not prejudiced because the trial court also took other steps to define the State's burden. The trial court explained "the State has the burden of proving the Defendant [is] guilty." (R. 318). Like McHoney, there is nothing in the language that supports a finding defendant had the burden of proving innocence. The Court also distinguished this from a civil case noting criminal cases required more proof and that "reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act." (R. 318-319). The notes written by the juror provide no evidence of prejudice. The charge is to be considered in its entirety, not in isolation. Even if notes written by a juror indicated evidence of prejudice, the notes included other terms used to contextualize the reasonable doubt standard. Because the instructions are reasonably free from error, an isolated portion that may be considered misleading does warrant reversal.

Considered in its entirety, the trial court's instructions properly defined the State's burden of proof. The Court properly preceded "real possibility" language with "firmly convinced" language, stated the State had the burden of proof, and distinguished the level of proof required from that of a civil case. Therefore, the instructions were proper. 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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November 28, 2023

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CERTIFICATE OF COUNSEL

The undersigned certifies 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 Appellate Court Filings."

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PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Final Brief of Respondent on Kathrine H. Hudgins, Esquire, counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 28th day of November 2023.

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Attachments: GREEN Wendy - FBOR (03445036xD2C78).PDF; GREEN Wendy - Representation Letter (03444965xD2C78).PDF

Good Morning Ms. Hudgins,

Attached please find a substitution of counsel letter and the Final Brief of Respondent in The State v. Wendy Michelle Green (2022-001036). These documents will be filed today with the South Carolina Court of Appeals via the AIS OneDrive System.

If you will, please confirm receipt of this email.

Thank you,

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