

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 09 2011

APPEAL FROM ANDERSON COUNTY
Court Of General Sessions

S.O. SUPREME COURT

Honorable J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2011-UP-273

The State,

Respondent,

vs.

Kevin M. Ware,

Petitioner.

A P P E N D I X

Kevin M. Ware
McDougall C.I.
1516 Old Gilliard Road
Ridgeville, SC 29472

Other Counsel Of Record:
William M. Blitch
Asst. Attorney General
P.O. Box 11549
Columbia, SC 29211

I N D E X

TRIAL TRANSCRIPT	1
APPELLANT'S BRIEF	143
RESPONDENT'S BRIEF	158
COURT OF APPEALS DISMISSAL ORDER	178
PETITION FOR REHEARING	181
ORDER DENYING PETITION FOR REHEARING	187
Officer Baskins' Completed Form B	188
OFFICER BASKINS'S EVIDENCE REPORT	189

1 THE COURT: Mr. Barrett and Mr. Lee, the two
2 alternates, sit in those seats, and the foreman sit in
3 that seat.

4 Madam, Clerk, if you would swear the jury.

5 (Whereupon, the clerk administers the oath to a jury
6 of 12 and 2 alternates.)

7 THE COURT: Solicitor.

8 OPENING STATEMENT

9 BY MR. BRADLEY:

10 May it please the court? Mr. Byrholdt? Good
11 afternoon, ladies and gentlemen of the jury. I told you
12 the other day my name is Matt Bradley, prosecutor here in
13 Anderson County.

14 We are here today because on January 15, 2007, the
15 defendant, Kevin Ware, was found to be in possession of
16 2.4 grams of crack cocaine. On that day January 15th,
17 Anderson police officers executed a search warrant at
18 305-A E Street here in Anderson city limits. As officers
19 entered the residence, they viewed the defendant, Kevin
20 Ware, inside the kitchen area of the house.

21 As officers Aman and Culbertson walked into the
22 kitchen, the defendant threw a baggy at officer Aman and
23 struck him in the chest, fell to the floor. Officer Aman
24 at that point detained the defendant, placed on the floor
25 on top of the baggy. As the scene cleared and forensic

1 officer -- the evidence officer came on to the scene, the
2 defendant was removed from the floor and the evidence
3 officer collected the baggy from underneath the
4 defendant.

5 That baggy was then tested. The baggy contained a
6 white, rock-like substance. That substance was tested
7 and it was found to be 2.4 grams --

8 MR. BYRHOLDT: I'm going to object. This is like
9 closing arguments, not opening statement. There is no
10 evidence before the jury at this point.

11 THE COURT: Solicitor, just tell the jury what facts
12 you plan on proving. Okay?

13 MR. BRADLEY: Yes, Your Honor.

14 THE COURT: Okay.

15 MR. BRADLEY: Thank you. These are the facts which
16 led to the arrest and charging -- the defendant was
17 arrested and charged with possession with intent to
18 distribute crack cocaine and possession with intent to
19 distribute within proximity of a park and conspiracy to
20 distribute crack cocaine.

21 South Carolina law defines those crimes, first,
22 possession with intent to distribute crack cocaine,
23 possession with intent to distribute crack cocaine within
24 proximity of a park -- it sounds very similar -- within a
25 half mile radius there was a public park; and conspiracy

1 to distribute crack cocaine, which is defined as a
2 combination of two or more persons for the accomplishment
3 of the unlawful objective, criminal objective, in this
4 case distributing crack cocaine.

5 As an assistant solicitor, it is my burden to prove
6 to you beyond a reasonable doubt that the defendant
7 committed these crimes. And I welcome that burden. A
8 reasonable doubt means that based upon all the evidence
9 presented to you, as a jury, you are firmly convinced of
10 a defendant's guilt.

11 The evidence you hear throughout the course of the
12 testimony comes from the Anderson City Police officers
13 who obtained a search warrant that day, who executed the
14 search warrant, found him to be in possession. You will
15 also hear evidence from the forensic chemist, who tested
16 the substance and did confirm it to be crack cocaine.
17 And you'll hear from Virginia Gail Richardson, the
18 occupier of the residence 305-A E street, who had called
19 the defendant earlier that day to come over and sell
20 crack cocaine to another individual.

21 I want to thank you for your patience and
22 attentiveness throughout the course of the trial.
23 Hearing all that evidence, and again, I submit to you at
24 the end of the trial, after hearing all the evidence,
25 you, the jury, will be firmly convinced of the

1 THE WITNESS: Yes, sir.

2 THE COURT: Do you understand?

3 THE WITNESS: Yes, sir.

4 THE COURT: Thank you, very much. All right.

5 Anything else before we bring the jury and call your
6 first witness?

7 MR. BRADLEY: No, your Honor.

8 THE COURT: Anything from the defendant?

9 MR. BYRHOLDT: Not from the defense, Your Honor.

10 THE COURT: Bring us the jury.

11 (Whereupon, the following proceedings were had
12 within the presence of the jury:)

13 KEVIN MARSEE, being first duly sworn,
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. BRADLEY:

17 THE CLERK: State your full name, as well your last
18 name for the record, please.

19 THE WITNESS: Kevin Marsee, last name spelled
20 M-A-R-S-E-E.

21 Q Good afternoon, what's your occupation?

22 A I am a captain with the Anderson city police
23 department.

24 Q How long you been there?

25 A I been with the department almost 25 years now.

1 Q What are your duties as an officer at the police
2 department?

3 A My duties are, at present I'm the captain of special
4 operations. That position encompasses a warrant
5 division, a vice and narcotics unit, and a gang unit.

6 Q And were you working in that capacity on January 15,
7 2007?

8 A I was.

9 Q Okay. And on that date did you come into contact
10 with the defendant?

11 A Yes. That was the date.

12 Q What was the reason for that contact?

13 A I had a search warrant to search a residence located
14 at 305-A E Street, which is located in the City of
15 Anderson. And based on the fact I had a search
16 warrant and was conducting an investigation, I
17 instructed officers to initiate surveillance on the
18 location.

19 Q And when was that search warrant executed?

20 A The search warrant was obtained around 6:30 that
21 evening. And we began the operation at around
22 7:55 p.m. After that time I guess it was around
23 8:40 p.m. or so we executed the search warrant at
24 that residence.

25 Q And during that time you were doing surveillance,

1 what did you observe?

2 A Only overheard radio transmissions to the officers
3 who were assigned to me. There were messages
4 transmitted to me that an individual had arrived at
5 the residence that we were expecting to have drugs.

6 Q And what time -- you say, used the term "executed a
7 search warrant." what exactly does that mean?

8 A Executing a search warrant is -- a search warrant is
9 a piece of paper that is issued by a judge that
10 authorizes a law enforcement officer to search for
11 evidence of a crime or fruits of a crime at any
12 location that that evidence may be located.

13 Q Okay. And you testified earlier what time the search
14 warrant was executed. When the search warrant was
15 executed, what officers entered this residence?

16 A Two of the officers who entered in was two of the
17 individuals working for me at the time. And those
18 officers were Eddie Aman and Jody Culbertson, along
19 with myself, Mike Baskin, Mike Bracone. And I
20 believe that was it.

21 Q After they entered the residence what happened?

22 A Once I entered the residence, I was instructed by the
23 officers who initially made entry that there were
24 several individuals in the residence, one of them
25 being Mr. Ware. I was instructed that Mr. Ware was

1 in the kitchen area upon the --

2 MR. BYRHOLDT: Your Honor, that's going to be --
3 essentially it's hearsay. I mean, he's -- I'm going to
4 object. I mean he's --

5 THE COURT: I'll sustain the objection. Testify if
6 you saw Mr. Ware in the kitchen. Testify of your own
7 knowledge what you saw, what you did, what you observed
8 of your own knowledge. We passed the stage why you went
9 there.

10 THE WITNESS: All right. Mr. Ware was in the
11 kitchen area. I saw Mr. Ware and I saw a bag of crack
12 underneath where Mr. Ware was lying. I saw a struggle
13 with Mr. Ware during the time he was being arrested. And
14 I observed drug paraphernalia throughout the residence,
15 including crack pipes.

16 Q Anything else inside the residence?

17 A Yes, there were other individuals which included
18 Miss Virginia Gail Richardson, who was the person
19 renting the house or the apartment.

20 Q And after entry was made, what happened after that?
21 Was anyone charged with the crime?

22 A Based on the evidence that was obtained, Mr. Ware was
23 charged with possession with intent to distribute
24 crack cocaine, possession of crack cocaine with
25 intent to distribute within proximity of a park.

1 This was due to the fact that there's a park at the
2 end of C Street, within a half mile of that location.
3 And after a subsequent interview with
4 Miss Richardson, he was charged with conspiracy to
5 distribute crack cocaine. Well --

6 Q You took a statement from Ms. Richardson?

7 A Yeah, later that evening I did interview Ms.
8 Richardson and take a statement from her.

9 Q Going back to the park you said was located near the
10 residence, how far was it away from the residence?

11 A Right at the end of the street, no more than three or
12 four hundred yards.

13 Q Okay. Officer Marsee, that residence 305-A E. Street
14 is in Anderson County; is that correct?

15 A In the city and county of Anderson. Yes, sir.

16 Q Thank you. No further questions at this time.

17 THE COURT: Cross examination?

18 CROSS EXAMINATION

19 BY MR. BYRHOLDT:

20 Q Do you have your case file with you?

21 A Yes, I do.

22 Q Do you have a case summary?

23 A I did two separate reports. I did a report known as
24 a drug track report and an incident report.

25 Q Is there anywhere in your report that says it was a

1 struggle?

2 A That's -- no, sir.

3 Q So that wasn't in your report? That would be
4 important to put down, wouldn't it, if there was a
5 struggle?

6 A No, sir. The defendant was arrested, that was
7 indicated in the report.

8 Q Do you guys take notes at the scene?

9 A Yes, sir.

10 Q How many people were in the house?

11 A There was --

12 Q Four or five?

13 A I believe five, yes.

14 Q And you conducted an interview with Ms. Richardson
15 later on?

16 A Yes, I did.

17 Q Did she identify anyone other than Mr. Ware as giving
18 her drugs?

19 A At that location? Yes. She admitted the fact that
20 she was involved with several individuals.

21 Q Were any of the people that she told you brought her
22 drugs at that location at the house that night?

23 A I'm sorry, sir?

24 Q Ms. Richardson identified people that brought her
25 drugs to that location?

- 1 A Yes, she did.
- 2 Q Were any of those people in the house the night of
- 3 the arrest of Ms. Richardson and Mr. Ware?
- 4 A Yes.
- 5 Q Was that person charged?
- 6 A Mr. Ware, yes.
- 7 Q Other than Mr. Ware?
- 8 A Oh, other than Mr. Ware?
- 9 Q Other than Mr. Ware and Ms. Richardson, did she
- 10 report any people bringing her drugs that were
- 11 present at that location that were not arrested?
- 12 A No. There was no one else who had brought drugs that
- 13 night.
- 14 Q That's not my question. My question was, did she
- 15 tell you the names of people that brought her drugs
- 16 to 305-A E Street?
- 17 A Yes.
- 18 Q That were present in that location --
- 19 A Yes.
- 20 Q -- in proximity to the crack pipes?
- 21 A Yes.
- 22 Q And they were not charged?
- 23 A They were not charged because they were not in
- 24 possession of drugs that night.
- 25 Q They were in the house, right?

1 A They were in the house but they were not in
2 possession of any drugs.

3 Q Were they charged with drug paraphernalia? They
4 weren't charged with anything, were they?

5 A Possession of drug paraphernalia isn't a charge that
6 we can make, only if you are responsible for the
7 location where you actually are can we make a charge
8 of drug paraphernalia.

9 Q The drugs that were seized, were they photographed?

10 A Yes, they were.

11 Q Who took those photographs?

12 A Our evidence officer, Mike Baskin.

13 Q Ms. Richardson was charged?

14 A Yes, she was.

15 Q She had already pled guilty. Are you aware of that?

16 A No, sir. I'm not.

17 Q Not aware of that. Would it surprise you she's pled
18 guilty?

19 A No, sir, not at all.

20 Q Do you know whether she was promised anything?

21 A She was not promised anything by me.

22 MR. BRADLEY: Objection.

23 THE COURT: What's your legal objection?

24 MR. BRADLEY: Not within his knowledge, Your Honor..

25 THE COURT: Pardon me?

1 MR. BRADLEY: Not within his knowledge of --

2 THE COURT: Overruled.

3 MR. BRADLEY: -- capacity as an officer.

4 BY MR. BYRHOLDT:

5 Q Do you know whether it would be proper,
6 hypothetically, if someone had two prior drug
7 offenses and was charged with conspiracy to possess
8 crack cocaine with intent to distribute, to get
9 probation for a third offense?

10 A It's difficult for me to give a legal conclusion to
11 that question. I mean, we as police officers do not
12 have control over what a person actually receives in
13 court. But whether it's proper or not, that calls
14 for a legal opinion that I don't --

15 Q You aware of any mandatory minimums for subsequent
16 drug offenses?

17 A There are mandatory minimums, but it depends on what
18 the person is indicted for.

19 Q Third offense possession with intent or conspiracy
20 to -- with intent to possess carries 15 to 30 years,
21 right, Captain Marsee?

22 A Yes. But if there are mandatory minimums, the judge
23 has no option but to give that to the person. If
24 there is an other indictment that is consistent with
25 the charge that they're indicted for a different

1 crime, we have no control over that.

2 Q You had nothing to do with anything that might have
3 happened?

4 A No, sir.

5 Q Thank you.

6 THE COURT: Redirect?

7 MR. BRADLEY: Nothing, Your Honor.

8 THE COURT: Thank you Mr. Marsee. You may step
9 down. Thank you, very much.

10 EDWARD J. AMAN, being first duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BRADLEY:

14 THE CLERK: If you'd please state your full name and
15 spell your last name for the record?

16 THE WITNESS: Edward Jackson Aman, A-M-A-N.

17 Q Good afternoon, officer. Could you tell the jury
18 what your occupation is?

19 A I'm a police officer with the City of Anderson police
20 department.

21 Q How long have you been there?

22 A I have broken time, which means I've been here twice.
23 I have eight years with the city, 13 years in law
24 enforcement.

25 Q As an officer, what are your duties?

1 A Right now my current duties pretty much revolve
2 around training most of the police officers defensive
3 tactics, firearms, report writing, things of that
4 nature. And also the SWAT team leader.

5 Q Also been your duty or other --

6 A I served in uniform patrol and narcotics as well.

7 Q In what capacity were you working on January of 2007?

8 A On this particular occasion I was serving as SWAT
9 team leader in execution of a search warrant.

10 Q Did you have reason to come in contact with the
11 defendant on that day?

12 A Yes, sir, I did.

13 Q What was that reason?

14 A We were executing a search warrant at a residence and
15 he was inside the residence.

16 Q What was the address of that residence?

17 A 305-A E, "Echo" Street, I believe.

18 Q Do you know who that address is listed?

19 A Richardson subject.

20 Q When did you make entry into the residence?

21 A To be honest with you, I don't remember the time
22 right off.

23 Q Were you with anyone or was it just you by yourself?

24 A No, sir. The SWAT team made entry into the
25 residence. Usually it's a six-man element. I'm not

1 sure how many entered that night. I was the fourth
2 man in the stack, so I was the fourth man to go
3 through the door.

4 Q When you made entry, can you tell us what you
5 observed?

6 A Yes, sir. I came in, we came in through the rear --
7 one of the rear entries of the dwelling and it enters
8 into like a mud room and a kitchen. And you have
9 basically, like in a kitchen, you always have the
10 countertops, you have cabinets, and you have kind of
11 a gap in between. As we come through, as I said,
12 there were actually three officers ahead of me. The
13 way we do what we do, first two guys actually
14 penetrating deeper into that residence, into what was
15 later determined to be the living room area. But as
16 I came in, my peripheral vision through that gap
17 there, I could see most of the kitchen, which ended
18 up being my area of responsibility. As I entered
19 through that doorway, I saw the defendant fling some
20 object into the air. The object actually struck me
21 in the chest. And went somewhere onto the floor.
22 And I actually had my weapon drawn on the defendant
23 and Ms. Richardson. They were both in that same
24 general vicinity.

25 Q What did you do next?

1 A I stayed there. I became the cover man. The contact
2 man, which was officer Culbertson, he was directly in
3 front of me in the stack. He actually took him to
4 the ground and cuffed him up, put handcuffs on him,
5 took him into custody. From there we pretty much
6 just waited for the evidence custodian to come around
7 and take names, take pictures, gather any evidence.

8 Q And so when you came into the room, you saw the
9 defendant and have something in his hand, threw it at
10 you, in your direction?

11 A I didn't see it in his hand necessarily. I saw his
12 arm making a type of flailing motion in my direction,
13 which drew my attention, because that's what we're
14 looking for, the hands. We're -- SWAT is always
15 looking for the hands because that's what can hurt
16 somebody, kind of trying to pick up on where their
17 hands are, what's around them. I see that motion and
18 I did see something in the air. And the thing,
19 whatever it was at that time, struck me in the chest
20 and landed on the ground.

21 Q And what happened to that officer later on?

22 A I believe Officer Culbertson, when he took the
23 defendant to the ground actually took him to the
24 ground on top of the object.

25 Q And after the defendant was removed from off the top

1 of the object, what happened to the object?

2 A The evidence officer came in and, observed to be kind
3 of consistent with what we know to be cocaine, crack
4 cocaine, they field tested it, field tested positive
5 for that. He took it into his control. We didn't
6 actually -- we try not to touch the evidence if we
7 know what it is.

8 Q All right.

9 THE COURT: Do you have any objection to them?

10 MR. BYRHOLDT: I do at this point.

11 THE COURT: Ladies and gentlemen of the jury, I got
12 another jury in the jury room deliberating on the first
13 trial. I'm trying to deal with some of those right now.

14 All right. Solicitor, please proceed.

15 MR. BRADLEY: Thank you, Your Honor. May I approach
16 the witness?

17 THE COURT: Yes, sir.

18 BY MR. BRADLEY:

19 Q Officer, showing you what's been marked for
20 identification purposes State's Exhibit 1 for
21 identification and State's Exhibit 2 for
22 identification. Take a look at those without
23 publishing them to the jury.

24 (Witness complies.)

25 Q Those items look familiar to you?

1 A Yes, sir.

2 Q Why do they look familiar to you?

3 A That's the item I believe struck me in the chest.

4 Q The night we're talking about, January 15?

5 A Yes, sir.

6 Q Okay. And where is the location of that picture?

7 A You can see the baseboard running by the trashcan
8 there. That's the counter I was talking about, as
9 you come into the kitchen. That's the kitchen floor,
10 it's on -- right there beside the trashcan.

11 Q When you came into the kitchen, did you see anyone
12 else in the kitchen besides the defendant?

13 A Ms. Richardson was in the kitchen as well.

14 Q Did you see Ms. Richardson's arm moving as the motion
15 described the defendant's arm moving?

16 A No, I did not.

17 Q Did you see any other objects coming at you from
18 anyone else other than the defendant's direction?

19 A No, sir, I did not.

20 Q Okay. Nothing further at this time.

21 CROSS EXAMINATION

22 BY MR. BYRHOLDT:

23 Q Lieutenant Aman, you didn't see anything in Mr.
24 Ware's hand, did you?

25 A No, sir.

1 Q And there are two people in the kitchen?

2 A Yes, sir.

3 Q I take it you say you were a SWAT leader?

4 A Yes, sir.

5 Q Focused primarily on the man that was there, was he
6 closest to you in proximity or were they about
7 together?

8 A They were about together. The proximity of this
9 particular room is not that large.

10 Q Can you tell this jury today where that object came
11 from? Whether it came from Ms. Richardson
12 originally, Mr. Ware, or from somebody else?

13 A You mean, definitively can I say?

14 Q Yeah.

15 A No, sir, I cannot.

16 Q Thank you, sir.

17 THE COURT: Any redirect?

18 REDIRECT EXAMINATION

19 BY MR. BRADLEY:

20 Q Officer, can you definitively say it did not come
21 from the defendant?

22 A No, sir. As I said, I saw his arm in that flowing
23 type motion, object struck me in the chest, went to
24 the floor. But I didn't take my eyes off either one
25 of the two subjects.

1 Q Again, they were the only two in the kitchen?

2 A They were the only two in the kitchen.

3 Q He was the only one moving his arm in your direction?

4 A Yes, sir.

5 Q And when he was taken down on the ground, you were
6 the closest to him?

7 A Right. But I still had to maintain visual contact on
8 her as well because when we do something like that,
9 taking all the people into custody, at least until we
10 make sure the scene is safe with the officers. So I
11 was kind of splitting my attention, but eyes on both
12 and right there in the same area:

13 Q Nothing else, Your Honor.

14 THE COURT: Recross?

15 MR. BYRHOLDT: No, your Honor.

16 THE COURT: You may step down, thank you, very much.

17 (Witness steps down from the stand.)

18 THE COURT: Call your next witness.

19 MR. BRADLEY: State calls officer Jody Culbertson.

20 JODY CULBERTSON, being first duly
21 sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BRADLEY:

24 Q If you'd please state your full name, spell your last
25 name for the record?

1 A Jody Culbertson, C-U-L-B-E-R-T-S-O-N.

2 Q Good afternoon, Mr. Culbertson. Tell us what your
3 occupation is.

4 A Narcotics investigator, City of Anderson police
5 department.

6 Q How long you been there?

7 A Four years.

8 Q That would have made you working there January 2007;
9 is that correct?

10 A That's correct.

11 Q What are some of your duties?

12 A As a narcotics investigator answer complaints inside
13 the city limits of drug -- citizens where they call
14 in drug complaints.

15 Q As part of your duties and capacity as an officer on
16 January 15, 2007, did you come in contact with the
17 defendant?

18 A Yes, I did.

19 Q What is the reason?

20 A I am assistant SWAT team leader, tasked with entry
21 that day at the residence.

22 Q What residence were you referring to?

23 A 305A Street.

24 Q 305-A E Street?

25 A E Street, yes, I'm sorry. In Anderson County.

1 Q And when you made entry into the residence, what did
2 you observe?

3 A As we made entry into the residence, there were two
4 of my operators in front of me. I was third in line
5 in front of the residence. My first two operators
6 behind the defendant who was standing deep in the
7 corner of the kitchen. As you go in there's a mud
8 room or a wash room. It hard -- right back it.
9 empties into the kitchen area. There's a wall to the
10 left. The defendant was standing deep in the back
11 corner beside a female individual.
12 As we made entry, I actually was behind him as well,
13 saw him out of the corner of my eye, turned back to
14 him. At that time he was -- I observed him to throw
15 a item that hit the fourth man mind me, off his
16 chest. At that time I directly went to the
17 defendant, took him down to the ground.

18 Q And that fourth man behind you, who was that?

19 A Lieutenant Aman.

20 Q So when you came into the kitchen, you testified that
21 only you saw the defendant there. Who else was in
22 the kitchen?

23 A It was a female.

24 Q It was a female?

25 A Yes.

1 Q Do you know who that female was?

2 A I believe it was Ms. Richardson.

3 Q And did you see Ms. Richardson throw anything at the
4 officer?

5 A No. No.

6 Q After you took the defendant down, what happened?
7 What did you do?

8 A At that time I placed him in handcuffs, stood up
9 there with them. Once he was secured, I went over
10 and stood over the item he threw.

11 Q What happened to the item that he threw?

12 A The collection officer came and collected the item.

13 Q I believe there may be some pictures up on the
14 witness stand. If you could take a look at those
15 without showing them to the jury. Do you know what
16 those are?

17 A Yes. That's the item that he threw.

18 Q Okay. After the defendant was obtained, was anyone
19 else arrested?

20 A I don't recall.

21 Q Do you remember what the defendant is charged with?

22 A Possession with intent to distribute crack cocaine,
23 possession with intent to distribute within proximity
24 of a school or park.

25 Q Anything else you remember?

1 A Not that I recall, no.

2 Q Nothing further at this time.

3 THE COURT: Cross examination?

4 MR. BYRHOLDT: May it please the Court?

5 CROSS EXAMINATION

6 BY MR. BYRHOLDT:

7 Q Officer Culbertson, do you know where this package
8 came from?

9 A Yes, sir, from the defendant's hand.

10 Q Before that? Did he get it from Ms. Richardson? Do
11 you know that?

12 A No, sir. I have no recollection of that.

13 Q Whose house was that?

14 A As far as I know, hers. My job that day was to make
15 entry and secure the residence.

16 Q Who took Mr. Ware to the ground?

17 A I did.

18 Q Was this -- did he struggle with you or you just
19 doing that for safety purposes?

20 A Safety purposes.

21 Q He didn't fight you?

22 A No more than just being -- SWAT team coming in on
23 him.

24 Q So you mean there was no struggle, no fight between
25 Mr. Ware and the officers?

1 A No, sir. I was the only one that came. Lieutenant
2 Aman covered me, I took him to the ground. That's
3 our normal operating procedure.

4 Q Did you see anybody field test that package?

5 A No, sir. As my duty was, once the residence is
6 secure, I stood over it. After it's secured I went
7 to narcotics mode, I stood over that. But as our
8 normal procedure, we always field test.

9 Q Who took possession of it?

10 A I -- whoever the collection officer was that
11 particular day. I don't recall.

12 Q You didn't?

13 A No, sir. No, sir. I just -- only thing I did was
14 stood over the package or the item until it was
15 collected and as well, that is our standard operating
16 procedure.

17 Q You didn't see any field tests on the premises?

18 A I don't recall. No.

19 Q Thank you.

20 THE COURT: Any redirect?

21 MR. BRADLEY: Yes, your Honor.

22 REDIRECT EXAMINATION

23 BY MR. BRADLEY:

24 Q Was it your duty that night to do the field test?

25 A No.

1 Q When you came into the kitchen, you testified that
2 you only saw the defendant in possession of the item
3 he threw at officer Aman; is that correct?

4 A Yes, sir.

5 Q No one else?

6 A No, sir.

7 Q Okay. Nothing else, Your Honor.

8 THE COURT: Thank you very much. Any recross?

9 MR. BYRHOLDT: No, Your Honor.

10 THE COURT: You may step down. Thank you so very
11 much.

12 (Witness steps down from the stand.)

13 THE COURT: Call your next witness.

14 MR. BRADLEY: State calls officer Mike --
15 Investigator Mike Baskin.

16 THE COURT: All right. Mr. Foreman, we're going to
17 break for today. I believe on Monday I told you our
18 stopping point would be around 5 or 5:30. It's now 5:15.
19 Due to prior commitments we're not going to be able to
20 start the trial tomorrow until 1:30. So if you'll be
21 back in the jury room at 1:30 tomorrow. We'll continue
22 the trial at that time.

23 Please do not discuss the case amongst yourselves or
24 with anyone else. Once you make a decision, I want you
25 to make a decision on what you hear in the courtroom, not

1 what someone tells you, what you read in the paper or
2 watch on television. If there's anything in the paper or
3 on TV, please don't read it. See you tomorrow at 1:30.
4 Have a good evening. Follow the bailiff. I think you
5 already know where to come to.

6 (Whereupon, the following proceedings were had
7 outside the presence of the jury:)

8 THE COURT: All right. I understand there's a chain
9 of custody issue the defense would like to take up? The
10 way I understood it, Officer Culbertson said he stood
11 over the drug or over the packet that had been thrown.
12 Someone collected it. Briefly, what's the chain of
13 custody problem?

14 MR. BYRHOLDT: My concern is there may have been
15 contamination of evidence from the information the state
16 supplied me. There was evidence sent to SLED, my
17 understanding, other than SLED, Mike Baskin is the only
18 person involved in the handling of the evidence.

19 THE COURT: Do we have to take testimony to address
20 that in camera?

21 MR. BYRHOLDT: I think we would because if I'm
22 successful, the evidence is going to be suppressed and
23 the case is probably going to end.

24 THE COURT: I know, but can we agree on a
25 stipulation of the facts in dispute without sitting here

1 listening to testimony?

2 MR. BYRHOLDT: No. I think we have to have some
3 questions of Investigator Baskin, Your Honor.

4 THE COURT: Officer Baskin, come around and be
5 sworn.

6 Before we get started, I'm going to excuse the other
7 jury for the evening.

8 Madam clerk, if you'd swear him, I'll be back in
9 five minutes.

10 (Pause.)

11 THE COURT: Solicitor, do you know what area he's
12 talking about?

13 MR. BRADLEY: Not at all.

14 THE COURT: Do you want to let him ask questions,
15 you ask questions? Let you follow up?

16 MR. BRADLEY: This is the first I heard of it, Your
17 Honor.

18 THE COURT: I want to cut through to the facts, get
19 to the meat real quick. I'll let you follow up with any
20 questions after he finishes. Okay? Mr. Byrholdt.

21 MIKE BASKIN, being first duly sworn,
22 testified as follows:

23 DIRECT EXAMINATION

24 BY MR. BYRHOLDT:

25 Q In discovery I was provided a SLED report says

1 2.4 grams of crack cocaine and a best kit number and
2 then on your -- in the investigator notes the best
3 kit sent down two packs of drugs and some pills?

4 A No. No, sir. What was the ---

5 Q It's in the report listed as -- let me show you the
6 case jacket. It's got you securing this evidence in
7 best kit number B, as in boy, 177531. Would you
8 agree that's what's in the evidence list?

9 A That's what's on the evidence list, but that's not
10 the correct thing. I don't ---

11 Q And then there's a second best kit with the same
12 number on it?

13 A These drugs were never sent to SLED.

14 Q How did these drugs get out of the best evidence kit?
15 The best evidence kit, don't you seal the drugs?

16 A They are in a best evidence kit.

17 Q They're supposed to be in the best evidence kit with
18 that number on it?

19 A It's a different number altogether.

20 Q No, the number --

21 A I understand what this says, that's a typographical
22 error. That's not the number that they're under.

23 Q But that's what the state provided, saying there's
24 two sets of drugs sent to SLED under the same number.
25 That was my concern.

1 A The number that this other best kit is under is best
2 evidence, I believe 13017.

3 Q That's not what the report says --

4 A I understand, sir.

5 Q -- that was provided by Anderson Police Department?

6 A I understand that.

7 Q Can you look at the photographs that's been marked
8 for identification purposes. Did you take those
9 photographs, Officer Baskin?

10 A Yes, I did.

11 Q Who is the evidence custodian --

12 THE COURT: You need him --

13 BY MR. BYRHOLDT:

14 Q -- that's represented what's in your best evidence
15 kit in front of you.

16 A Yes.

17 Q And you're saying that that's the same materials?

18 A Yes, sir. They were put in this evidence bag and
19 then put in a best kit later.

20 Q What is this bag?

21 A This is the SLED lab number that was done by the SLED
22 analyst.

23 Q But what's the bag -- is that the bag that was
24 actually seized? Or do you know?

25 A I don't really know, that's what I would assume it

1 would be.

2 Q Was that material field tested at the scene?

3 A Yes, sir.

4 Q You tell me where in this report it says it was field
5 tested. The second page deals with that seizure.

6 A It doesn't say.

7 Q Okay. Is that just something that was left out?

8 Now, this is a typographical -- there's not any drugs
9 mixed together?

10 A No, sir. There's only one.

11 Q Was there another -- you saying there was a second
12 best evidence kit?

13 A Yes, sir, from the buy that was never sent to SLED.

14 Q Why wasn't it sent to SLED?

15 A Because he's not charged with it.

16 Q But it was listed in this report. You're saying
17 erroneous -- you didn't do this report, did you?

18 A That's the drug track report.

19 Q Who did that?

20 A The -- I guess whoever's case it is.

21 Q You did not do this?

22 A I may have transferred the evidence over to it, I'm
23 not sure.

24 Q That's my concern. You would agree it appears
25 there's two sets of drugs with the same evidence kit

75

1 number?

2 A Yes, sir. As I said, there's a typographical error
3 there. These drugs were collected at 1600 hours by
4 someone else and given to me. And they were in a
5 separate bag.

6 Q That's my problem. But the number says it's the same
7 bag?

8 A Yes, sir. I understand that. The best kit bag says
9 it is not the same bag. There's an evidence bag in
10 the best kit.

11 Q Right. But it's put in one bag. That's my concern.
12 From the report, it seems like there were two sets of
13 drugs put in the best evidence kit, number B, as in
14 boy, 177531.

15 A But as you can see, there are only one set of drugs
16 in this thing.

17 Q Unless somebody combined them, put them in that bag?

18 A No, sir. The other bag has got the drugs in them.

19 Q We don't know that because no best evidence kit in
20 this number report, other than the one.

21 MR. BYRHOLDT: That's my concern, Your Honor.

22 There's two sets of reports. One from an earlier seizure
23 he's not charged with. Here's one, one with best
24 evidence numbers. That's why they have the best evidence
25 kit so they're kept separately.

1 THE COURT: You have any more questions?

2 MR. BYRHOLDT: Not of Investigator Baskin. No, sir.

3 THE COURT: All right. Solicitor, you have any
4 questions? Do you want these reports for your questions?

5 MR. BRADLEY: We have the reports, Your Honor.

6 THE COURT: Do you have any questions?

7 MR. BRADLEY: Just a few, Your Honor.

8 CROSS EXAMINATION

9 BY MR. BRADLEY:

10 Q Investigator, the best kit that was collected the
11 night of January 15, 2007, it has a best kit, has a
12 number of B-177531; is that correct?

13 A Yes.

14 Q And does that match the best kit number on the SLED
15 report that was tested down at SLED?

16 A Investigation 177531.

17 Q Prior to that night, before the search warrant was
18 executed, were there any other drugs that were
19 collected by you in regard to the defendant?

20 A I did not collect them from the defendant. I checked
21 some drugs from another officer.

22 Q Okay. And that, where did those drugs come from?

23 A They came from a drug buy according to the -- to the
24 evidence bag.

25 Q And so they were not sent to SLED --

1 A No, sir, they were not.

2 Q -- to be tested?

3 A The only thing sent to SLED is in that bag right
4 there, that's correct. This right here.

5 Q Okay. So that I believe what Mr. Byrholdt is
6 referring to is another part of the narrative and
7 case summary, the same number is listed on the
8 controlled buy drugs; is that right?

9 A That's correct.

10 Q Okay. And your position for that, it was a
11 typographical error; is that correct?

12 A That's correct.

13 Q But the only thing that was sent, you were in
14 possession of both bags the entire time? They were
15 constantly under your custody, care, and control; is
16 that right?

17 A The -- once I received it, the first bag I received
18 from your office, then it was under my control. This
19 was all under my control from the time I collected
20 it.

21 Q And at any time did they get combined together?

22 A No.

23 Q Okay.

24 THE COURT: After all this confusion, tell me what
25 was sent to SLED. Under what best number and SLED

1 number.

2 THE WITNESS: The container number was 177531.

3 THE COURT: Wait a minute, 177531.

4 THE WITNESS: And had a number -- has number
5 L-07-1365.

6 THE COURT: All right. How do you know that's the
7 drugs that was removed from the floor of the house
8 where --

9 THE WITNESS: Because I put it in an evidence bag
10 with a date and time. And with the item number on it.

11 THE COURT: And then put it in a best kit? All
12 right. So your markings show that?

13 THE WITNESS: That is correct. That is correct.

14 THE COURT: You said you keep the best evidence kit?

15 THE WITNESS: Yes.

16 THE COURT: And that was sent to SLED?

17 THE WITNESS: Correct.

18 THE COURT: Now, how do you know that other number
19 wasn't sent?

20 THE WITNESS: Because I still have it.

21 THE COURT: So you still have the other number?

22 THE WITNESS: Yes.

23 THE COURT: All right. Do you have any questions
24 based on the questions the Court just asked?

25 MR. BYRHOLDT: Yes.

1 BY MR. BYRHOLDT:

2 Q But both of them are marked going into the best
3 evidence kit, correct?

4 A Both marked with the same number.

5 Q Right. One bag was sent to SLED. Like I said, the
6 problem is it appeared that they were combined. I
7 don't know if they were or not.

8 THE COURT: I understand. But he says the other one
9 is still in his possession, but the second bag was sent.
10 One bag had been sent, one bag hasn't been and it's still
11 in his possession.

12 MR. BYRHOLDT: The only thing that's been produced
13 to me, one under that evidence kit number, which showed
14 two things went.

15 THE COURT: I understand what you're saying, but I
16 think his testimony has clarified it. I'll be glad to
17 hear your argument.

18 MR. BYRHOLDT: I just think it appears there could
19 be contamination because it appears from the report that
20 two separate sets of drugs were placed in the same best
21 evidence kit based on the report.

22 THE COURT: I understand. But that's not his
23 testimony.

24 MR. BYRHOLDT: I agree, it's not his testimony.
25 It's what the report said.

1 THE COURT: We're not admitting it under his report.
2 We're admitting it under his testimony. Tell me where
3 this confusion under his testimony the, basis of your
4 motion to suppress, I assume that's your motion, right?
5 What's your motion? Let's back up. What's your motion?

6 MR. BYRHOLDT: To suppress. I'll renew that at this
7 time. They still have to put the chemist up.

8 THE COURT: I understand what your motion, to
9 suppress, right?

10 MR. BYRHOLDT: That the chain of custody is
11 incomplete because the report said two sets of reports
12 were sent in the same evidence bag, now saying it's a
13 clerical error. We don't know that. I've seen no other
14 drugs.

15 THE COURT: The way I understand his testimony, he
16 put a number on the bag that was collected at -- what's
17 the house number, 305-A E Street -- at that house, been
18 in his possession that was sent to SLED. He got that
19 back. The other bag never been sent, under his
20 possession. However, it does have the same number
21 177531. That's his testimony the way I understand it.
22 Do you understand it that way?

23 MR. BYRHOLDT: I do.

24 THE COURT: Do you understand it that way,
25 Solicitor?

1 MR. BRADLEY: Yes, sir, Your Honor.

2 THE COURT: As far as the motion concerning here,
3 we'll hear from SLED, My tendency is to rule against you.
4 But I will keep it under advisement until I hear from
5 SLED.

6 MR. BYRHOLDT: I understand.

7 THE COURT: SLED may come in and say they tested
8 two, I don't know.

9 MR. BYRHOLDT: Thank you.

10 THE COURT: Do you understand what I'm saying? It's
11 under advisement until I hear from SLED. He's explained
12 the conflict from his end. Now I guess SLED is going to,
13 have to see what they say. I'll take it under advisement
14 until we hear from SLED. Okay?

15 MR. BRADLEY: Yes, sir.

16 THE COURT: Anything else we need to deal with this
17 afternoon?

18 MR. BYRHOLDT: No, sir.

19 MR. BRADLEY: Just matter of bond for the defendant.

20 THE COURT: His bond is over. He appeared for
21 court. He goes to jail until tomorrow.

22 MR. BRADLEY: Just wanted to address it on the
23 record.

24 THE COURT: I don't know there's anything to
25 address. They're going to take him to jail.

1 MR. BYRHOLDT: I'd request ---

2 THE COURT: Denied.

3 MR. BYRHOLDT: Okay.

4 THE COURT: Goes to jail. Thank you so very much.
5 We'll start back tomorrow.

6 MR. BYRHOLDT: Can the state not discuss prior
7 testimony with their witnesses, about what people have
8 testified to? I think they can interview their
9 witnesses.

10 THE COURT: Yeah. Don't go out there and tell them
11 what everybody testified to. I don't have any problem
12 you prepping the witness.

13 (Whereupon, the proceedings are adjourned for the
14 evening recess.)

15 January 8, 2009

16 (Whereupon, court reconvened with all parties
17 present, when the following proceedings were had:)

18 THE COURT: Anything from the state before we bring
19 the jury?

20 MR. BRADLEY: No, Your Honor.

21 THE COURT: From the defendant?

22 MR. BYRHOLDT: No, Your Honor.

23 THE COURT: Talking yesterday about suppression,
24 refresh my memory.

25 MR. BYRHOLDT: I had investigator Baskin on the

1 stand. We finished all questions with him. We're ready
2 to go forward.

3 THE COURT: We're going to wait until we hear from
4 the SLED on the drugs, right?

5 MR. BYRHOLDT: Yes.

6 THE COURT: All right. Bring the jury in, please.

7 (The following proceedings were had within the
8 presence of the jury:)

9 THE COURT: Solicitor, call your next witness.

10 MR. BRADLEY: Thank you, your Honor. May it please
11 the Court? The state calls investigator Mike Baskin.

12 THE COURT: Ladies and gentlemen of the jury, the
13 reason we were waiting, the other jury reached a verdict.
14 We were dealing with that. That's the reason we were
15 running late. We got a verdict and I had to deal with
16 that before we start the trial. Sort of happened -- they
17 got the verdict at the same time as you all were coming
18 in.

19 W. MICHAEL BASKIN, being first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. BRADLEY:

23 THE CLERK: Please state your full name, spell your
24 last name for the record.

25 THE WITNESS: William Michael Baskin, B-A-S-K-I-N.

1 Q Good afternoon, tell us what your occupation is.

2 A I work for the solicitor's office.

3 Q In what capacity?

4 A Investigator.

5 Q How long have you been employed there?

6 A About 16 months.

7 Q What did you do before then?

8 A Worked for the Anderson City Police Department.

9 Q How long?

10 A A little over 30 years.

11 Q What titles did you hold there?

12 A I did crime scene and evidence there. I was a
13 sergeant.

14 Q And were you working in that capacity January, 2007?

15 A Yes, I was.

16 Q Did you have reason to respond to 305-A E Street,
17 Anderson, on that day?

18 A Yes, I did.

19 Q On January 15, 2007?

20 A Yes, I did.

21 Q What was the reason for responding there?

22 A I was there to collect evidence.

23 Q And what items did you collect?

24 A I collected drugs, crack pipe, cell phone.

25 Q And when you collected these items, when you

1 collected the drugs, did you do anything with them?

2 A I put them in an evidence bag.

3 Q Before that, did you do anything with them?

4 A The drugs I field tested.

5 Q What does field test mean?

6 A I have a -- have a presumptive test that you drop
7 part of the drugs into and break an ampule. It will
8 turn a certain color depending on the type of drug it
9 is.

10 Q What did it test?

11 A It tested for cocaine.

12 Q And, Investigator Baskin, showing you what's marked
13 State's Exhibit 3 for identification purposes, take a
14 look at that, tell me if you recognize that.

15 A Yes, sir. This is the drugs I collected that day.

16 Q Where did you collect them from?

17 A Kitchen floor.

18 Q Anything else about where you collected them from?

19 A They were underneath the defendant.

20 Q And besides collecting the item of evidence from the
21 residence that night, did you do anything else? Take
22 photographs?

23 A I'm sorry?

24 Q Did you do anything else at the scene that night?

25 A I took photographs, yes. Identified everyone in the

1 house.

2 Q What did you photograph?

3 A The drugs.

4 Q Anything else?

5 A Yes, I -- all the people that were in the house, and
6 another place in the bathroom where I collected a
7 crack pipe.

8 Q Okay. Investigator, showing you State's Exhibit 1
9 and 2 for identification purposes. Take a look at
10 those. Do you recognize them?

11 A Yes, sir. These are the drugs I collected.

12 Q Those the photographs you took as well?

13 A Yes.

14 Q Do those photographs accurately depict the scene from
15 that night?

16 A Yes, sir. After the defendant was taken off the
17 drugs.

18 Q Okay. And have they been edited or altered in any
19 way?

20 A No.

21 MR. BRADLEY: At this time, I'd like to move the
22 photos in evidence.

23 MR. BYRHOLDT: No objection.

24 THE COURT: What number is it, Mike?

25 MR. BRADLEY: One and two.

87

1 THE COURT: State's Exhibit 1 and 2 admitted without
2 objection.

3 (WHEREUPON, State's Exhibit No. 1-2 are admitted
4 into evidence.)

5 MR. BRADLEY: Thank you, Your Honor. Permission to
6 publish to the jury, Your Honor?

7 THE COURT: Yes, sir.

8 BY MR. BRADLEY:

9 Q Show you these on the overhead. Just describe to the
10 jury what they're seeing, please.

11 THE COURT: You need to step down?

12 (Witness steps down from the stand.)

13 A That's the baggy with the drugs in it there. This is
14 the kitchen. The defendant was on top of these
15 drugs.

16 THE COURT: Could I get him to speak up a little?

17 THE WITNESS: I said the defendant was on top of
18 these drugs. This is the baggy containing the drugs on
19 the kitchen floor.

20 Q And that was State's Exhibit No. 2. Show State's
21 Exhibit No. 1. If you could, explain this one as
22 well.

23 A Those are the same drugs.

24 Q That's the kitchen floor, that's the baggy they were
25 in?

1 A This is the baggy underneath the defendant.

2 MR. BRADLEY: Thank you. You may return to the
3 stand.

4 (Witness resumes stand.)

5 BY MR. BRADLEY:

6 Q After collecting the evidence and taking the
7 photographs that night, what did you do with the
8 evidence you collected?

9 A I took it and locked it up in the evidence room at
10 the city police department.

11 Q Regardless of the drugs, did you take it to have any
12 more testing done?

13 A Took it to SLED. Yes, sir.

14 Q What is SLED?

15 A SLED is the South Carolina Law Enforcement Division.

16 I took it to the log in there at the laboratory.

17 Q And what did they do at SLED?

18 A The log in and lab they analyze, they analyze drugs
19 they analyze DNA, all sorts of stuff.

20 Q And you personally took those drugs?

21 A Yes, sir. I personally took them.

22 Q What exactly did you take?

23 A I took the drugs -- well, I -- first, I put them in
24 an evidence bag at the scene. When I got back to the
25 police department, I put them in a best kit, which is

1 a container to take stuff to SLED with. It has a
2 chain of evidence on it. And I log it in. I logged
3 this into Amy Stevens and she took possession of it.

4 Q Is that the only thing you took?

5 A Yes. That was the only, as to this case, I took.

6 Q And mentioned that you took it to Amy Stevens and
7 logged it in?

8 A Yes.

9 Q What happened to the evidence while it was down there
10 at SLED?

11 A It was just logged in. I gave it to her and she took
12 possession of it.

13 Q Okay. Did this evidence come back into your
14 possession at any time after that?

15 A Yes, sir. I picked it up in April of that year.

16 Q April of that year. And who did you retrieve it
17 from?

18 A Carhonda Williams.

19 Q She's a SLED employee?

20 A Yes. She was in log in. She no longer works there.

21 Q What did she do when you arrived at SLED to pick it
22 up?

23 A I signed for it and she gave it to me.

24 Q What did you do after that?

25 A I brought it back to the Anderson Police Department

1 and locked it back up.

2 Q And after you took them back to the police department
3 were they constantly in your care and control while
4 you were working at the police department?

5 A Yes, sir.

6 Q And you mentioned that you left the police department
7 to come work for the solicitor's office a little
8 while ago. What did you do when you left the police
9 department with the evidence?

10 A It was still locked in place. Kevin Warren assumed
11 possession of the evidence then.

12 Q Kevin Warren is also with the police department?

13 A Yes, sir, evidence technician at the police
14 department now.

15 Q So it would be his duty to maintain custody and
16 control of that evidence?

17 A Yes, sir.

18 Q Investigator, if you could, walk us through the
19 process of when you collect the evidence and you put
20 it in the bag. What is the process of doing that?
21 How do you do that?

22 A I photograph it first, and then I -- depending on the
23 type of drug it is, I do a field analysis. The only
24 kind of drug I would not do a field analysis on would
25 be pills or marijuana. Then I put it in an evidence

1 bag. I put a case number on it, put the offense, the
2 person's name, the date and time collected, a
3 description of what I collected, you know, where I
4 collected it from. And then I bring it -- then, like
5 in this case with crack, I would bring it back to the
6 police department. Then I would fill out, as I said,
7 a best kit for taking it to the SLED laboratory.

8 Q Since it was in your possession, if it had been
9 edited or altered in any way, you would be able to
10 tell; is that correct?

11 A Yes. It's a sealed bag.

12 Q Has it been edited or altered any since it was in
13 your possession?

14 A Since the last time, no, sir.

15 Q Thank you. No further questions.

16 THE COURT: Cross examination?

17 MR. BYRHOLDT: May it please the Court?

18 CROSS EXAMINATION

19 BY MR. BYRHOLDT:

20 Q Investigator Baskin, you put it in a best evidence
21 kit to protect its integrity, correct?

22 A I put it in a best evidence bag to take it to SLED.

23 Q But also to preserve its integrity, right? So
24 someone doesn't add something or take something out?

25 A It's already in a sealed evidence bag.

1 Q And when you write down the number on your chain of
2 custody form, you do have chain of custody form,
3 right?

4 A Yes, sir. There's chain of custody forms with the
5 best kit. And I also keep a computerized
6 chain-of-evidence form.

7 Q Can you explain to this jury how two sets of evidence
8 could have the same best evidence kit number?

9 A Sir?

10 Q Can you explain to this jury whether it would be
11 possible for two separate quantities of drug to have
12 the same best evidence kit number?

13 A Two different drugs, the only way that could be
14 possible for a typographical error. In this
15 particular case, when I typed up the evidence in the
16 computer, I put the same lab number -- I mean, excuse
17 me, not lab number, container number for two
18 different sets of evidence.

19 Q So it's a clerical error?

20 A Yes, sir.

21 Q Do you do a Form B chain of custody?

22 A Yes, sir.

23 Q Do you have that with you today?

24 A No, sir. I don't. It may be in the case file.

25 Q Let me show you my copy. That's, again, for the

93

1 chain of custody, make sure it's all done correct?

2 A Correct.

3 Q Would it be possible to do a chain of custody and
4 swear that it was done on January 16th of 2007 when
5 the drugs weren't sent off until January 27, 2007?
6 Would that be another clerical error?

7 Is that your chain of custody form, sir?

8 A That's my original chain of custody form. Yes.

9 Q All right. On the bottom of it there's a notary
10 where it was sworn to, correct?

11 A That is my signature was sworn to, not the day that I
12 collected it. No, sir.

13 Q No, what's the day -- I mean, it's the day the form
14 was completed, correct?

15 A No. The day that I got my signature notarized I
16 didn't say -- I can't say I didn't complete the form
17 on the 16th. I don't remember.

18 Q You wouldn't have the form notarized before it was
19 completed, would you?

20 A No, sir.

21 Q What date was it notarized?

22 A My signature was notarized on the 16th of January.

23 Q And the form should have been completed before it was
24 notarized, correct?

25 A Correct.

1 Q What date was the evidence sent to SLED?

2 A It was sent 1/29.

3 Q Well, how could it be notarized January 16th when the
4 stuff wasn't sent out for eleven more days?

5 A I'm not following you.

6 Q Well, you sign it when the form is completed,
7 correct?

8 A My signature has to be notarized. Yes, sir.

9 Q Well, you wouldn't have it notarized before the form
10 was completed, would you?

11 A No, sir. The form was completed when I got it
12 notarized.

13 Q How could it be notarized on the 16th when the
14 evidence wasn't sent until 11 days later? Or did
15 somebody add stuff later?

16 A No. SLED will not notarize my signature. Therefore,
17 I have to have my signature notarized here. When I
18 take it to SLED, I put in the date and -- that I
19 turned it in to SLED. We don't put a name, but we
20 put the SLED for the law enforcement agency and for
21 the name.

22 Q So you're telling the jury you have your signature
23 and the form notarized before it's completed?

24 A I have my signature notarized before I take it to
25 SLED. Yes, sir. That's on every case.

1 Now, at one time we used to take stuff to SLED and
2 get them to notarize our signature but they will not
3 do it anymore. At least they wouldn't when I was
4 working. I don't know what that policy is now.

5 Q So it would be fair to say you entered information
6 after your signature was verified?

7 A Oh, yes, sir.

8 Q The form says you received it, placed it at SLED,
9 sworn before you some eleven days before it was sent?

10 A No, sir. That's not what it says.

11 Q Read the bottom of it, sir. What does this say?

12 Right here, the last paragraph.

13 A Sworn and subscribed this first of six -- January,
14 2007, Amy Sexton she works at the police department.
15 SLED will not notarize my signature. That's the
16 reason I have to have it done here.

17 Q Yeah, but you could have it done after you took the
18 drugs. Like let's assume you seized it on the 15th,
19 took it on the 27th, and you fill out the form and
20 say I delivered it and swear to it when you get back?

21 A These forms are turned in to SLED.

22 Q What I'm saying is you're swearing something was
23 done. Amy Sexton didn't know that was done, did she?

24 A She's not. My signature is what she's signing, not
25 what I've written there. My signature that I signed

1 it.

2 Q That's not what the form says, though is it? It says
3 sworn that you've done these things?

4 A Every best kit is done that way.

5 Q And every best kit has two sets of drugs in it,
6 clerical errors in it, mistakes?

7 A No, two sets of drugs in that best kit.

8 Q How many photographs did you take?

9 A Of the drugs?

10 Q How many photographs did you take at the scene?
11 We've only seen two.

12 A Five, six, seven, I believe. Maybe -- I take that
13 back, nine.

14 Q All right. How many -- nine?

15 A Yes, sir.

16 Q How many individuals, non-law enforcement, were in
17 that house?

18 A Five.

19 Q You took pictures of all five?

20 A Yes, sir.

21 Q Are they here today?

22 A Are all five of those people here?

23 Q Miss Richardson is here. Anyone else? Mr. Ware.

24 A I -- there's one other, there's one other lady here.

25 I think one of the ladies is dead. Mr. Ware is here.

1 Virginia Richardson is here. I'll have to look at
2 the other girl's name.

3 Q The reason we have a chain of custody is when the
4 drugs are handled, somebody is supposed to keep track
5 of them, correct?

6 A Correct.

7 Q And if that was not done, would that be a breach of
8 protocol, Mr. Baskin, in the handling of drugs?

9 A Yes, sir.

10 Q Because everybody -- every time somebody touches
11 them, somebody is supposed to sign off on the chain
12 of custody, correct?

13 A I'm sorry?

14 Q When you take them and hand them to someone else,
15 they sign for the drugs and have custody?

16 A They have custody, yes, sir.

17 Q When you get them back you sign for them?

18 A Yes, sir.

19 Q Everybody that has custody in the interim signs off
20 on them?

21 A Yes, would be handled at SLED.

22 Q Was the chain of custody maintained yesterday when
23 the drugs were put in with the court reporter here?

24 MR. BRADLEY: Objection, your Honor.

25 THE COURT: Overruled.

1 A The chain of custody?

2 Q Was it maintained? Did someone have possession of
3 the drugs without signing for them?

4 A The only person that took the drugs were the person
5 that relieved me of my duties.

6 Q Well, did anybody sign for them yesterday?

7 A No, they didn't sign for them. He brought them with
8 me and he was here in the courtroom and took them
9 from me in the courtroom.

10 Q Took them from the court reporter?

11 A Do you mean today? Yesterday?

12 Q Yesterday.

13 A I thought he took them from me.

14 Q Was that proper?

15 A I saw nothing wrong with it. No, sir.

16 Q Did he sign for them?

17 A No, sir.

18 Q Do we know who had them at all times yesterday?

19 A Do I know who had them at all times yesterday? No,
20 sir. Not after I gave them to him.

21 Q Nothing further. Thank you, sir.

22 THE COURT: Redirect?

23 MR. BRADLEY: Thank you, Your Honor.

24 DIRECT EXAMINATION

25

1 BY MR. BRADLEY:

2 Q Investigator Baskin, is it true that the drugs were
3 not ID'd for evidence until today?

4 A Correct.

5 Q Okay. They were never given to the court reporter
6 yesterday; is that correct?

7 A Not to my knowledge. No, sir.

8 Q Okay. Is it your duty, and in your capacity now as
9 investigator for the solicitor's office, to maintain
10 the custody and control of the drugs?

11 A No, sir, it's not.

12 Q And you testified earlier that's officer Warren's
13 duties, correct?

14 A Correct.

15 Q And he's the one that brought them to the courtroom
16 yesterday and today; is that correct?

17 A That's correct.

18 Q Okay. Going back to the night of January 15, 2007,
19 what was it you collected from the scene
20 specifically? What was in that baggy that you
21 collected from the scene specifically?

22 MR. BYRHOLDT: Asked and answered, Your Honor.

23 Object.

24 THE WITNESS: Crack cocaine.

25 THE COURT: Overruled. Go ahead.

1 Q Did you seal it in that bag when you collected?

2 A Yes, sir. I put it in the bag.

3 Q Is that the bag that you sealed it in?

4 A When I collected it, the bag that's in the best kit,
5 this bag right here.

6 Q And from the time that you collected it until the
7 time it went to SLED, did anyone else touch it?

8 A No, sir.

9 Q And during that time was anything done to it before
10 you took it to SLED?

11 A No, sir, other than put it in the best kit.

12 Q Was it still in the same sealed bag when you took it
13 to SLED?

14 A Yes, sir, it was.

15 Q And after it was tested, when you picked it up, was
16 it still in that sealed bag?

17 A It had been opened and analyzed, but it had been heat
18 sealed back and it's still heat sealed back.

19 Q Before you took it and after you picked it up, was
20 anything added or mixed with it?

21 A No, sir. No.

22 Q And, again, once you transfer custody of it to
23 Officer Warren, upon leaving the police department,
24 it's his duty to bring it to the courtroom and
25 maintain the custody, not your duty; is that correct?

1 A That's correct.

2 Q Nothing further, Your Honor.

3 THE COURT: Recross?

4 MR. BYRHOLDT: Yes, sir.

5 RECROSS EXAMINATION

6 BY MR. BYRHOLDT:

7 Q You said on the 15th you seized it from Mr. Ware. Is
8 that what you said?

9 A It was underneath Mr. Ware. He was picked up.

10 Q What does your form say it was seized from?

11 A Kevin Montreat Ware, Virginia Gail Richardson. They
12 were codefendants.

13 Q Well, you never mentioned Miss Richardson?

14 A I did.

15 Q Seized from her?

16 A The drugs weren't under Miss Richardson.

17 Q Why did you put her name?

18 A Because she was charged also with the drugs.

19 Q Okay. And you're saying it hasn't been altered, the
20 drugs?

21 A No.

22 Q When you left the city, did you do an inventory of
23 all the drugs that were there?

24 A No, sir, I did not.

25 Q Did you sign those drugs over to the officer that

1 replaced you?

2 A I signed nothing over to him.

3 Q How do we know what happened to those drugs?

4 A Because they're still in heat-sealed bag, untampered
5 with.

6 Q Well, you said it was opened at SLED and they
7 heat-sealed it back up, right?

8 A Yes, sir. They gave it to me just like it was.

9 Q Well, if you didn't sign it over to somebody, how do
10 we know somebody hasn't opened it back up and heat
11 sealed it back?

12 A Yes, we do. We could tell it.

13 Q Why wasn't it turned over to somebody, have them sign
14 for it?

15 A There are over 17,000 pieces of evidence, sir, and I
16 don't know how many --

17 Q It would take too much time?

18 A It would take years.

19 Q But it would protect people's rights, wouldn't it?
20 Nothing further.

21 THE COURT: You may step down, thank you very much.

22 Call your next witness.

23 MR. BRADLEY: Thank you.

24 May it please the Court. State calls Officer Kevin
25 Warren.

1 KEVIN WARREN, being first duly sworn,
2 testified as follows:

3 BY MR. BRADLEY:

4 THE CLERK: State your full name, as well as you
5 last name for the record, please, sir.

6 THE WITNESS: William Kevin Warren, W-A-R-R-E-N.

7 Q Good afternoon. Tell us what your occupation is.

8 A Police officer with Anderson City Police Department.

9 Q How long you been there?

10 A Fifteen years.

11 Q What title do you hold there?

12 A Corporal as evidence custodian.

13 Q Evidence custodian. When did you take over that
14 title?

15 A August of 2008.

16 Q And who had that title prior to you taking it over?

17 A Mike Baskin.

18 Q So when he left work there, you took over his duties
19 and all the evidence?

20 A That's correct. Correct, that year. It was August
21 of '07 that I took over, not '08.

22 Q And if you'd take a look at Exhibit No. 3. It's
23 right there. Tell me if you recognize that.

24 A Yes, sir, I do.

25 Q How do you recognize that?

1 A It has a label on it marked with the case number,
2 item number, and also the location where it was
3 stored in the evidence room.

4 Q And where did you receive this. Did you receive this
5 item?

6 A When I took over evidence as the evidence custodian,
7 this was already in the evidence room of the police
8 department.

9 Q Who had possession of it prior to you?

10 A Officer Mike Baskin.

11 Q Okay. Is it -- today is it the same condition as it
12 was when you took over that day from Mr. Baskin?

13 A Yes, sir. It's still in the sealed envelope that it
14 came from SLED in, the hot-sealed packet.

15 Q Those packets, are they tamper proof? Can somebody
16 tamper with it without it being recognized?

17 A I don't see how. It's hot sealed in their custody
18 and this is the way it's brought back from their
19 office to be put back in the evidence room. This one
20 doesn't appear to be tampered with from what can I
21 tell.

22 Q From the time you took it over from Mike Baskin when
23 he had that same job you had, evidence custodian, it
24 looks exactly the same from that time; is that
25 correct?

1 A That's correct.

2 Q And have you done anything with it except for
3 bringing it to court?

4 A No, sir.

5 Q And is that part of your duties, to transport the
6 evidence to trial when we have trials like this?

7 A That's correct.

8 Q Okay. Mr. Baskin --

9 MR. BRADLEY: May we approach, Your Honor?

10 THE COURT: Yes, sir.

11 (WHEREUPON, a bench conference was held in the
12 presence of the jury but outside the hearing of the
13 jury.)

14 MR. BRADLEY: Your Honor, the state has no further
15 questions of this witness at this time.

16 THE COURT: Cross examination?

17 MR. BYRHOLDT: May it please the Court?

18 CROSS EXAMINATION

19 BY MR. BYRHOLDT:

20 Q Officer Warren, when you're -- you're the evidence
21 custodian now?

22 A That's correct.

23 Q Is it proper procedure to use the same best evidence
24 kit number for two separate amounts of drugs?

25 A Clarify that. I don't understand the question.

1 Q Well, if you seize drugs, put them in a best kit,
2 it's got a number on it?

3 A Yes, sir.

4 Q Control number to preserve the integrity of the item
5 within?

6 A That's correct.

7 Q Would there be any reason to have the same best
8 evidence kit number for two distinct seizures of
9 drugs?

10 A Not to my knowledge.

11 Q Shouldn't happen, should it?

12 A No, sir.

13 Q Are you familiar with form B --

14 A Yes, sir.

15 Q -- chain of custody?

16 A Yes, sir.

17 Q Do you fill it out and have it notarized before it's
18 completed or do you complete it?

19 A Form B, whoever collects the evidence, fills out form
20 B, has it notarized, drops it in the evidence box or
21 wherever, or gives it to another officer. When I
22 receive it, I fill out form C and have it notarized.

23 Q But shouldn't form B be completed before it's
24 notarized?

25 A Anything going to SLED has to be notarized and

1 everything. If the form's not complete, to my
2 knowledge, they will not accept it there.

3 Q There's no way it should be notarized with a date
4 before it's sent off?

5 A You can notarize the form -- if you fill out form B
6 on the day you collect it, it should be notarized
7 that day. They notarize your signature when you sign
8 that form B.

9 Q And it should be done on the day it's seized?

10 A The day you sign it, they need to notarize that
11 signature is what I'm saying.

12 Q But why would you notarize something if you haven't
13 completed the project? Where the space is, I made
14 delivery such and such a date, and you're swearing
15 that that's what happened. How can you notarize
16 before it happens? What if it's never sent to SLED,
17 you've got a notarized form that would be empty or
18 you got a notarized form that said it was sent on the
19 29th or 7th whatever it is, and sworn to eleven days
20 earlier. How can you swear to something that hasn't
21 happened yet?

22 A Amy Sexton is saying that he signed this form on this
23 date validating his signature on this form.

24 Q That's not what the form says. The form says, "I
25 certify that I have done these things." That's what

1 the form says. That's not a good way to do it, is
2 it?

3 A This is the only form I've ever seen.

4 Q That doesn't make it right, though, does it?

5 A I'm just saying it could be errors. Yes, sir.

6 Q Definitely could be errors. When you took over the
7 evidence room, was there a chain of custody form
8 signed that you're now the custodian of all the
9 evidence?

10 A We signed over the keys, or Officer Baskin turned his
11 keys in to captain or lieutenant over the division.
12 Then they were reassigned. I had to sign for those
13 saying all this is in my custody at this date and
14 time I received the key.

15 Q How can you -- can you tell this jury how you knew
16 what was in there when you took over.

17 A Other than the evidence log, the computer -- in the
18 computer, all the evidence, I mean I didn't go
19 through each piece and verify.

20 Q Nobody has, have they?

21 A There are 18,000 pieces in the computer, roughly.

22 Q Thank you, Officer Warren.

23 THE COURT: Any redirect?

24 MR. BRADLEY: Nothing further, Your Honor.

25 THE COURT: Officer Warren, you may step down.

1 Q No further questions, Your Honor.

2 THE COURT: Redirect?

3 MR. BRADLEY: No redirect, Your Honor.

4 THE COURT: Miss Johnson, if you'll go have a seat
5 beside Officer Warren please, ma'am.

6 (Witness complies.)

7 THE COURT: Who is your next witness?

8 MR. BRADLEY: State calls Virginia Gail Richardson.

9 VIRGINIA G. RICHARDSON, being first
10 duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BRADLEY:

13 THE CLERK: If you'll please state your full name,
14 spell your last name for the record.

15 THE WITNESS: Virginia Gail Richardson.

16 Q Ms. Richardson, where were you living in January of
17 2007?

18 A I was living at 305 E Street.

19 Q Okay. I'd like for you to speak up so we can hear
20 you all the way back here. Okay?

21 A Okay.

22 Q Make sure everybody can hear you. Did anybody else
23 live there with you?

24 A Yes. My friend, Marie Pitts.

25 Q Is that residence 305-A E Street close to any parks

1 or ball fields?

2 A Yes, about a block and half from the ball park on C
3 Street.

4 Q That's called C Street Park; is that right?

5 A Yes, sir.

6 Q Do you know the defendant?

7 A Yes, sir. I know him. Yes, sir.

8 Q How long have you known him?

9 A About six months.

10 Q Six months from today or six months from January
11 2007?

12 A Six months from January the 15th.

13 Q Okay. And speaking of January 15, do you remember
14 seeing the defendant on that day?

15 A Yes, sir, I did.

16 Q And where did you see him?

17 A Well, I made a phone call for him to bring over
18 something for a guy.

19 Q To bring over, you said bring over something. What
20 did you ask for him to bring over?

21 A Drugs.

22 Q What type of drugs?

23 A It was crack cocaine.

24 Q And what was his reason for bringing that over?

25 A Greg Kay come there. He wanted me to make a phone

1 call for him to get him and bring it over to him.

2 Q So you called the defendant and he came over there
3 that night?

4 A Yes, sir.

5 Q And that was at your house?

6 A At my house.

7 Q And did he come over that night?

8 A Yes, he did.

9 Q What time of day or night was that?

10 A It was around 8:30, 9:00.

11 Q Okay. When he arrived at your house, what did he do?

12 A He come in the back door and Greg was there and I was
13 there. And so it was a little argument at first
14 because he approached him for to bring \$200 worth,
15 but when he got there, Kevin -- I mean Greg didn't
16 have but a hundred dollars.

17 Q And so what happened after that?

18 A Well, right after that, that's when he started
19 unwrapping the bag.

20 Q Sorry, when you say he, who are you talking about?

21 A The crack cocaine. The drugs.

22 Q But who was doing that?

23 A Kevin.

24 Q Okay. Continue. I'm sorry.

25 A Okay. And that's when it was a little argument

1 between them two. And right after that, that's when
2 the laws come in.

3 Q He was unwrapping the bag, you said?

4 A Right, when they come in my back door.

5 Q And you saw the drugs in the defendant's hands?

6 A Yes, I did.

7 Q Where did he have the drugs prior to having them in
8 his hands?

9 A Come out of his jacket, sweater pocket.

10 Q So he took it out of his pocket in his shirt?

11 A Yes.

12 Q I'm going to show you what's been marked State's
13 Exhibit 1 and 2. Take a look at those for me. Tell
14 me if you can recognize that.

15 A Yes, sir.

16 Q How do you recognize that?

17 A Because when they come in the back door, that's when
18 he slung it in the floor.

19 Q That's the bag of drugs --

20 A That's the only thing that was in my house, yes.

21 Q And when the officers came in that night, what did
22 you see the defendant do?

23 A He slung it towards the officer, towards the floor.

24 Q And did it hit any of the officers?

25 A No, I don't think it did. It hit the wall.

1 Q Okay. And it ended up in the floor. Is that what
2 you said?

3 A Yes, sir.

4 Q What happened after the defendant slung the drugs at
5 the officer. What happened after that?

6 A That's when they throwed him down on the floor and
7 turned around and put me down on the floor.

8 Q Put you down on the floor as well?

9 A Yes, sir.

10 Q Were you arrested that night?

11 A Yes, sir. I was arrested that night, too.

12 Q Did you throw anything at the officers when they came
13 in?

14 A Did what, sir?

15 Q Did you throw anything at the officers?

16 A No, sir. No, sir. I had nothing on me.

17 Q Did anyone else throw anything on the officers when
18 they came in?

19 A No, sir.

20 Q To your knowledge, did anyone else in that house,
21 were they in possession of any drugs that night?

22 A That -- I can't hear all that good. What now?

23 Q I'm sorry. Did anyone else in the house besides the
24 defendant have possession of drugs that night?

25 A No, sir. No, sir.

1 Q And you said you were arrested. What crimes were you
2 charged with that night?

3 A I think I -- probably was after they searched the
4 house and everything, maybe 10:30 or 11:00 when they
5 got me to the city jail.

6 Q What were you charged with?

7 A At first they said it was going to be running a crack
8 house, something like that. And then that morning
9 that's when they brought me the warrant in on
10 conspiracy.

11 Q You been convicted of that crime?

12 A No, sir.

13 Q You haven't been convicted?

14 A Yeah, I've been convicted. Yeah, I'm doing
15 probation. I about got it over with.

16 Q And how did you -- how were you convicted of that
17 crime?

18 A I pled guilty.

19 Q Prior to pleading guilty, did anyone offer you
20 anything --

21 A No, sir.

22 Q -- for your testimony at this trial?

23 A No, sir.

24 Q Is it true you also have a few shoplifting
25 convictions on your record?

1 A No, I'm not no drug dealer. No, sir.

2 Q You weren't a drug dealer with Kevin Ware?

3 A No, sir. I was not no drug dealer with him.

4 Q Thank you, ma'am. No other questions.

5 A Okay.

6 THE COURT: Any redirect?

7 MR. BRADLEY: Nothing further, Your Honor.

8 THE COURT: You may step down, Ms. Richardson.

9 Thank you very much. Be careful stepping down.

10 (Witness steps down from the stand.)

11 THE COURT: Call your next witness.

12 MR. BRADLEY: State calls Amy Stevens of SLED.

13 MR. BYRHOLDT: She just a custodian? Go ahead. Amy
14 Stephens.

15 AMY STEPHENS, being first duly sworn,
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. BRADLEY:

19 THE CLERK: If you'll please state your full name,
20 spell your last name for the record.

21 THE WITNESS: Amy Stevens, S-T-E-P-H-E-N-S.

22 Q Good afternoon. Can you tell us where you're
23 employed?

24 A Employed with the South Carolina Law Enforcement
25 Division, also known as SLED.

1 Q What's your position there?

2 A I'm a forensic technician in the evidence control
3 department.

4 Q How long have you worked there?

5 A I been employed with SLED since March of 2006.

6 Q What are your duties there?

7 A In the evidence control department we log in all the
8 evidence that comes in from the agencies throughout
9 the state of South Carolina, log into our computer
10 system, which assigns it a lab number. We then put
11 it into our evidence room under lock and key and
12 that's our duties.

13 Q Did you receive any items of evidence on January 29,
14 2007?

15 A Yes, sir, I did.

16 Q And did you mark the -- from where and what purpose
17 did you receive them?

18 A I received it from Mr. Baskin of the Anderson Police
19 Department. I logged it in, gave it lab number
20 L-071365, item No. 1.

21 Q And what did you do with that?

22 A I put into our drug intake storage, which is in our
23 evidence room.

24 Q I believe State's Exhibit 3 is still up there on the
25 witness stand. Will you take a look, see if you

1 recognize it?

2 A I remember the lab number, which is L-07961, item No.
3 1.

4 Q How long was it in your control, custody, and care?

5 A I logged it in at 9:34 a.m. And I put it in the drug
6 intake unit 10:02 a.m.

7 Q Is it in substantially the same condition now as it
8 was when you first received it?

9 A I received it in a best kit envelope. I'm not sure
10 what the analyst did when -- what he did with it, but
11 it's in the same type bag as when I received it.

12 Q Okay. And after you logged it in, you take and put
13 it -- and store it. What happens after that?

14 A It stays in storage until the analyst comes down,
15 gives us a list of lab numbers they'd like to
16 retrieve from the evidence room. In this case I
17 retrieved it on February 7, 2007, for forensic
18 scientist, Carmen Tucker.

19 Q After you retrieved it, what happened to it?

20 A I scanned it back into my custody and gave it to her,
21 which we all have bar codes and we scan it in our
22 custody in order to take custody of the evidence.

23 Q And Carmen Tucker, you said she was a forensic
24 analyst?

25 A Yes, in the drug ID department.

1 Q She's the one that did the testing on it; is that
2 correct?

3 A Correct.

4 Q And did you come back into contact with it
5 afterwards?

6 A No, sir.

7 Q Did she -- would the process be for another
8 technician to come put it back in custody with you?

9 A Yes, sir. After she analyzes it, they'll bring it
10 back down to evidence control for storage until we
11 return it to the returning agency.

12 Q And that's the standard procedure?

13 A Yes.

14 Q No further questions, Your Honor.

15 MR. BYRHOLDT: May it please the Court?

16 THE COURT: Yes, sir.

17 CROSS EXAMINATION

18 BY MR. BYRHOLDT:

19 Q Every time you handle it, you get your bar code?

20 A Correct.

21 Q And then when it goes to Carmen, her bar code comes
22 on; then it comes back to you, bar coded again?

23 A Well, actually the evidence only has one bar code.
24 Each person has a bar code for themselves.
25

1 Q All right. Would it be proper procedure for a best
2 evidence number to be used for two distinct, the same
3 number to be used for two distinct pieces of
4 evidence?

5 A If it's all in the same bag. You talking about two
6 pieces of drugs? If it's all in the same best kit,
7 yes, it all gets the same lab number.

8 Q If a best number is used for two items, those items
9 were combined then and put in the best kit?

10 A I would assume so. Yes.

11 Q Nothing further. Thank you, ma'am.

12 MR. BRADLEY: No direct.

13 THE COURT: You may step down. Thank you very much.

14 May this witness be excused?

15 MR. BYRHOLDT: No objection.

16 THE COURT: Have a safe trip back to Columbia.

17 (Witness excused.)

18 MR. BRADLEY: State calls Nikki Perry, next witness.

19 NICHOLE R. PERRY, being first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. BRADLEY:

23 THE CLERK: If you would state your full name, spell
24 your last name for the record.

25 THE WITNESS: Nichole Renee Perry, P-E-R-R-Y.

1 Q Good afternoon, Miss Perry. Tell us where you're
2 employed.

3 A The South Carolina Law Enforcement Division.

4 Q What title do you hold there?

5 A I'm a forensic technician in the evidence control
6 department.

7 Q How long have you worked there?

8 A Approximately two and a half years.

9 Q And your duties there?

10 A I log in and package evidence brought in by agencies
11 across the state of South Carolina. We also have the
12 evidence room where we return evidence that has
13 already been analyzed to agencies.

14 Q As part of your duties -- is that the reason why
15 you're here testifying today?

16 A Yes, sir.

17 Q Did you come into contact with some evidence in this
18 matter?

19 A Yes, sir, I did.

20 Q Would you take a look at State's Exhibit No. 3,
21 that's already up there on the witness stand, see if
22 you recognize that.

23 A I do.

24 Q How do you recognize it?

25 A I recognize it by our yellow label. We give it a lab

1 number, L-070-1365.

2 Q Is this the evidence that came into your custody
3 while working at SLED?

4 A Yes, sir, it is.

5 Q What was the purpose of it coming into your custody?

6 A I received it. After analyzation -- I received
7 evidence into my custody from forensic scientist,
8 Carmen Tucker.

9 Q What did you do with it after that?

10 A I placed it on a shelf in our locked evidence room.

11 Q Is the evidence still in the same substantial
12 condition as it was when you received it in your
13 possession?

14 A Yes, sir, it is.

15 Q Did you come into contact with it any other time
16 after that?

17 A No, sir.

18 Q Was there anyone -- you were one of the last persons
19 to be in custody of it at SLED. Was there anyone
20 else in custody of it at SLED prior to it being
21 returned to the submitting agency?

22 A According to our chain of custody, Carhonda Williams
23 returned it to the agency.

24 Q What position does Miss Williams hold?

25 A Carhonda was a forensic technician in our evidence

1 control division as well.

2 Q The same position you hold as well?

3 A Yes, sir.

4 Q When did she come in possession of those items?

5 A On April 16, 2007.

6 Q For what reason did she come into possession of it?

7 A She returned it to Mike Baskin with the Anderson
8 Police Department.

9 Q And that would be a standard procedure for her to do
10 while she was working there?

11 A Yes, sir.

12 Q Is she still employed there at SLED?

13 A No, sir, she is not.

14 Q Okay. No further questions, Your Honor.

15 THE COURT: Cross examination.

16 MR. BYRHOLDT: May it please the Court?

17 CROSS EXAMINATION

18 BY MR. BYRHOLDT:

19 Q Was there a best evidence kit number associated with
20 Exhibit 3?

21 A According to this package it is.

22 Q What is that number?

23 A B177531.

24 Q Would it be proper to combine drugs from two separate
25 seizures in one best kit?

1 A I'm -- that's not really something that I -- I don't
2 seize drugs, so that's not something in my department
3 that I --

4 Q You would admit that if a best number is put on it,
5 on an item that matches B177531, then those items
6 would have been submitted to SLED in that envelope,
7 correct?

8 A Correct. Possible.

9 Q Let me show you something.

10 MR. BYRHOLDT: May I approach the witness, Your
11 Honor?

12 THE COURT: Yes, sir.

13 Q On 070-2472, there is a best kit listed that matches
14 that number, correct, B-177531?

15 A Matches that number. Yes.

16 Q That was some drugs that were collected at 1600 hours
17 on January 15th?

18 A According to your paper. Yes, sir.

19 Q According to the city police report?

20 A Okay.

21 Q Is this the same number B-177531 for some drugs that
22 were collected at 21:30 hours on the same day, with
23 the same best kit number?

24 A According to this report.

25 Q According to the report.

1 A That's what it appears.

2 Q All right. So does that mean that the drugs seized
3 at two different times were put in the same best kit
4 according to this report?

5 A Well, for me -- I believe you should probably ask the
6 officer that seized the drugs and placed it in this
7 pouch. All I do, receive this pouch from Carmen
8 Tucker that's already sealed. I don't even know
9 what's in there.

10 Q But what you claim to have there in Exhibit 3, is
11 what's in best pack B-177531 is what -- the same
12 number that's listed on that is listed in this
13 report?

14 A It's the same number that's listed on this best pouch
15 is the same number that's listed on that report.

16 MR. BYRHOLDT: Thank you, ma'am. I have nothing
17 further.

18 MR. BRADLEY: No redirect, Your Honor.

19 THE COURT: Thank you very much.

20 MR. BRADLEY: May this witness be excused?

21 THE COURT: Did you all come together? Witness may
22 be excused.

23 THE WITNESS: Thank you.

24 (Witness excused.)

25 THE COURT: Call your next witness.

1 MR. BRADLEY: Thank you, Your Honor. The state
2 calls Carmen Tucker.

3 CARMEN TUCKER, being first duly
4 sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BRADLEY:

7 THE CLERK: Go right around there, have a seat in
8 the witness chair, please. If you'll state your full
9 name, spell your last name for the record.

10 THE WITNESS: Carmen Jeanine Tucker, T-U-C-K-E-R.

11 Q Good afternoon. Could you tell us what your
12 occupation is?

13 A I work at South Carolina Law Enforcement Division in
14 the forensic lab, the drug ID lab.

15 Q How long have you been employed there?

16 A Two years and seven months.

17 Q And what position do you hold there?

18 A I'm a drug analyst. I analyze any kind of compounds
19 that come into our department for -- to see if they
20 contain controlled substances.

21 Q Would that be considered your duties there at SLED?

22 A Yes, sir.

23 Q And what type of training is required to do such a
24 job?

25 A Well, my background in education got me in the door.

1 And then also I went through the academy for the law
2 part. And then we have extensive training, my
3 training was eight months of training with the other
4 drug analysts in the lab.

5 Q And as part of your duties, your job, have you had
6 occasion to chemically analyze substances to
7 determine whether the substance is or contains a
8 narcotic?

9 A Yes, I have.

10 Q Or a controlled substance?

11 A Yes.

12 Q And how many times have you done that?

13 A I'd say upwards, it's closing down on 2000, 2000 now.

14 Q And have you had occasion to chemically analyze
15 substances to determine whether the substance is or
16 contained crack cocaine?

17 A Yes, I have.

18 Q How many times?

19 A Well, that would be the same.

20 Q Same?

21 A Yeah, 2000.

22 Q And, again, a week how many analyses would you do?

23 A In a given week, would vary, anywhere between 20 and
24 30, 20 and 30 cases. Some of them would contain
25 multiple items.

1 Q As part of your job, have you ever testified to your
2 findings? You have testified as part of your duties
3 with your job?

4 A Oh, yes.

5 Q When you testified, were you qualified as an expert
6 in your field?

7 A Yes, I was.

8 Q How many times have you been qualified?

9 A I have been qualified four times.

10 MR. BRADLEY: At this time, Your Honor, I'd like to
11 move to have the witness declared an expert.

12 MR. BYRHOLDT: No objection.

13 THE COURT: Court so finds.

14 MR. BRADLEY: Thank you, Your Honor.

15 Q At this time like to show you State's Exhibit 3.
16 It's already up there on the witness stand. Take a
17 look at that, see if you recognize it.

18 A Yes, I do.

19 Q How do you recognize it?

20 A These are my initials on the writing where the date
21 is on there.

22 Q And when did you date it?

23 A This is dated February 14, 2007.

24 Q Why would you date it?

25 A That is the day it was processed.

1 Q By processed, what do you mean?

2 A That's the day I analyzed the evidence.

3 Q And what type of analysis did you do?

4 A The analysis performed on this evidence consists of a
5 preliminary test, which is a spot test that we run.

6 And then the conclusive test, which is the gas
7 chromatography mas spectroscopy, GC mas speck, a test
8 we use to analyze the compounds in the sample.

9 Q From where did you receive this Exhibit?

10 A The way it works at SLED is, I would go downstairs to
11 our log-in department, the first floor. I go in,
12 give a list of cases I need to pull for that day,
13 they pull the cases, place the cases under my name.
14 At that time I would take them upstairs.

15 Q While in your possession, were they constantly in
16 your care and control?

17 A Once we received, we have a vault that is locked
18 inside of our lab, part of our lab; and we lock the
19 evidence in the vault until such time as it's
20 processed.

21 Q Is the exhibit in essentially the same condition now
22 as it was the last time you saw it?

23 A Yes, it was.

24 Q How about when you first received it?

25 A No. When I first received it, this sealable bag in

1 here has a tamper-evident seal. All of the evidence
2 that you see here was inside this bag and that was
3 inside of a case jacket.

4 Q And what do you do to that bag.

5 A Basically what I do, I take this bag out. I check it
6 first for a seal tampering basically. If it's a
7 tamper evident seal, you can tell if someone tried to
8 pull it open due to the type of adhesive used. I
9 also check around the edges, make sure there are no
10 cuts or tears. Once that is done, I mark "Okay," let
11 me know it's okay, no tamperings, then I date and
12 initial.

13 I moved the evidence, which is in the evidence bag,
14 that is also labeled with the case number and sample
15 number and is initialed with my initials. I bring
16 the evidence out, which was in a plastic bag, which
17 is also labeled with the sample number and case
18 number and my initials. And then I begin processing
19 the evidence.

20 Q So when you received it, it was in that bag sealed
21 and it didn't appear to have been tampered with in
22 any way?

23 A That's correct.

24 Q So you had to open it to do your test on it?

25 A Yes, sir.

1 Q And a little while ago you went into some of the
2 tests that you performed. Based on those tests, what
3 was your conclusion on the evidence that you tested?

4 A Based on the test I performed, my conclusion was that
5 this rock substance cocaine-based crack 2.4 grams in
6 weight, 37.03 grains, and it is a schedule II
7 substance.

8 Q Is that your expert opinion?

9 A Yes, sir.

10 MR. BRADLEY: Your Honor, at this time I'd like to
11 move the drugs into evidence. Exhibit three?

12 THE COURT: Any objection?

13 MR. BYRHOLDT: Yes, sir. Need to take it up outside
14 the presence of the jury.

15 THE COURT: All right. Let me see the attorneys up
16 here just a second.

17 (WHEREUPON, a bench conference was held in the
18 presence of the jury but outside the hearing of the
19 jury.)

20 THE COURT: Mr. Foreman, members of the jury, I'm
21 going to ask you to go to the jury room. I need to hear
22 a motion at this time. The reason I'm going to ask you
23 to go to the jury room, I'm not permitted to comment on
24 the facts. When I make a decision on a motion or
25 evidence rules, I have to make a decision whether it's

1 admissible under the rules of evidence and rules of
2 court. I want to be free to comment on the facts. So I
3 have to ask you to go to the jury room so I'll be free to
4 comment on those facts out of your presence. That's the
5 reason I'm asking you to go.

6 So if you'll go to the jury room, please don't
7 discuss the case. I'll get you back as soon as I can.

8 (Whereupon, the following proceedings were had
9 outside the presence of the jury:)

10 THE COURT: What's the basis of your motion?

11 MR. BYRHOLDT: Rely on the case State versus
12 Chisholm, 584 S.E. 2d 401, South Carolina Court of
13 Appeals, 2003. A crack cocaine case. What we've got
14 here we've got one person missing from the chain of
15 custody. Miss Williams is not on the witness list, is no
16 longer employed at SLED. She's on the chain of custody.
17 She's not around.

18 But beyond that, we've got a problem with the
19 evidence that was submitted under best evidence number
20 B-177531, which is reflected in the Exhibit Number 3. In
21 the city police report, that best evidence number is
22 attributed to two different seizure times and amounts of
23 drugs. And I think that calls into question the
24 credibility of the chain of custody when you have the
25 same best evidence kit being used for a seizure that

1 allegedly took place unrelated to Mr. Ware earlier that
2 day; and a seizure arguably may be related to him later
3 on that day. And we've got one set of drugs being sent
4 under B-177531.

5 Plus we have the problem with the chain of custody
6 letter where they're swearing to something that's been
7 completed when it hasn't been. That would be my basis
8 for objecting to the evidence being admitted at this
9 time.

10 MR. BRADLEY: I don't really know with regard to
11 Miss Williams not being here to testify today. Refer to
12 the State versus Taylor, which a similar circumstance,
13 the former custodian worked at a place, was no longer
14 employed there, he was not there to testify. The next
15 person in line testified for him, completed the chain
16 because he was identified. Just because he wasn't there
17 to testify did not put the link in the chain as ruled by
18 State versus Taylor.

19 With the -- Officer Baskin testified to on the
20 numbers, the best evidence kit numbers, typographical
21 error is what's made -- on the report itself was a
22 typographical error that said the drugs from controlled
23 buy earlier in the day was the same drugs, the same kit
24 that was collected that night at the arrest of Mr. Ware.

25 I was asked and answered myself times, Mr. Byrholdt

147

1 and Mr. Baskin, he made clear just a typographical error.
2 What was taken to SLED, as Mr. Baskin referred to, and
3 what SLED employees referred to, what Mr. Baskin brought
4 down there. He says that's the only thing he took, what
5 he collected from Mr. Ware, right after his arrest, what
6 was beneath him. Because of typographical error,
7 Mr. Byrholdt relying on that, saying there's credibility
8 problem.

9 As far as the form, the standard procedures, Your
10 Honor, you already spoken to the officers about how they
11 would -- didn't notarize down at SLED. Therefore, they
12 notarize it beforehand. And you told them it's improper
13 procedure. But as far as chain of custody, I don't
14 believe it makes a link in the chain because standard
15 procedure, standard protocol they have, Your Honor. He
16 delivered it and testified to it, to that fact on many
17 occasions.

18 Mr. Byrholdt kept questioning him about it. His
19 testimony was that he took the evidence he collected that
20 night from underneath Mr. Ware, put it in a bag labeled
21 it with that number and took it to SLED within a couple
22 of days. He signed that form when he got back to the
23 police department that night and that -- and then later
24 on is when he placed it into SLED's custody. Therefore,
25 Your Honor, all those things that the testimony has

1 revealed, the state feels the chain of custody is
2 complete; and, therefore, the drugs should be allowed to
3 come in.

4 THE COURT: Okay. Anything briefly in rebuttal?

5 MR. BYRHOLDT: Just briefly, what Chisholm holds is
6 that chain of custody, the complete chain of evidence,
7 chain of possession must be established as far as
8 practical. A missing link in a chain creates an issue of
9 admissibility.

10 And we don't know if they even tried to get
11 Miss Williams here. I mean, the fact that she may not be
12 employed at SLED, I mean she may be working down the
13 street, I don't know. I mean, she's on my chain of
14 custody that was given to me and then she doesn't appear
15 as a witness.

16 More important than that, we have this problem with
17 two best evidence kit numbers. We've been shown no other
18 evidence.

19 THE COURT: Well, the testimony has been the
20 evidence itself that was seized from in the house where
21 the defendant was arrested, had the right number and the
22 right information on it. That was in the best --

23 MR. BYRHOLDT: But there is another problem, is
24 there's other evidence referenced in that same --

25 THE COURT: I understand. That other best kit is

1 not the evidence that was seized in this particular case,
2 according to the testimony from the officers. I
3 understand what you're saying.

4 MR. BYRHOLDT: Different interpretation.

5 THE COURT: Okay?

6 MR. BYRHOLDT: Yes, sir.

7 THE COURT: I don't think that alone arises to
8 suppression of the drugs. Okay. I think the fact that
9 Ms. Williams is not available, I think has been explained
10 by two custodians. I don't think that's a break in the
11 chain. Okay.

12 As far as the notarized statement where they
13 notarize the truthfulness of the statement, I know the
14 officers testified it notarizes the signature,
15 technically when you notarize something, a person is
16 swearing under oath, this is a true and accurate
17 statement, and you sign it and you notarize it.
18 Obviously, that's not a true and accurate statement, it
19 was a false affidavit, it was a false notary.

20 However, I don't think that rises to suppression. I
21 think that goes to weight and sufficiency of the evidence
22 and you'll just have to make that argument to the jury.
23 I don't think that arises to the suppression as far as the
24 chain is concerned.

25 MR. BYRHOLDT: Yes, sir.

1 THE COURT: Okay. So your motion to suppress is
2 denied. Anything else before we bring the jury --

3 MR. BRADLEY: Nothing further, Your Honor.

4 THE COURT: -- on this witness? All right, bring us
5 the jury, please.

6 (Whereupon, the following proceedings were had
7 within the presence of the jury:)

8 THE COURT: Solicitor.

9 MR. BRADLEY: Thank you, Your Honor. At this time
10 I'd like to move State's Exhibit 3 into evidence.

11 THE COURT: Over the defendant's objection. It's
12 admitted with objection. That's No. 3, right?

13 MR. BRADLEY: Yes, Your Honor.

14 THE COURT: State's Exhibit 3 admitted with
15 objection.

16 (WHEREUPON, State's Exhibit No. 3 is admitted into
17 evidence.)

18 MR. BRADLEY: I have nothing further for this
19 witness Your Honor.

20 THE COURT: Mr. Byrholdt.

21 MR. BYRHOLDT: May it please the court?

22 CROSS EXAMINATION

23 BY MR. BYRHOLDT:

24 Q Miss Tucker, would it be proper procedure in handling
25 evidence to seize drugs from two different incidents

1 and combine them in the same best evidence kit under
2 the same best evidence kit number?

3 A No, sir.

4 Q That would be improper, right?

5 A Yes, sir.

6 Q Because it would combine, it could change the type of
7 drug and the amount, correct?

8 A If the evidence is combined, it could contaminate.

9 Q It's what?

10 A If the two different evidence's are combined, they
11 could contaminate each other.

12 Q Could contaminate each other?

13 A Right.

14 Q Would be bad police procedure?

15 A I would assume so. Yes.

16 Q No further questions. Thank you, Miss Tucker.

17 THE COURT: Any direct?

18 MR. BRADLEY: Nothing, Your Honor.

19 THE COURT: Miss Tucker, you may step down. Have a
20 safe trip back to Columbia.

21 (Witness excused.)

22 THE COURT: Call your next witness.

23 MR. BRADLEY: At this time the state rests, Your
24 Honor.

25 THE COURT: Let me see the attorneys up here again

Friday, January 9, 2009

(WHEREUPON, Court reconvened with all parties present, when the following proceedings were had outside the presence of the jury:)

THE COURT: State ready for closing arguments?

MR. BRADLEY: Yes, Your Honor.

THE COURT: Defendant ready?

MR. BYRHOLDT: Yes, sir.

THE COURT: Anything before we bring the jury? Do you want to go over the charge?

MR. BYRHOLDT: I'm familiar with your charge. Are you going to charge simple possession?

THE COURT: I think the rules say we're supposed to have a charge conference.

MR. BYRHOLDT: Your Honor, the state opens in full, I get the last argument.

THE COURT: Yes, sir. You get the last argument.

(Bench conference held.)

THE COURT: I understand at the -- Donna, on the record. We had an informal charge conference at the bench, Mr. Byrholdt wants a charge on simple possession which the Court is not going to charge. And he wants to take exception to that after I complete the charge. That's fine.

You all ready to bring the jury now?

1 was just a mistake. Where are those drugs? And where is
2 that record that shows there's some other drugs out
3 there. We don't have that. It wasn't here.

4 On behalf of Kevin, we ask you to deliberate
5 adhering to the oath that you took. If you hold the
6 state to that high burden of proof, beyond a reasonable
7 doubt, you should bring back a verdict of not guilty on
8 both charges. The other charge the Court already took
9 care of. They told you they were going to prove all
10 three charges and they haven't.

11 I, on Kevin's behalf, we thank you. And I
12 appreciate the attention you've paid during this trial.

13 JURY CHARGE

14 THE COURT: Mr. Foreman, members of the jury, the
15 state of South Carolina charges the defendant Kevin M.
16 Ware with one count of possession of crack cocaine with
17 intent to distribute and one count of possession of crack
18 cocaine with intent to distribute within proximity of a
19 park.

20 I'm going to give you a copy of these instructions
21 in written form. During your deliberations you may refer
22 to the instructions to guide your decision making. You
23 must consider the instructions as a whole, not follow
24 some and ignore others. Please return the instructions,
25 Mr. Foreman, to the Court after you've reached a verdict.

1 I charge you further that the fact that a defendant
2 elects not to testify on his own behalf cannot and must
3 not be considered against him under any circumstances or
4 in any manner whatsoever. The decision of any defendant
5 not to take the witness stand to testify in his own
6 behalf does not create any inference against him. I tell
7 you now that you must not permit that fact to weigh in
8 even the slightest degree against such defendant. You
9 should not permit this fact to enter into your
10 discussions or deliberations of the issues in this case.

11 Now, as to these indictments, the defendant has
12 entered a plea of not guilty, which places upon the State
13 the burden of proving the defendant guilty. A person
14 charged with committing a criminal offense in South
15 Carolina is never required to prove himself innocent. I
16 charge you that it is a vital and important rule of
17 law of evidence that a defendant in a criminal trial, no
18 matter how great or serious may be the offense with which
19 he is charged, must always be presumed innocent until his
20 guilt has been proven beyond a reasonable doubt.

21 This presumption of innocence remains with the
22 defendant at all times, from the moment of his appearance
23 in this court, throughout the trial, until you, the jury,
24 have upon the testimony and evidence presented, reached a
25 verdict of guilty beyond a reasonable doubt. For it is

1 the solemn duty of the jury, if not clearly convinced of
2 his guilt beyond a reasonable doubt, to acquit the
3 defendant.

4 So the burden of proof is upon the state to
5 establish by evidence to your satisfaction, the guilt
6 beyond a reasonable doubt of this defendant.

7 Now, what is reasonable doubt? A reasonable doubt
8 is the kind of doubt that would cause a reasonable person
9 to hesitate to act. If you have such a doubt as to the
10 guilt of the defendant, he would be entitled to a verdict
11 of not guilty. A reasonable doubt may arise from the
12 evidence in the case or from the absence or lack of
13 evidence in the case. You, alone, must make a
14 determination whether or not reasonable doubt exists as
15 to the guilt of the defendant.

16 The term reasonable doubt should be given its
17 everyday, plain, ordinary meaning. Proof beyond a
18 reasonable doubt is proof which leaves you firmly
19 convinced of the defendant's guilt. There are very few
20 things in this world that we know with absolute
21 certainty. In criminal cases the law does not require
22 proof that overcomes every possible doubt. Based upon
23 your consideration of the evidence, if you are firmly
24 convinced of the defendant is guilty of the crime
25 charged, you must find him guilty.

1 On the other hand, if you are not firmly convinced
2 the defendant is guilty, you must give him the benefit of
3 the doubt and find him not guilty. The evidence from
4 which you're to decide the facts consist of the sworn
5 testimony of a witness, both on direct and cross
6 examination, regardless of who called the witness, the
7 exhibits that have been received in evidence, any facts
8 which the lawyers have agreed or stipulated.

9 Certain things are not evidence, you may not
10 consider them in deciding what the facts are. I will
11 list them for you. Arguments and statements by lawyers
12 are not evidence. The lawyers are not witnesses. What
13 they've said in their opening statements, closing
14 arguments, and at other times is intended to help you
15 interpret the evidence but is not evidence. If the facts
16 as you remember them differ from the way the lawyers have
17 stated them, your memory controls.

18 Questions and objections by lawyers are not
19 evidence. Attorneys have a duty to their clients to
20 object when they believe a question is improper under the
21 rules of evidence. You should not be influenced by the
22 objection or the Court's ruling on the objection.
23 Testimony that's been excluded as stricken, that you've
24 been instructed to disregard is not evidence and must not
25 be considered. Anything you may have seen on television

1 or read in the paper or heard from others when the Court
2 was not in session is not evidence. You're to decide the
3 case solely on the evidence received at trial.

4 Under the constitution and code of laws, only you,
5 the jury, can make the findings of fact in this case.
6 I'm not permitted to indicate to you how I may feel about
7 the testimony and evidence which has been presented.
8 Throughout this trial it's been my intention to be fair
9 and impartial towards each of the parties involved.

10 In determining the facts of this case you will have
11 to evaluate the credibility, which means the
12 believability, of each witness. And some of the things
13 you may consider as you decide whether or not to believe
14 a witness's testimony about a particular matter include:
15 First, what was the manner and appearance of the witness
16 who testified? Was she or he straightforward or
17 hesitant in answering? Second, was the testimony of a
18 witness consistent or inconsistent? How did the witness
19 come to know the facts that he or she testified to? Was
20 the person present during the incident or did he happen
21 on the scene after it occurred? Fourth, is there some
22 reason a witness would want to give testimony which would
23 help or hurt one side or the other? In other words, was
24 a witness biased or prejudiced? Was the testimony of a
25 witness strengthened or weakened by other testimony and

1 evidence?

2 You can believe as much or as little of each
3 witness's testimony as you think proper. You may believe
4 testimony of a single witness against that of many or
5 just the opposite. Of course, you do not determine the
6 truth by merely counting the number of witnesses
7 presented by each side. Throughout this process you have
8 but one objective, to seek the truth, regardless of its
9 source.

10 The same constitution and laws which designate and
11 make you the finders of fact as I just explained also
12 make me the sole instructor of the law. You should
13 accept statements of law as I give them to you. The
14 attorneys are not instructors of the law. Please base
15 your decision making on what the law is and not what you
16 think the law should be.

17 There are two types of evidence which are generally
18 presented during a trial, direct evidence and
19 circumstantial evidence. Direct evidence is the
20 testimony of a person who asserts or claims to have
21 actual knowledge of a fact, such as an eyewitness.
22 Circumstantial evidence is proof of a chain of facts and
23 circumstances indicating the existence of a fact.

24 The law makes absolutely no distinction between the
25 weight or value to be given to either direct or

1 circumstantial evidence, nor is a greater degree of
2 certainty required of circumstantial evidence than of
3 direct evidence. You should weigh all the evidence in
4 the case on a contested factual issue. You may have some
5 direct evidence and some circumstantial evidence. To
6 determine the facts in this case you will have to
7 evaluate the credibility, which means the believability
8 of each witness.

9 The defendant is charged with possession with intent
10 to distribute crack cocaine. The state must prove beyond
11 a reasonable doubt that the defendant possessed crack
12 cocaine with the intent to distribute it. To prove
13 possession, the state must prove beyond a reasonable
14 doubt that the defendant had both the power and the
15 intent to control the disposition or the use of the crack
16 cocaine.

17 Possession may be either actual or constructive.
18 Actual possession means that the crack cocaine was in the
19 actual physical custody of the defendant. Constructive
20 possession means the defendant had dominion and control.
21 The right to exercise dominion and control over either
22 the crack cocaine itself or the property on which the
23 crack cocaine was found.

24 Mere presence at the scene where the drugs was found
25 is not enough to prove possession. Actual knowledge of

1 the presence of the crack cocaine is strong evidence of
2 the defendant's intent to control its disposition or use.
3 The defendants knowledge and possession may be inferred
4 if the substance is found in property under the
5 defendant's control; however, this inference is simply an
6 evidentiary fact to be taken into consideration by you,
7 along with other evidence in the case, give it the weight
8 you decide it should have.

9 Two or more persons may have joint possession of a
10 drug. The state must also prove beyond a reasonable
11 doubt the defendant intended to distribute the crack
12 cocaine. Distribution means to deliver other than by
13 administering or dispensing a drug. Intent may be shown
14 by acts or conduct of defendant under circumstances which
15 you may naturally infer intent.

16 To determine whether the defendant had the intent to
17 distribute crack cocaine you may consider the
18 circumstances surrounding the defendant's alleged
19 possession; you may consider the amount of the substance,
20 the amount to have been possessed, the manner which it
21 was allegedly possessed, and the facts where it was
22 allegedly possessed, and other factors which you consider
23 to be important.

24 You must find the defendant did not intend to have
25 the crack cocaine solely for his own use. Possession of

1 more than -- one or more grams of crack cocaine creates
2 an inference that the defendant possessed the crack
3 cocaine with the intent to distribute it. This inference
4 does not relieve the state from proving beyond a
5 reasonable doubt the defendant had the intent to
6 distribute. This is simply an evidentiary fact to be
7 taken into consideration by you, along with the other
8 evidence in the case, to be given the weight you decide
9 it should have.

10 Possession of crack cocaine with intent to
11 distribute within proximity of a park. The defendant is
12 charged with possession of crack cocaine with intent to
13 distribute within proximity of a park. The state must
14 prove beyond a reasonable doubt that the defendant
15 unlawfully possessed with the intent to distribute crack
16 cocaine while in or within one-half mile of the grounds
17 of a public playground or park.

18 You've been selected as fair and impartial jurors,
19 sworn to impartiality to try and determine the facts of
20 this case. When you comply with your oath to do so, no
21 one will have the right to criticize your verdict. You
22 will have fully discharged your duty as jurors. You're
23 to decide this case according to the testimony as you
24 heard from the lips of sworn witnesses, along with other
25 evidence introduced.

1 I charge you as jurors you must decide the issues in
2 this proceeding without bias or prejudice to any party.
3 Do not allow yourself to be governed by sympathy, by
4 prejudice, by passion, by public opinion, or any other
5 arbitrary factor. Both the state and defendant have the
6 right to expect that each of you will carefully and
7 impartially consider all the evidence in the case.
8 Follow the law as I have explained it to you.

9 Nothing I may have said or done during the course of
10 this trial has been in any way intended to express or
11 suggest a view of the case or opinion of the facts, the
12 weight of the evidence, or credibility of the witnesses.
13 If any of my acts or words seem to so indicate disregard
14 such form your own opinion as to these matters.

15 Mr. Foreman, members of the jury, I have prepared
16 two verdict forms. Up at the top it has the State of
17 South Carolina versus Kevin M. Ware, the case number: We
18 the jury find the defendant, Kevin M. Ware, guilty of
19 possession of crack cocaine with the intent to distribute
20 within proximity of park. We, the jury, find the
21 defendant, Kevin M. Ware, not guilty of possession of
22 crack cocaine with intent to distribute within the
23 proximity of a park. There's a place for the foreman to
24 sign and date it.

25 I have the second verdict form, same caption, with a

1 different case number. We, the jury, find the defendant
2 Kevin M. Ware, guilty of possession of crack cocaine with
3 intent to distribute. We the jury find the defendant
4 Kevin M. Ware, not guilty of possession of crack cocaine
5 with intent to distribute. A place to sign and date it.

6 Ladies and gentlemen of the jury, your verdict has
7 to be unanimous. All 12 of you have to agree. I tell
8 you, it's a collective reasoning process on your part.
9 Respect each other's opinions, listen to each other's
10 opinions, discuss your opinions about the case and arrive
11 at a consensus of opinion that all 12 of you feel is
12 appropriate and proper. Review the evidence, discuss the
13 case amongst yourselves.

14 Mr. Foreman, I'm going to ask you to go to the jury
15 room. Don't begin your deliberations until the bailiff
16 brings the exhibits that have been admitted into
17 evidence, the charge, and the verdict form, and instructs
18 you to begin your deliberations. I have to take my
19 charge up with the attorneys. I may have to add
20 something or take something away. So I don't want you to
21 begin your deliberations until we bring all the items to
22 the jury room and instruct you to begin your
23 deliberations.

24 Mr. Foreman members of the jury if you would follow
25 the bailiff to the jury room please.

1 And the alternates please keep your seats. Two
2 alternates just keep your seats.

3 (Whereupon, the following proceedings were had
4 outside the presence of the jury:)

5 Any exceptions from the State?

6 MR. BRADLEY: Nothing.

7 THE COURT: From the defendant?

8 MR. BYRHOLDT: Yes, Your Honor, again I would renew
9 any request for lesser included charge of simple
10 possession even though amount raises inference I think
11 there was evidence in this record if the jury found the
12 evidence had been contaminated where they could find it
13 reduced down to less than a grandmother where it would be
14 simple possession.

15 THE COURT: That's denied. Anything else?

16 MR. BYRHOLDT: No, Your Honor. No, your Honor.

17 THE COURT: If the two parties would come forward,
18 make sure all the exhibits are present, put on the record
19 they're all present. And we'll deliver them to the jury
20 room to begin.

21 MR. BYRHOLDT: The defense, we've reviewed -- there
22 are three exhibits.

23 MR. BRADLEY: State's in agreement, your Honor.

24 Also reviewed the verdict forms, no objections to those.

25 (WHEREUPON, at 11:46 AM the jury retires to begin

1 its deliberations.)

2 (WHEREUPON, a note is received from the jury which
3 is marked as Court's Exhibit No. 1 for
4 identification.)

5 (Whereupon, the court reporter read back the
6 testimony to the jury in the jury room as follows:)

7 THE COURT REPORTER: This is the testimony of Mike
8 Baskin:

9 "Q Please state your full name, spell
10 your last name for the record.

11 "A William Michael Baskin, B-A-S-K-I-N.

12 "Q Good afternoon, tell us what your
13 occupation is.

14 "A I work for the solicitor's office.

15 "Q In what capacity?

16 "A Investigator.

17 "Q How long have you been employed there?

18 "A About 16 months.

19 "Q What did you do before then?

20 "A Worked for the Anderson City Police
21 Department.

22 "Q How long?

23 "A A little over 30 years.

24 "Q What titles did you hold there?

25 "A I did crime scene and evidence there.

1 I was a sergeant.

2 "Q And were you working in that capacity
3 January, 2007?

4 "A Yes, I was.

5 "Q Did you have reason to respond to
6 305-A E Street, Anderson, on that day?

7 "A Yes, I did.

8 "Q On January 15, 2007?

9 "A Yes, I did.

10 "Q What was the reason for responding
11 there?

12 "A I was there to collect evidence.

13 "Q And what items did you collect?

14 "A I collected drugs, crack pipe, cell
15 phone.

16 "Q And when you collected these items,
17 when you collected the drugs, did you do
18 anything with them?

19 "A I put them in an evidence bag.

20 "Q Before that, did you do anything with
21 them?

22 "A The drugs I field tested.

23 "Q What does field test mean?

24 "A I have a -- have a presumptive test
25 that you drop part of the drugs into and break

1 an ampule. It will turn a certain color
2 depending on the type of drug it is.

3 "Q What did it test?

4 "A It tested for cocaine.

5 "Q And, Investigator Baskin, showing you
6 what's marked State's Exhibit 3 for
7 identification purposes, take a look at that,
8 tell me if you recognize that.

9 "A Yes, sir. This is the drugs I
10 collected that day.

11 "Q Where did you collect them from?

12 "A Kitchen floor.

13 "Q Anything else about where you
14 collected them from?

15 "A They were underneath the defendant.

16 "Q And besides collecting the item of
17 evidence from the residence that night, did you
18 do anything else? Take photographs?

19 "A I'm sorry?

20 "Q Did you do anything else at the scene
21 that night?

22 "A I took photographs, yes. Identified
23 everyone in the house.

24 "Q What did you photograph?

25 "A The drugs.

1 "Q Anything else?

2 "A Yes, I -- all the people that were in
3 the house, and another place in the bathroom
4 where I collected a crack pipe.

5 "Q Okay. Investigator, showing you
6 State's Exhibit 1 and 2 for identification
7 purposes. Take a look at those. Do you
8 recognize them?

9 "A Yes, sir. These are the drugs I
10 collected.

11 "Q Those the photographs you took as
12 well?

13 "A Yes.

14 "Q Do those photographs accurately depict
15 the scene from that night?

16 "A Yes, sir. After the defendant was
17 taken off the drugs.

18 "Q Okay. And have they been edited or
19 altered in any way?

20 "A No.

21 "MR. BRADLEY: At this time, I'd like to
22 move the photos in evidence.

23 "MR. BYRHOLDT: No objection.

24 "THE COURT: What number is it, Mike?

25 "MR. BRADLEY: One and two.

1 "THE COURT: State's Exhibit 1 and 2
2 admitted without objection.

3 "MR. BRADLEY: Thank you, Your Honor.
4 Permission to publish to the jury, Your Honor?

5 "THE COURT: Yes, sir.

6 "Q Show you these on the overhead. Just
7 describe to the jury what they're seeing,
8 please.

9 "THE COURT: You need to step down?

10 "A That's the baggy with the drugs in it
11 there. This is the kitchen. The defendant was
12 on top of these drugs.

13 "THE COURT: Could I get him to speak up a
14 little?

15 "A I said the defendant was on top of
16 these drugs. This is the baggy containing the
17 drugs on the kitchen floor.

18 "Q And that was State's Exhibit No. 2.
19 Show State's Exhibit No. 1. If you could,
20 explain this one as well.

21 "A Those are the same drugs.

22 "Q That's the kitchen floor, that's the
23 baggy they were in?

24 "A This is the baggy underneath the
25 defendant.

1 "Q Thank you. You may return to the
2 stand.

3 After collecting the evidence and taking the
4 photographs that night, what did you do with the
5 evidence you collected?

6 "A I took it and locked it up in the
7 evidence room at the city police department.

8 "Q Regardless of the drugs, did you take
9 it to have any more testing done?

10 "A Took it to SLED. Yes, sir.

11 "Q What is SLED?

12 "A SLED is the South Carolina Law
13 Enforcement Division. I took it to the log in
14 there at the laboratory.

15 "Q And what did they do at SLED?

16 "A The log in and lab they analyze, they
17 analyze drugs they analyze DNA, all sorts of
18 stuff.

19 "Q And you personally took those drugs?

20 "A Yes, sir. I personally took them.

21 "Q What exactly did you take?

22 "A I took the drugs -- well, I -- first,
23 I put them in an evidence bag at the scene.
24 When I got back to the police department, I put
25 them in a best kit, which is a container to take

1 stuff to SLED with. It has a chain of evidence
2 on it. And I log it in. I logged this into Amy
3 Stevens and she took possession of it.

4 "Q Is that the only thing you took?

5 "A Yes. That was the only, as to this
6 case, I took.

7 "Q And mentioned that you took it to Amy
8 Stevens and logged it in?

9 "A Yes.

10 "Q What happened to the evidence while it
11 was down there at SLED?

12 "A It was just logged in. I gave it to
13 her and she took possession of it.

14 "Q Okay. Did this evidence come back
15 into your possession at any time after that?

16 "A Yes, sir. I picked it up in April of
17 that year.

18 "Q April of that year. And who did you
19 retrieve it from?

20 "A Carhonda Williams.

21 "Q She's a SLED employee?

22 "A Yes. She was in log in. She no
23 longer works there.

24 "Q What did she do when you arrived at
25 SLED to pick it up?

1 "A I signed for it and she gave it to me.

2 "Q What did you do after that?

3 "A I brought it back to the Anderson
4 Police Department and locked it back up.

5 "Q And after you took them back to the
6 police department were they constantly in your
7 care and control while you were working at the
8 police department?

9 "A Yes, sir.

10 "Q And you mentioned that you left the
11 police department to come work for the
12 solicitor's office a little while ago. What did
13 you do when you left the police department with
14 the evidence?

15 "A It was still locked in place. Kevin
16 Warren assumed possession of the evidence then.

17 "Q Kevin Warren is also with the police
18 department?

19 "A Yes, sir, evidence technician at the
20 police department now.

21 "Q So it would be his duty to maintain
22 custody and control of that evidence?

23 "A Yes, sir.

24 "Q Investigator, if you could, walk us
25 through the process of when you collect the

1 evidence and you put it in the bag. What is the
2 process of doing that? How do you do that?

3 "A I photograph it first, and then I --
4 depending on the type of drug it is, I do a
5 field analysis. The only kind of drug I would
6 not do a field analysis on would be pills or
7 marijuana. Then I put it in an evidence bag. I
8 put a case number on it, put the offense, the
9 person's name, the date and time collected, a
10 description of what I collected, you know, where
11 I collected it from. And then I bring it --
12 then, like in this case with crack, I would
13 bring it back to the police department. Then I
14 would fill out, as I said, a best kit for taking
15 it to the SLED laboratory.

16 "Q Since it was in your possession, if it
17 had been edited or altered in any way, you would
18 be able to tell; is that correct?

19 "A Yes. It's a sealed bag.

20 "Q Has it been edited or altered any
21 since it was in your possession?

22 "A Since the last time, no, sir.

23 "Q Thank you. No further questions.

24 "THE COURT: Cross examination?

25 "MR. BYRHOLDT: May it please the Court?

1 Investigator Baskin, you put it in a best
2 evidence kit to protect its integrity, correct?

3 "A I put it in a best evidence bag to
4 take it to SLED.

5 "Q But also to preserve its integrity,
6 right? So someone doesn't add something or take
7 something out?

8 "A It's already in a sealed evidence bag.

9 "Q And when you write down the number on
10 your chain of custody form, you do have chain of
11 custody form, right?

12 "A Yes, sir. There's chain of custody
13 forms with the best kit. And I also keep a
14 computerized chain-of-evidence form.

15 "Q Can you explain to this jury how two
16 sets of evidence could have the same best
17 evidence kit number?

18 "A Sir?

19 "Q Can you explain to this jury whether
20 it would be possible for two separate quantities
21 of drug to have the same best evidence kit
22 number?

23 "A Two different drugs, the only way that
24 could be possible for a typographical error. In
25 this particular case, when I typed up the

1 evidence in the computer, I put the same lab
2 number -- I mean, excuse me, not lab number,
3 container number for two different sets of
4 evidence.

5 "Q So it's a clerical error?

6 "A Yes, sir.

7 "Q Do you do a Form B chain of custody?

8 "A Yes, sir.

9 "Q Do you have that with you today?

10 "A No, sir. I don't. It may be in the
11 case file.

12 "Q Let me show you my copy. That's,
13 again, for the chain of custody, make sure it's
14 all done correct?

15 "A Correct.

16 "Q Would it be possible to do a chain of
17 custody and swear that it was done on
18 January 16th of 2007 when the drugs weren't sent
19 off until January 27, 2007? Would that be
20 another clerical error?

21 Is that your chain of custody form, sir?

22 "A That's my original chain of custody
23 form. Yes.

24 "Q All right. On the bottom of it
25 there's a notary where it was sworn to, correct?

1 "A That is my signature was sworn to, not
2 the day that I collected it. No, sir.

3 "Q No, what's the day -- I mean, it's the
4 day the form was completed, correct?

5 "A No. The day that I got my signature
6 notarized I didn't say -- I can't say I didn't
7 complete the form on the 16th. I don't
8 remember.

9 "Q You wouldn't have the form notarized
10 before it was completed, would you?

11 "A No, sir.

12 "Q What date was it notarized?

13 "A My signature was notarized on the 16th
14 of January.

15 "Q And the form should have been
16 completed before it was notarized, correct?

17 "A Correct.

18 "Q What date was the evidence sent to
19 SLED?

20 "A It was sent 1/29.

21 "Q Well, how could it be notarized
22 January 16th when the stuff wasn't sent out for
23 eleven more days?

24 "A I'm not following you.

25 "Q Well, you sign it when the form is

1 completed, correct?

2 "A My signature has to be notarized.

3 Yes, sir.

4 "Q Well, you wouldn't have it notarized
5 before the form was completed, would you?

6 "A No, sir. The form was completed when
7 I got it notarized.

8 "Q How could it be notarized on the 16th
9 when the evidence wasn't sent until 11 days
10 later? Or did somebody add stuff later?

11 "A No. SLED will not notarize my
12 signature. Therefore, I have to have my
13 signature notarized here. When I take it to
14 SLED, I put in the date and -- that I turned it
15 in to SLED. We don't put a name, but we put the
16 SLED for the law enforcement agency and for the
17 name.

18 "Q So you're telling the jury you have
19 your signature and the form notarized before
20 it's completed?

21 "A I have my signature notarized before I
22 take it to SLED. Yes, sir. That's on every
23 case. Now, at one time we used to take stuff to
24 SLED and get them to notarize our signature but
25 they will not do it anymore. At least they

1 wouldn't when I was working. I don't know what
2 that policy is now.

3 "Q So it would be fair to say you entered
4 information after your signature was verified?

5 "A Oh, yes, sir.

6 "Q The form says you received it, placed
7 it at SLED, sworn before you some eleven days
8 before it was sent?

9 "A No, sir. That's not what it says.

10 "Q Read the bottom of it, sir. What does
11 this say? Right here, the last paragraph.

12 "A Sworn and subscribed this first of
13 six -- January, 2007, Amy Sexton she works at
14 the police department. SLED will not notarize
15 my signature. That's the reason I have to have
16 it done here.

17 "Q Yeah, but you could have it done after
18 you took the drugs. Like let's assume you
19 seized it on the 15th, took it on the 27th, and
20 you fill out the form and say I delivered it and
21 swear to it when you get back?

22 "A These forms are turned in to SLED.

23 "Q What I'm saying is you're swearing
24 something was done. Amy Sexton didn't know that
25 was done, did she?

1 "A She's not. My signature is what she's
2 signing, not what I've written there. My
3 signature that I signed it.
4 "Q That's not what the form says, though
5 is it? It says sworn that you've done these
6 things?
7 "A Every best kit is done that way.
8 "Q And every best kit has two sets of
9 drugs in it, clerical errors in it, mistakes?
10 "A No, two sets of drugs in that best
11 kit.
12 "Q How many photographs did you take?
13 "A Of the drugs?
14 "Q How many photographs did you take at
15 the scene? We've only seen two.
16 "A Five, six, seven, I believe. Maybe --
17 I take that back, nine.
18 "Q All right. How many -- nine?
19 "A Yes, sir.
20 "Q How many individuals, non-law
21 enforcement, were in that house?
22 "A Five.
23 "Q You took pictures of all five?
24 "A Yes, sir.
25 "Q Are they here today?

1 "A Are all five of those people here?

2 "Q Miss Richardson is here. Anyone else?

3 Mr. Ware.

4 "A I -- there's one other, there's one
5 other lady here. I think one of the ladies is
6 dead. Mr. Ware is here. Virginia Richardson is
7 here. I'll have to look at the other girl's
8 name.

9 "Q The reason we have a chain of custody
10 is when the drugs are handled, somebody is
11 supposed to keep track of them, correct?

12 "A Correct.

13 "Q And if that was not done, would that
14 be a breach of protocol, Mr. Baskin, in the
15 handling of drugs?

16 "A Yes, sir.

17 "Q Because everybody -- every time
18 somebody touches them, somebody is supposed to
19 sign off on the chain of custody, correct?

20 "A I'm sorry?

21 "Q When you take them and hand them to
22 someone else, they sign for the drugs and have
23 custody?

24 "A They have custody, yes, sir.

25 "Q When you get them back you sign for

1 them?

2 "A Yes, sir.

3 "Q Everybody that has custody in the
4 interim signs off on them?

5 "A Yes, would be handled at SLED.

6 "Q Was the chain of custody maintained
7 yesterday when the drugs were put in with the
8 court reporter here?"

9 THE COURT REPORTER: At that point there was an
10 objection.

11 "A The chain of custody?

12 "Q Was it maintained? Did someone have
13 possession of the drugs without signing for
14 them?

15 "A The only person that took the drugs
16 were the person that relieved me of my duties.

17 "Q Well, did anybody sign for them
18 yesterday?

19 "A No, they didn't sign for them. He
20 brought them with me and he was here in the
21 courtroom and took them from me in the
22 courtroom.

23 "Q Took them from the court reporter?

24 "A Do you mean today? Yesterday?

25 "Q Yesterday.

1 "A I thought he took them from me.

2 "Q Was that proper?

3 "A I saw nothing wrong with it. No, sir.

4 "Q Did he sign for them?

5 "A No, sir.

6 "Q Do we know who had them at all times
7 yesterday?

8 "A Do I know who had them at all times
9 yesterday? No, sir. Not after I gave them to
10 him.

11 "Q Nothing further. Thank you, sir."

12 THE COURT REPORTER: Redirect Examination by Mr.
13 Bradley.

14 "Q Investigator Baskin, is it true that
15 the drugs were not ID'd for evidence until
16 today?

17 "A Correct.

18 "Q Okay. They were never given to the
19 court reporter yesterday; is that correct?

20 "A Not to my knowledge. No, sir.

21 "Q Okay. Is it your duty, and in your
22 capacity now as investigator for the solicitor's
23 office, to maintain the custody and control of
24 the drugs?

25 "A No, sir, it's not.

1 "Q And you testified earlier that's
2 officer Warren's duties, correct?

3 "A Correct.

4 "Q And he's the one that brought them to
5 the courtroom yesterday and today; is that
6 correct?

7 "A That's correct.

8 "Q Okay. Going back to the night of
9 January 15, 2007, what was it you collected from
10 the scene specifically? What was in that baggy
11 that you collected from the scene specifically?"
12 THE COURT REPORTER: And there was an objection.

13 "A Crack cocaine.

14 "THE COURT: Overruled. Go ahead.

15 "Q Did you seal it in that bag when you
16 collected?

17 "A Yes, sir. I put it in the bag.

18 "Q Is that the bag that you sealed it in?

19 "A When I collected it, the bag that's in
20 the best kit, this bag right here.

21 "Q And from the time that you collected
22 it until the time it went to SLED, did anyone
23 else touch it?

24 "A No, sir.

25 "Q And during that time was anything done

1 to it before you took it to SLED?

2 "A No, sir, other than put it in the best
3 kit.

4 "Q Was it still in the same sealed bag
5 when you took it to SLED?

6 "A Yes, sir, it was.

7 "Q And after it was tested, when you
8 picked it up, was it still in that sealed bag?

9 "A It had been opened and analyzed, but
10 it had been heat sealed back and it's still heat
11 sealed back.

12 "Q Before you took it and after you
13 picked it up, was anything added or mixed with
14 it?

15 "A No, sir. No.

16 "Q And, again, once you transfer custody
17 of it to Officer Warren, upon leaving the police
18 department, it's his duty to bring it to the
19 courtroom and maintain the custody, not your
20 duty; is that correct?

21 "A That's correct.

22 "Q Nothing further, Your Honor."

23 THE COURT REPORTER: Recross examination by Mr.
24 Byrholdt.

25 "Q You said on the 15th you seized it

1 from Mr. Ware. Is that what you said?

2 "A It was underneath Mr. Ware. He was
3 picked up.

4 "Q What does your form say it was seized
5 from?

6 "A Kevin Montreat Ware, Virginia Gail
7 Richardson. They were codefendants.

8 "Q Well, you never mentioned
9 Miss Richardson?

10 "A I did.

11 "Q Seized from her?

12 "A The drugs weren't under
13 Miss Richardson.

14 "Q Why did you put her name?

15 "A Because she was charged also with the
16 drugs.

17 "Q Okay. And you're saying it hasn't
18 been altered, the drugs?

19 "A No.

20 "Q When you left the city, did you do an
21 inventory of all the drugs that were there?

22 "A No, sir, I did not.

23 "Q Did you sign those drugs over to the
24 officer that replaced you?

25 "A I signed nothing over to him.

1 "Q How do we know what happened to those
2 drugs?

3 "A Because they're still in heat-sealed
4 bag, untampered with.

5 "Q Well, you said it was opened at SLED
6 and they heat-sealed it back up, right?

7 "A Yes, sir. They gave it to me just
8 like it was.

9 "Q Well, if you didn't sign it over to
10 somebody, how do we know somebody hasn't opened
11 it back up and heat sealed it back?

12 "A Yes, we do. We could tell it.

13 "Q Why wasn't it turned over to somebody,
14 have them sign for it?

15 "A There are over 17,000 pieces of
16 evidence, sir, and I don't know how many --

17 "Q It would take too much time?

18 "A It would take years.

19 "Q But it would protect people's rights,
20 wouldn't it? Nothing further."

21 THE FOREMAN: Ma'am, that's enough.

22 THE COURT REPORTER: Is that all?

23 (Jurors respond affirmatively and the court reporter
24 exits at 3:50 p.m.)

25 (WHEREUPON, Court was again in session at 4:05 p.m.)

1 when the following proceedings were had:)

2 (WHEREUPON, Court's Exhibit No. 2 is marked for
3 identification.)

4 THE COURT: All right. Mr. Foreman ladies and
5 gentlemen of the jury, you sent a note stating you were
6 unable to agree on a verdict in this case.

7 As I instructed you earlier, the verdict of the jury
8 must be unanimous. When a matter is in dispute, it isn't
9 always easy for even two people to agree. So when 12
10 people must agree, it becomes even more difficult. In
11 most cases, absolute certainty cannot be reached or
12 expected. However, you have a duty to make every
13 reasonable effort to reach a unanimous verdict.

14 In doing this you should consult with one another,
15 express your own views and listen to opinions of your
16 fellow jurors. Tell each other how you feel and why you
17 feel that way. Discuss your differences with open minds.
18 Therefore, to some degree it can be said jury service is
19 a matter of give and take.

20 Although the verdict of the jury must be unanimous
21 every one of you has a right to your own opinion. The
22 verdict you agree to must be your own verdict result in
23 your own convictions and you should not give up your
24 firmly held beliefs merely to be in agreement with your
25 fellow jurors. The majority should consider the

1 minority's opinion and the minority should consider the
2 majority's opinions. You should carefully reevaluate
3 your position, the reasonable, correctness, and
4 impartiality. You must lay aside all outside matters and
5 reexamine the question before you based on the law and
6 the evidence in this case.

7 If you do not agree on a verdict in this case, I
8 must declare a mistrial. In that case it does not mean
9 anyone wins. It just means that at some future time I
10 try this case some other jury sitting where you now sit.
11 The same participant will come, the same lawyers, ask
12 basically the same questions, and give basically the same
13 answers and we'll go through the whole process again.

14 You were selected in the same manner and same source
15 any future jury would be and there's no reason for me to
16 suppose that this case would ever be submitted to 12 more
17 intelligent, impartial, conscientious and competent
18 jurors than you; or that more clearer evidence will be
19 produced on one side or the other.

20 I, therefore, ask you to return to the deliberations
21 with the hope you can arrive at a verdict. Mr. Foreman,
22 members of the jury, go to the jury room.

23 (The jury retires to continue deliberations at
24 4:08 p.m.)

25 THE COURT: We'll stand at ease waiting on a jury

1 verdict.

2 MR. BRADLEY: Thank you, sir.

3 THE COURT: All right. Would you bring us the jury,
4 please.

5 (Whereupon, court was again in session at 5:20 p.m.
6 when the jury returns to open court to report its
7 verdict.)

8 THE COURT: Mr. Foreman, I understand you've reached
9 a verdict; is that correct?

10 THE FOREMAN: Yes, Your Honor.

11 THE COURT: Would you hand the verdict forms to the
12 bailiff please, sir.

13 (Foreman complies.)

14 THE COURT: Mr. Foreman, I have filled in the
15 verdict forms on the back of the indictment. I'm going
16 to give it to the clerk, have you to please sign it.
17 Then the clerk will publish the verdict.

18 THE CLERK: Indictment 2007-GS-04-971, the state of
19 South Carolina versus Kevin M. Ware. The verdict of the
20 jury, "We, the jury, find the defendant, Kevin M. Ware,
21 guilty of possession of crack cocaine, with intent to
22 distribute."

23 As to indictment 2007-GS-04-972, the State of South
24 Carolina versus Kevin M. Ware, the verdict of the jury,
25 "We, the jury, find the defendant, Kevin M. Ware, guilty

1 of possession of crack cocaine with the intent to
2 distribute within proximity of a park."

3 Mr. Foreman, ladies and gentlemen of the jury, if
4 these were your verdicts, would you please indicate by
5 raising your right hand.

6 (No negative response elicited.)

7 THE CLERK: All hands raised, verdicts of the jury,
8 Your Honor.

9 THE COURT: Okay. Thank you very much.

10 All right. Mr. Foreman, ladies and gentlemen of the
11 jury, I want to thank you for your services this week.
12 The clerk has some letters for your employers if you need
13 it. If you'd go to the jury room. You're welcome to
14 stay through the sentencing process. If you want to
15 leave, that's up to you. Or you can go to the jury room,
16 she'll give you letters.

17 What remains is sentencing. You are welcome to stay
18 if you want to stay for the sentencing process. What's
19 the desire of the individual jurors? Did you want to
20 stay?

21 THE FOREMAN: I'd like to go. I'd like to go.

22 THE COURT: Well, fine. You're welcome to stay.
23 Mr. Ware, do you want to come around. You're welcome go
24 or stay, whichever you want to do.

25 (Jurors exit courtroom.)

1 him. We really, really don't want him to go. We, you
2 know, we trying to just get ourselves together. Help him
3 get himself together. Just wish the Court have a little
4 mercy on him. Just try to work with him keep him home,
5 please.

6 MR. BYRHOLDT: Thank you.

7 THE COURT: Thank you very much.

8 Mr. Ware, glad to hear from you.

9 THE DEFENDANT: Sir, I have a drug problem. And
10 that was the reason for me a lot of things that I did do.
11 I apologize for that.

12 THE COURT: I understand you were probably selling
13 the drugs to feed your own habit, I would assume; is that
14 correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: One problem I have with that, even
17 though you may be an addict, you were actually selling;
18 and, unfortunately, I can't give you a suspended sentence
19 I guess legislature in their wisdom says couldn't get you
20 out. Like to give you suspended sentence, get out of
21 jail, get drug treatment. Legislature won't let you do
22 that. That's the law, unfortunately. Basically to give
23 you straight time so when you get back out, won't have
24 anything hanging over your head.

25 MR. BYRHOLDT: May it please the Court? The reason

1 this case was tried, the sheriff's office did an
2 excellent job. The investigation in this case, had some
3 holes in it, problems with the forms, problem with the
4 evidence, which presented -- which gave Mr. Ware some
5 concern. He exercised his right's under the constitution
6 to have a trial. The jury deliberated more than five
7 hours on this case. And, with the questions they asked,
8 there were some concerns.

9 I would ask the Court to take -- I know the Court
10 has to impose a sentence. I would ask the Court to, as
11 part of that, also give him treatment, ATU. He has a
12 drug problem. He needs treatment. He's an excellent
13 young man we worked together on this case, met with his
14 girlfriend. And I think he, Kevin, is salvageable. He
15 needs to get clean, which he's been clean since he got
16 out. He spent a lot of time in jail. I would ask the
17 Court to give him credit for the time.

18 THE COURT: How long he been in jail, solicitor? Do
19 you know?

20 MR. BRADLEY: I believe it's little over 70, 70
21 days.

22 MR. BYRHOLDT: October 6th, 70 days.

23 THE COURT: Got out of jail this week or the week
24 before that?

25 MR. BYRHOLDT: No, Friday. Last Friday.

1 THE COURT: So you were in jail from October 6th
2 until I guess January the 2nd?

3 MR. BYRHOLDT: Yes.

4 THE COURT: Is that correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Well, actually might as well just count
7 it through today because he's been in jail since
8 consequence. How many days is it total?

9 THE CLERK: Your Honor, it's it a days from October
10 6 until today. Less than --

11 THE COURT: Less two days. I'll give him credit for
12 the two days. Does that sound correct, solicitor?

13 MR. BRADLEY: That's fine, your Honor.

14 THE COURT: Pardon?

15 MR. BRADLEY: Yes, Your Honor.

16 MR. BYRHOLDT: And I would ask the Court to give him
17 a sentence commensurate with his prior record which he
18 has, but also take into account that the questions the
19 jury had and the evidentiary problems we --

20 THE COURT: It's 85 percent crime, no question.
21 He's got to serve 85 percent. Do you understand that,
22 Mr. Ware?

23 THE DEFENDANT: Yes.

24 THE COURT: You won't be eligible in a third or
25 fourth, you have to do 85 percent. Do you understand?

1 You will not be eligible for parole, do you understand?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. Indictment number 791,
4 that's the possession with intent, second. Sentenced to
5 the State Department of Corrections a period of ten
6 years, credit for 92 days and run it concurrent with the
7 other indictment. Indictment 972, that's the proximity
8 of a park, that sentenced to the state department of
9 corrections a period of ten years, give you credit for it
10 approximate days, run that concurrent. Concurrent means
11 they run together. Do you understand? You'll serve
12 eight and a half years.

13 MR. BRADLEY: Thank you, your Honor.

14 THE COURT: Write on there ATU ordered. I forgot to
15 write it on there.

16 THE CLERK: Yes, Your Honor.

17 * * * * * END OF REQUESTED TRANSCRIPT OF RECORD * * * * *

18

19

20

21

22

23

24

25

WITNESSES
CULBERTSON - APD

DOCKET NO. 2007-65-04-971

The State of South Carolina,
ANDERSON

County of _____

COURT OF GENERAL SESSIONS

MAR 20 2007 TERM _____

MSM THE STATE

KEVIN M. WARE

1715781

ARREST WARRANT NO. _____

ACTION OF GRAND JURY

TRUE BILL

MAR 20 2007

Foreman of Grand Jury

Foreperson

VERDICT

Guilty

James Pace Jr.

11/9/09

Foreman of Petit Jury

Date:

Indictment for

POSSESSION OF CRACK COCAINE
WITH INTENT TO DISTRIBUTE
44-53-0375 (B)(1) [3015]

COMMITMENT

01/09/09- cmp

139

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT FOR
POSSESSION OF CRACK COCAINE
WITH INTENT TO DISTRIBUTE
44-53-0375(B)(1)[3015]

At a Court of General Sessions, convened on MAR 20 2007,
the Grand Jurors of ANDERSON County present upon their oath:

POSSESSION OF CRACK COCAINE WITH INTENT TO DISTRIBUTE

THAT KEVIN M. WARE DID IN ANDERSON COUNTY ON OR ABOUT JANUARY 15, 2007
POSSESS WITH INTENT TO DISTRIBUTE A QUANTITY OF CRACK COCAINE, A CONTROLLED
SUBSTANCE UNDER PROVISIONS OF 44-53-110, *et seq.* Code of Laws of South Carolina (1976), AS
AMENDED, SUCH POSSESSION NOT HAVING BEEN AUTHORIZED BY LAW.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.


SOLICITOR

WITNESSES
CULBERTSON - APD

DOCKET NO. 2007-G15-04-972

The State of South Carolina,

County of _____

COURT OF GENERAL SESSIONS

MAR 20 2007 TERM _____

MSM THE STATE

KEVIN M. WARE
vs.

ARREST WARRANT NO. _____

ACTION OF GRAND JURY

TRUE BILL

MAR 20 2007

Foreman of Grand Jury

[Signature]
Foreperson

VERDICT

Guilty
James Core Jr.

Foreman of Petit Jury

1/9/09
Date

Indictment for

POSSESSION OF CRACK COCAINE
WITH INTENT TO DISTRIBUTE
WITHIN PROXIMITY OF A PARK
44-53-0445 (B)(2) [0108]

CONFIDENTIAL
01/09/09-cmp
141

142

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT FOR
POSSESSION OF CRACK COCAINE
WITH INTENT TO DISTRIBUTE WITHIN
PROXIMITY OF A PARK
44-53-0445(B)(2)(0108)

At a Court of General Sessions, convened on MAR 20 2007,
the Grand Jurors of ANDERSON County present upon their oath:

POSSESSION OF CRACK COCAINE WITH INTENT TO DISTRIBUTE

WITHIN PROXIMITY OF A PARK

THAT KEVIN M. WARE DID IN ANDERSON COUNTY ON OR ABOUT JANUARY 15, 2007,
POSSESS WITH INTENT TO DISTRIBUTE A QUANTITY OF CRACK COCAINE, A CONTROLLED
SUBSTANCE UNDER PROVISIONS OF 44-53-110, et seq. Code of Laws of South Carolina (1976), AS
AMENDED, SUCH POSSESSION NOT HAVING BEEN AUTHORIZED BY LAW. THIS OFFENSE
OCCURRED WITHIN A 1/2 MILE RADIUS OF A PARK.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.


SOLICITOR

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court Of General Sessions

Honorable J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Kevin M. Ware,

Petitioner.

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

S.C. Commission on Indigent
Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT.....	5
CONCLUSION.....	13
CERTIFICATE OF COUNSEL	14

TABLE OF AUTHORITIES

Cases

<u>Allen v. U.S.</u> , 164 U.S. 492 (1894)	11
<u>Benton v. Pellum</u> , 232 S.C. 26, 100 S.E.2d 534 (1957).....	9
<u>State v. Governor</u> , 362 S.C. 609, 608 S.E.2d 474 (Ct. App. 2005)	9
<u>State v. Harris</u> , 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009)	11
<u>State v. Mekler</u> , 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005).....	11
<u>State v. Sweet</u> , 374 S.C. 1, 647 S.E.2d 202 (2007).....	9
<u>State v. Taylor</u> , 360 S.C. 18, 598 S.E.2d 735 (Ct. App. 2004).....	8
<u>State v. Williams</u> , 297 S.C. 290, 376 S.E.2d 773 (1989).....	8
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001)	9
<u>Suber v. State</u> , 371 S.C. 554, 640 S.E.2d 884 (2007)	11

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying appellant's motion to suppress the drugs based on the apparent contamination of the drugs, and a false affidavit signifying when the drugs were delivered to SLED?
2. Did the trial court err in refusing to charge the jury on the lesser charge of possession of crack cocaine?

STATEMENT OF THE CASE

On March 20, 2007, the Anderson County Grand Jury indicted Kevin M. Ware on the charges of possession with intent to distribute crack cocaine (PWID), possession with intent to distribute crack cocaine within the proximity of a park, and conspiracy. On January 5, 2009, Ware proceeded to trial before the Honorable J. C. Nicholson, Jr., and a jury. He was represented by Bruce A. Byrholdt, Esquire. Judge Nicholson granted a directed verdict on the conspiracy charge at the close of the state's case. Supp. ROA. 1, ll. 22 – 25; Supp. ROA. 2, ll. 1 – 2. The jury returned verdicts of guilty as indicted on the PWID and proximity charge. Judge Nicholson sentenced Ware to ten years on the PWID second offense, and ten years to run concurrently on the proximity charge. Ware's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in denying appellant's motion to suppress the drugs based on the apparent contamination of the drugs, and a false affidavit signifying when the drugs were delivered to SLED.

On January 15, 2007, Virginia Richardson testified that she called Kevin Ware to "bring over crack cocaine" to her home for Greg Kay. ROA. 67, ll. 12 – 25; ROA. 68, ll. 1 – 25; ROA. 69, ll. 1; ROA. 4, ll. 17 – 20. Ware allegedly went to her home that night with drugs. ROA. 69, ll. 2 – 25.

After Ware's arrival, police officers arrived to execute a search warrant at the residence. As the officers walked into the house, Ware allegedly threw a baggy with drugs which hit Officer Edward Aman in the chest and then fell to the floor. ROA. 14, ll. 10 – 25; ROA. 15, ll. 1 – 25; ROA. 16, ll. 1 – 25; ROA. 17, ll. 1 – 25. Officer Jody Culbertson then threw Ware to the floor and he fell on top of the drugs. The drugs allegedly tested to be 2.4 grams of crack cocaine. Ware was then charged with PWID crack cocaine, PWID proximity to a park, and conspiracy. ROA. 17, ll. 18 – 24; ROA. 2, ll. 10 – 25; ROA. 3, ll. 1 – 20.

In a pretrial motion, defense counsel asked for an *in camera* hearing on the possible contamination of the drugs which the judge granted. ROA. 28, ll. 6 – 25; ROA. 29, ll. 1 – 20. Officer Mike Baskins of the Anderson Police testified that two sets of drugs were included in the same best evidence kit with same number. He explained that the first set of drugs were collected earlier in the day at 1600 hours by someone else and given to him. Ware was not charged with those drugs and those drugs were not sent to SLED according to Officer Baskins. He said that due to a typographical error the two sets have the same best kit

number of B 177531. The report indicated only one best evidence kit number. He denied that the two sets were contaminated. Officer Baskins said he was not sure if he transferred the evidence to the drug track report or if someone else did it. He explained that the two sets of drugs were put in an evidence bag and put in a best kit later. ROA. 31, ll. 7 – 25; ROA. 32, ll. 1. Defense counsel said that the report indicated that two sets of drugs were sent to SLED under the same number according to the report. ROA. 29, ll. 24 – 25; ROA. 30, ll. 1 – 25; ROA. 31, ll. 1 – 25; ROA. 32, ll. 1 – 25; ROA. 33, ll. 1 – 25; ROA. 34, ll. 1 – 25; ROA. 35, ll. 1 – 25; ROA. 36, ll. 1 – 25; ROA. 37, ll. 1 – 25; ROA. 38, ll. 1 – 25; ROA. 39, ll. 1 – 14.

Officer Baskins told the judge, when he asked how he knew that those drugs were from the floor of the house where Ware was, that he (Officer Baskins), put them in an evidence bag with an item number and date and time. He then transferred them to a best kit. He told the court that he still had the other bag of drugs, but both were marked with the same best evidence kit number. ROA. 35, ll. 24 – 25; ROA. 36, ll. 1 – 25; ROA. 37, ll. 1 – 25.

Officer Baskins had testified earlier in response to questioning from defense counsel that he put the two sets of drugs in an evidence bag and transferred them later to a best evidence kit. ROA. 31, ll. 1 – 19. He later testified before the jury that he put the drugs in an evidence bag at the scene and then put them in a best kit when he returned to the police department. ROA. 46, ll. 6 – 25; ROA. 47, ll. 1 – 3.

Defense counsel argued to the court that he had seen no other set of drugs to show that it was not sent to SLED. Counsel argued that according to the report two sets of drugs were sent in the same evidence bag to SLED. He moved for the drugs to be suppressed. The

judge said he would take the motion under advisement until he heard from SLED. The judge said that SLED may say they tested two sets of drugs. ROA. 38, ll. 1 – 25; ROA. 39, ll. 1 – 15.

Amy Stephens, a forensic technician with SLED, testified that if two pieces of drugs which were two different pieces of evidence, were in the same best evidence kit, they would be given the same lab number at SLED. She said she would assume they were combined and put in the same kit. ROA. 73, ll. 1 – 25; ROA. 77, ll. 1 – 11.

Nichole Perry, a forensic technician with SLED in the control department, testified that she logged in evidence brought in by agencies. She said according to the report, the best kit contained drugs collected at 1600 hours on January 15 and drugs collected at 2130 hours on January 15 with the same best kit number. ROA. 77, ll. 18 – 25; ROA. 78, ll. 1 – 13; ROA. 80, ll. 18 – 25; ROA. 81, ll. 1 – 25; ROA. 82, ll. 1 – 17.

Carmen Tucker, drug analyst with SLED, testified that it would be improper procedure to combine drugs from two different incidents in the same best evidence kit. She said that if they were combined, the evidence would be contaminated. ROA. 83, ll. 1 – 22; ROA. 94, ll. 24 – 25; ROA. 95, ll. 1 – 16.

Officer Baskins testified that he took the drugs to SLED to be analyzed, and delivered them to Amy Stephens at SLED. ROA. 46, ll. 6 – 25; ROA. 47, ll. 1 – 25. He explained on cross examination that he completed a Form B chain of custody which defense counsel produced. Officer Baskins testified that that was his original Form B. Officer Baskins admitted that the Form B was notarized on January 16, 2007 but was not delivered to SLED until January 29, 2007. He said he would not have the form notarized until it was completed. ROA. 50, ll. 21 – 25; ROA. 51, ll. 1 – 25; ROA. 52, ll. 1 – 2.

He admitted that the Form B stated that he swore that he received the drugs, and placed them at SLED. However, the drugs were not delivered to SLED until eleven days after he had the Form notarized that he had delivered them to SLED. He explained that SLED will not notarize signatures any longer so he had to have his signature notarized before he took the drugs. He admitted that he entered information on the Form after his signature was notarized. ROA. 52, ll. 1 – 25; ROA. 53, ll. 1 – 25.

Officer Kevin Warren admitted that the Form stated: "I certify that I have done these things". He admitted there could be errors. ROA. 65, ll. 10 -25; ROA. 66, ll. 1 – 5.

When the state requested to move the drugs into evidence, defense counsel objected. He argued that the drugs should be suppressed based on the problem with the one number for the best kit for two sets of drugs. He said that affected the credibility of the chain of custody. He also argued that the drugs should be suppressed based on the problem with the Form B when the officer swore to something that had not been done, and the fact that a person from the chain of custody, Miss Williams, was missing ROA. 88, ll. 10 – 25; ROA. 89, ll. 1 – 25; ROA. 90, ll. 1 – 9.

The judge ruled that he was admitting the drugs based on testimony from the officer, and not the actual report, that only one set of drugs was sent to SLED. The judge stated that the notarized Form B affidavit was not a true and accurate statement as it was a false affidavit. However, he ruled that it did not rise to the level of suppression. The judge stated that he was admitting the drugs over the defendant's objection. ROA. 92, ll. 4 – 25; ROA. 93, ll. 1 – 25; ROA. 94, ll. 1 – 2.

The admission of evidence is left to the sound discretion of the trial court. State v. Williams, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989). On appeal, the question is

whether the trial court's decision is controlled by an error of law or is without evidentiary support. State v. Taylor, 360 S.C. 18, 23, 598 S.E.2d 735, 737 (Ct. App. 2004). If there is any evidence to support the trial court's decision, the appellate courts will affirm. State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 829 (2001).

A party offering into evidence fungible items such as drugs must establish a complete chain of custody as far as practicable. State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). Where the substance has passed through several hands the evidence must not leave to conjecture as to who had it and what was done with it between the taking and the analysis. Benton v. Pellum, 232 S.C. 26, 33 – 34, 100 S.E.2d 534, 537 (1957). While proof of a chain of custody need not negate all possibility of tampering, it must establish a complete chain of evidence as far as practicable. State v. Governor, 362 S.C. 609, 608 S.E.2d 474 (Ct. App. 2005).

The evidence as to what drugs were actually sent to SLED in the best evidence kit was confusing, and the judge did not clarify this conflict. Officer Baskins testified that his report said two bags of drugs had the same best evidence kit number indicating they were both sent to SLED in one kit. However, he testified that this was a typographical error. He then said he still had the second bag of drugs, but the court did not require him to produce that bag of drugs. The judge admitted the drugs based on his testimony although there was a written report contradicting his testimony.

Officer Baskins collected two bags of drugs the same day in the field which were in his possession. The testimony indicated that he identified them and put them together to take back to the police department. There was a reasonable probability that he put them both in the same best evidence kit.

This was prejudicial to Ware as the possibility remained that both bags of drugs may have been combined to obtain his total amount. SLED technician Nikki Perry testified that the best kit presented to SLED indicated that two sets of drugs were included with the same best evidence kit number.

There was no clear chain of custody established as to the drugs charged to Ware.

The false affidavit of Form B signed by Officer Baskins and notarized on January 16 indicating he had delivered the drugs to SLED created a break in the chain of custody. The trial judge stated that it was a false affidavit and falsely notarized. Since it was a false document, it could not be used to confirm when the drugs were delivered to SLED. Eleven days passed between the date of Office Baskins' signature and the date the drugs were delivered to SLED. There was no testimony as to where the drugs were during this time or who had them. Officer Baskins testified only that no one else touched them but he did not explain how he knew this.

The trial judge abused his discretion by admitting drugs through a chain of custody based on a false Form B.

ARGUMENT

II.

The trial court erred in refusing to charge the jury on the lesser charge of possession of crack cocaine.

Just before closing arguments, the trial judge put on the record that defense counsel requested a charge on simple possession which the court was not going to charge. ROA. 96, ll. 1 – 24. After the judge charged the jury, defense counsel renewed his request for the lesser included charge of simple possession. He argued that if the jury found that the evidence had been contaminated, then they could find the amount was less than a gram and find him guilty of possession. The judge denied the request. ROA. 108, ll. 3 – 15.

The jury requested to hear the full testimony of Officer Baskins again which the court played for them. ROA. 108, ll. 25; ROA. 109, ll. 1 – 24; Supp. ROA. 3 – 22. The jury retired to deliberate again. The jury returned to the courtroom with a note that they were unable to reach a verdict. The judge instructed them with an Allen¹ charge. The jury retired to deliberate again. ROA. 111, ll. 1 – 25; ROA. 112, ll. 1 – 25. Then the jury returned with the verdicts of guilty. ROA. 113, ll. 1 – 25; ROA. 114, ll. 1 – 9.

The law to be charged to the jury must be determined by the evidence presented at trial. State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009). The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed. Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005).

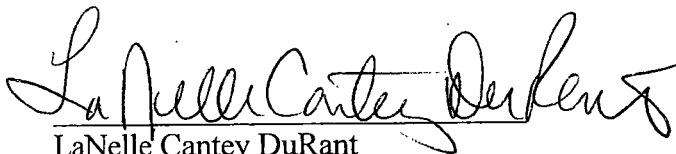
There was evidence that Ware was guilty only of possession if the jury believed the drugs had been contaminated. Virginia Richardson, who was the only evidence that Ware sold drugs, was a biased witness because she had been charged with conspiracy, and received a probationary sentence when she pled guilty. ROA. 72, ll. 1 – 25.

¹ Allen v. U.S., 164 U.S. 492 (1894).

CONCLUSION

Based on the above, the convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,

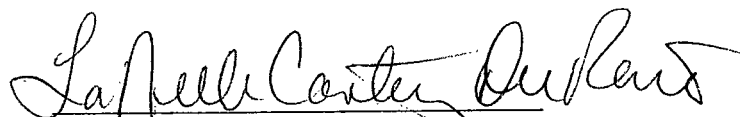

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT.

This 18th day of March, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that 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."

LANELLE CANTEY DURANT

Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Honorable J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Kevin M. Ware,

Petitioner.

FINAL BRIEF OF APPELLANT

HENRY D. McMASTER
Attorney General

JOHN W. McINSTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Asst. Deputy Attorney General

WILLIAM M. BLITCH, JR.
Asst. Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

CHRISTINA T. ADAMS
Solicitor, Tenth Judicial
Circuit

100 South Main Street
Anderson, SC 29624
(864) 260-4046

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	5
I. The trial court did not err in refusing to suppress the admission of the crack cocaine because the State established a chain of custody as far as practicable.	5
II. The trial court did not err in refusing to charge the jury the lesser included offense of possession of crack cocaine.	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:

<u>Dempsey v. State</u> , 363 S.C. 365, 610 S.E.2d 812 (2005)	12
<u>Matthews v. State</u> , 300 S.C. 238, 387 S.E.2d 258 (1990)	13
<u>State v. Butler</u> , 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003)	6
<u>State v. Carter</u> , 344 S.C. 419, 544 S.E.2d 835 (2001)	7-9
<u>State v. Fields</u> , 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003)	12
<u>State v. Gourdine</u> , 322 S.C. 396, 472 S.E.2d 241 (1996)	12
<u>State v. Haselden</u> , 353 S.C. 190, 577 S.E.2d 445 (2003)	10
<u>State v. James</u> , 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004)	13, 14
<u>State v. Odom</u> , 382 S.C. 144, 676 S.E.2d 124 (2009)	7, 9
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006)	6
<u>State v. Robinson</u> , 344 S.C. 220, 543 S.E.2d 249 (Ct. App. 2001)	13
<u>State v. Schumpert</u> , 312 S.C. 502, 435 S.E.2d 859 (1993)	11
<u>State v. Smith</u> , 326 S.C. 39, 482 S.E.2d 777 (1997)	8
<u>State v. Sweet</u> , 374 S.C. 1, 647 S.E.2d 202 (2007)	7, 10
<u>State v. Taylor</u> , 360 S.C. 18, 598 S.E.2d 735 (Ct. App. 2004)	7, 9
<u>State v. White</u> , 361 S.C. 407, 605 S.E.2d 540 (2004)	12
<u>State v. Williams</u> , 297 S.C. 290, 376 S.E.2d 773 (1989)	10
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001)	6

Other Authorities:

S.C. Code Ann. § 44-53-375(B) (Supp. 2008)	12-14
--	-------

STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in refusing to suppress the admission of the crack cocaine because the State established a chain of custody as far as practicable.
- II. The trial court did not err in refusing to charge the jury the lesser included offense of possession of crack cocaine.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On January 15, 2007, Captain Kevin Marsee and other officers conducted surveillance on the residence of Virginia Richardson. The surveillance began after the officers obtained a search warrant for the residence after suspecting drug activity. (T.48; R. 6).

Richardson called Appellant and asked him to bring some drugs to her house for Greg Kay. (T.115-116; R.68-69). Around 8:30 p.m. Appellant arrived at Richardson's house with the drugs. (T.116; R.69). Shortly thereafter, the SWAT team made entry into the residence to secure the residence and execute the search warrant. (T.48-49; 57-58; R.6-7; 15-16). At the time of the entry, Appellant and Richardson were in her kitchen. (T.50; 58; 65; R.8; 16; 23).

Officer Edward Aman was the fourth man in line as the SWAT team entered the residence. As he entered the doorway to the kitchen, Appellant flung an object into the air which struck Officer Aman. (T.58; 65; 117-118; R.16; 23; 70-71). Officer Culbertson then took Appellant to the ground and arrested him. (T.59; 65-66; R.17; 23-24).

The officers secured the object thrown by Appellant. (T.59-60; 66; R.17-18; 24). Mike Baskin, an Officer with the Anderson Police Department at the time of the incident, collected the object, as well as other items such as a crack pipe and cell phone. (T.84-85; R. 42-43). The object thrown by Appellant appeared to be a bag containing a substance consistent with crack cocaine so Officer Baskin conducted a field test. The test was presumptively positive for cocaine. (T.60; 85; R.18; 43). Officer Baskin photographed the object and then collected it by placing it into an evidence bag. (T.85-88; State's Exhibit 1 and 2; R.43-46).

The drugs were transported to SLED for testing. (T.88-89; R.46-47). The analysis revealed the substance was 2.4 grams of crack cocaine. (T.144; R.88). As a result, Appellant was indicted for possession with intent to distribute crack cocaine (PWID); PWID within proximity of a park, and conspiracy. (Indictments; R.119).

ARGUMENT

I. The trial court did not err in refusing to suppress the admission of the crack cocaine because the State established a chain of custody as far as practicable.

Appellant contends the trial court erred in denying his motion to suppress the crack cocaine at trial. He asserts the credibility of the chain is at issue and the drugs may have been compromised because an evidence report lists two sets of drugs as included in the one best evidence kit submitted to SLED for testing. Further, he maintains the drugs should be suppressed due to a false affidavit submitted by the collecting officer and its impact on the chain of custody. Finally, he asserts Carhonda Williams failed to testify so the chain of custody was incomplete. First, it is questionable whether the issue is properly preserved for review on appeal. Additionally, the State established a full chain of custody as far as practicable, and the chain contained no missing links. Any argument regarding the possible contamination of the drugs and the validity of the affidavit went to the weight of the evidence and not its admissibility.

PRESERVATION

This issue is not properly preserved for review on appeal. In order to preserve an evidentiary issue for review on appeal, a contemporaneous objection must be made when the testimony is offered. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523.

Counsel did not contemporaneously object when the results of the lab testing were admitted. The State is required to establish the chain of custody prior to admitting evidence regarding the crack cocaine or the analysis of the substance. Once the forensic analyst testified without objection that the substance was 2.4 grams of crack cocaine, any subsequent objection would be untimely. In this case, Appellant waited until the State offered the actual drugs into evidence to object, instead of objecting when the analysis of those drugs was admitted. (T.144; R.88). As a result, the objection was not timely and the issue is not preserved for review on appeal.

MERITS

The issue also fails on the merits. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

In order to admit the drug evidence:

[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion

by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.

State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007) (citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)).

Possible Contamination

Appellant contends the trial court erred in refusing to suppress the drugs because an evidence report indicated two sets of drugs may have been contained in the same best evidence kit bag. Officer Baskin, however, explained the discrepancy, and any evidence regarding a lack of care in the handling of the evidence or procedures utilized goes to the weight of the evidence to be determined by the jury and not its admissibility. As the Supreme Court explained in State v. Carter:

[W]e have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the [fungible evidence] was not established at least as far as practicable. On the other hand, where the identity of persons handling the specimen is established, we have found evidence regarding its care goes only to the weight of the specimen as credible evidence. In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility.

State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001) (emphasis added) (internal citations omitted); see also, State v. Odom, 382 S.C. 144, 153, 676 S.E.2d 124, 128 (2009) (“This Court has held on a number of occasions that violations of procedure go to the weight, rather than the admissibility of evidence.”).

In his testimony, Officer Baskin clarified he confiscated one set of drugs during the execution of the search warrant of Richardson's home. He indicated a second set of drugs was previously collected after a drug buy from Appellant. Officer Baskin checked the drugs for another officer. (T.74-76; R.32-34). He testified the drugs collected during the execution of the search warrant were included in the best evidence bag. Officer Baskin explained the report listing the same best evidence bag for the set of drugs from the drug buy was a typographical error. (T.72; 74; 77; 92; R.30; 32; 35; 50). He testified the drugs from the drug buy were always kept separate and were not sent to SLED for analysis because Appellant had not been charged with any crime related to those drugs. (T.75; 77; R.33; 35). Further, he explained even if the drugs were in the same best evidence bag, they would have been in separate sealed evidence bags before being placed in the best evidence kit bag, so contamination would not have occurred. (T.91; 100-101; R.49; 58-59).

Any issue created by the typographical error on the evidence report inures to the weight of the evidence and not to its admissibility. As will be discussed in more depth below, the State completed the chain of custody as far as practicable. Any issue regarding the care or handling of the drugs only went to the weight to be assigned by the jury and does not affect its admissibility. See Carter, 344 S.C. at 424, 544 S.E.2d at 837; State v. Smith, 326 S.C. 39, 41, 482 S.E.2d 777, 778-779 (1997) ("However, the proof of the chain of custody need not negate all possibility of tampering but must establish a chain as far as practicable."). Further, Officer Baskin thoroughly explained the reason for the confusion as well as the handling of both sets of drugs. As a result, the trial court properly refused to suppress the drugs based on the confusion of the evidence report.

Improper Affidavit

Appellant contends the trial court should have suppressed the drugs based on the improperly sworn affidavit. Any error in the procedures utilized for recording the delivery of the drugs from Officer Baskin to SLED, however, only goes to the weight of the evidence and not its admissibility once the chain is properly established. The affidavit was not required in order to establish the chain of custody because Officer Baskin testified and was subject to cross-examination. He was clearly identified as a link in the chain of custody and testified regarding his handling and the procedures used to deliver the drugs to SLED. As a result, the trial court properly denied the motion to suppress based on the affidavit because any error only went to the evidence's weight and not its admissibility. See Odom, 382 S.C. at 153, 676 S.E.2d at 128; Carter, 344 S.C. at 424, 544 S.E.2d at 837.

Ms. Williams

Appellant asserts the drugs should have been suppressed because Carhonda Williams, a link in the chain of custody, did not testify. Appellant's only argument at trial was Ms. Williams failed to testify, not whether the State adequately identified her and demonstrated the method of her handling of the drugs. The State, however, identified Ms. Williams as the person who delivered the drugs back to Officer Baskin after the analysis by SLED, and provided testimony that this was part of her routine duties at SLED.

Testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility of the fungible evidence. Taylor, 360 S.C. at 27, 598 S.E.2d at 739. "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been

willing to fill gaps in the chain of custody due to an absent witness.” Sweet, 374 S.C. at 7, 647 S.E.2d at 206 (citing State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989) (upholding the admissibility of a blood test even though a nurse who drew the blood from the defendant did not testify at trial; hospital forms completed by the absent nurse and testimony from the other evidence custodians sufficiently established a chain of custody)).

Nikki Perry, a forensic technician with SLED, testified Ms. Williams handled the drugs after her and Ms. Williams was the last person at SLED to handle the drugs. Perry testified it was part of Ms. Williams’ job to log in and out items such as the drugs. (T.135-136; R.79-80). Officer Baskin testified he picked the drugs up from SLED and received them from Ms. Williams. He testified he had to sign for the drugs before Ms. Williams turned them over to him. (T.89; R.47).

The State identified all members of the chain of custody and demonstrated their handling of the drugs in this case. There are no missing links. At most, there is a weak link because Ms. Williams did not testify. The trial court properly denied the motion to suppress the drugs because the State established the chain of custody as far as practicable.

HARMLESS ERROR

Even if the issue is preserved and has merit, any possible error is entirely harmless. As discussed above, Appellant did not object to the forensic analyst’s testimony the substance was 2.4 grams of crack cocaine. The admission of the physical drugs, the only thing objected to by Appellant, would be cumulative to the testimony establishing the weight and type of drugs confiscated during the execution of the search warrant. See State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (admission of improper

evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless). Therefore, any error would be entirely harmless due to Appellant's failure to object to the testimony of the forensic analyst.

II. The trial court did not err in refusing to charge the lesser included offense of possession of crack cocaine.

Appellant contends the trial court erred in refusing to charge the jury with the lesser included offense of possession of crack cocaine instead of solely charging possession with intent to distribute crack cocaine (PWID). The only evidence presented at trial supported the charge of PWID.

The law to be charged is determined by the evidence presented at trial. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004): “A trial judge is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred a defendant committed a lesser rather than a greater offense. Conversely, a trial judge does not err by refusing to charge a lesser-included offense where there is no evidence tending to show that the defendant was guilty only of the lesser offense.” State v. Fields, 356 S.C. 517, 522-523, 589 S.E.2d 792, 795 (Ct. App. 2003) (internal citations omitted). “[A] judge is required to charge a jury on a lesser-included offense ‘if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed.’” Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) (quoting State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) (emphasis supplied)).

Possession with intent to distribute crack cocaine or cocaine base is defined by 44-53-375(B) of the South Carolina Code:

(B) A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or

deliver . . . cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony. . . .

S.C. Code Ann. § 44-53-375(B) (Supp. 2008).

The section also “creates a permissive inference that possession of more than one gram of crack cocaine constitutes possession with intent to distribute. However, a conviction of possession with intent to distribute does not hinge upon the amount involved. Furthermore, the statute does not mandate a reverse inference or presumption for amounts less than one gram.” State v. Robinson, 344 S.C. 220, 223, 543 S.E.2d 249, 250 (Ct. App. 2001) (citations omitted); S.C. Code Ann. § 44-53-375(B). “Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute.” State v. James, 362 S.C. 557, 561-562, 608 S.E.2d 455, 457 (Ct. App. 2004) (citing Matthews v. State, 300 S.C. 238, 239, 387 S.E.2d 258, 259 (1990)).

First, the only evidence in the record indicates Appellant went to Richardson’s residence with the intent to distribute or deliver the crack cocaine. There is no evidence in the record indicating he was merely in possession of the drugs. Richardson testified without contradiction she called Appellant and asked him to bring drugs to sell to Greg Kay. (T.115-116; R.68-69). Richardson further testified Kay and Appellant argued over the amount of drugs and the amount Kay had to pay Appellant. (T.116-117; R.69-70). The testimony clearly indicates Appellant’s sole reason for having the drugs was to sell, distribute, or at least attempt to distribute the drugs to Kay. There is no evidence the drugs were for personal use or any other use besides to distribute to Kay. As a result, the trial court properly denied

the request to charge possession of crack cocaine and correctly only charged possession with intent to distribute crack cocaine.

Also, in the instant case, the only evidence indicated Appellant had 2.4 grams or 37.03 grains of crack cocaine. Appellant argued the possible contamination of the drugs required a charge for possession of crack cocaine instead of PWID. Appellant asks this Court to require a jury charge based solely on rank speculation and nothing more. The only evidence presented to the jury indicated one set of drugs was in the best evidence bag, the set collected during the execution of the search warrant. Further, the drugs analyzed by SLED weighed 2.4 grams, well over the one gram requirement for an inference for PWID. Appellant set forth no evidence indicating the weight of the drugs could be less than one gram. As a result, the permissive inference in section 44-53-375(B) was applicable.

Finally, as discussed, the only testimony indicated Appellant intended to distribute the crack cocaine to Kay. Therefore, even if one engages in the rank speculation sought by Appellant and determined the weight of the crack cocaine could be less than one gram, it does not nullify Appellant's intent to distribute the crack cocaine to Kay or the charge of PWID. See James, 362 S.C. at 561-562, 608 S.E.2d at 457. Accordingly, the trial court properly only charged the jury regarding PWID and not possession of crack cocaine.

CONCLUSION

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

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

CHRISTINA T. ADAMS
Solicitor, Tenth Judicial Circuit

100 South Main Street
Anderson, South Carolina 29624
(864) 260-4046

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 9, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Anderson County
Hon. J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent,

v.

Kevin M. Ware,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

CHRISTINA T. ADAMS
Solicitor, Tenth Judicial Circuit

100 South Main Street
Anderson, South Carolina 29624
(864) 260-4046

By: 
WILLIAM M. BLITCH, JR.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 9, 2010

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Kevin M. Ware,

Appellant.

Appeal From Anderson County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2011-UP-273
Submitted May 1, 2011 – Filed June 8, 2011

AFFIRMED

Appellate Defender LaNelle DuRant, of Columbia,
for Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General William M. Blich, Jr.,
all of Columbia; and Solicitor Christina T. Adams, of
Anderson, for Respondent.

PER CURIAM: Kevin M. Ware appeals his convictions for possession with intent to distribute (PWID) crack cocaine and PWID crack cocaine within proximity of a park. First, he argues the trial court erred in admitting the crack cocaine into evidence because the State failed to establish a clear chain of custody. Specifically, Ware alleges two sets of crack cocaine might have been tested together because the Anderson Police Department's drug tracking report used the same Best Evidence Number to refer to both sets. Moreover, Ware also contends the evidence was insufficient to establish a chain of custody because the State's Form-B was a false affidavit. Second, Ware argues the trial court erred in declining to charge the jury on the lesser-included offense of possession of crack cocaine because the record contained evidence he only possessed the drugs. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether the trial court erred in admitting the crack cocaine into evidence: State v. Hatcher, Op. No. 26950 (S.C.Sup.Ct. filed Mar. 21, 2011) (Davis Adv.Sh. No. 10 at 76) ("The trial [court]'s exercise of discretion must be reviewed in the light of the following factors: . . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. If upon the consideration of such factors the trial [court] is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence. . . . [W]here all individuals in the chain are, in fact, identified and the manner of handling is reasonably demonstrated, it is not an abuse of discretion for the trial [court] to admit the evidence in the absence of proof of tampering, bad faith, or ill-motive." (citations and internal quotation marks omitted) (second alteration in original)).

2. As to whether the trial court erred in declining to charge the jury on the lesser-included offense of simple possession of crack cocaine: State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010) ("The law to be charged must be determined from the evidence presented at trial." (citations omitted)); State v. Fields, 356 S.C. 517, 523, 589 S.E.2d 792, 795 (Ct. App. 2003) ("[A] trial judge does not err by refusing to charge a lesser-included offense where there is no evidence tending to show that the defendant was

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

guilty only of the lesser offense." (citations omitted)); see also S.C. Code Ann. § 44-53-375(B) (Supp. 2010) (providing that a person commits PWID crack cocaine rather than merely simple possession of crack cocaine where the person "possesses with intent to distribute . . . cocaine base . . ."); State v. Franks, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (2008) ("The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense." (citations and internal quotation marks omitted)).

AFFIRMED.

FEW, C.J., HUFF and THOMAS, JJ., concur.

181
Yoder Copy

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Anderson County

Hon. J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Kevin M. Ware,

Appellant.

PETITION FOR REHEARING

Kevin M. Ware, #269271
McDougall Corr. Inst.
1516 Old Gilliard Road
Ridgeville, SC
PRO SE APPELLANT

Other Counsel Of Record:

Mr. William M. Blitch, Jr.
Asst. Attorney General
P.O. Box 11549
Columbia, SC 29211

Under Rule 221, South Carolina Rules of Appellate Procedure, Appellant respectfully moves this Court to withdraw the Unpublished Opinion, No. 2011-UP-272, and reassess those determinations leading to the dismissal of Kevin Ware's appeal. Appellant received notice of the Court's decision on June 14, 2011. In support of this Petition For Rehearing, the Appellant alleges the following matters were misapprehended and/or overlooked by the Court.

DISCUSSION

- I. THE TRIAL COURT ERRED TO ADMIT 2.4 GRAMS OF CRACK COCAINE AS EVIDENCE OF WARE'S GUILT, WHERE THE INTEGRITY OF THE EVIDENCE WAS DESTROYED BY THE BAD FAITH ACTIONS OF THE EVIDENCE CUSTODIAN

As the first of two trial court errors argued on appeal, Appellant Kevin Ware (Ware), alleged that the court impermissibly admitted 2.4 grams of crack cocaine as evidence of Ware's guilt. Ware's objections stemmed from two factors.

First, the trial court erred to admit the crack cocaine into evidence because the state failed to establish a clear chain of custody. The written records of the case, which is the best evidence, substantiates Ware's claim that the police combined two distinct pieces of evidence in the same Best-Evidence Kit, thereby contaminating the entire contents of the Best-Evidence Kit. (See attached evidence list; Rec. p.77, L.24 thru p.79, L.25).

Second, the custodian of the evidence, officer Mike Baskin, admitted under oath that he lied on the chain of custody Form-B

Affidavit. Officer Baskin stated that he delivered the evidence to S.L.E.D. for testing on January 16, 2007. However, Officer Baskins did not actually deliver the drugs to S.L.E.D. until January 29, 2007. After to swearing to the truth of the statements in the affidavit, Officer Baskin went back and added information to the affidavit, which in its most basic form must be viewed as fraud. (Rec. p.92, L.21 thru p.96, L.4; and p.149, LL.12-24).

As a basis for denying Ware relief on this ground of appeal, the Court relied on State vs. Hatcher, Op. No. 26950 (S.C. Sup.Ct. filed March 2011). In Hatcher, the Supreme Court held, "...it is not an abuse of discretion for the trial [court] to admit the evidence in the **absence of** proof of tampering, **bad faith**, or ill-motive." (emphasis added). It is precisely the Court's own words which support Ware's contention that the 2.4 grams of crack cocaine evidence should not have been admitted into evidence. On the one hand, the trial court found that Officer Baskin made a bad notary, or false notary, yet then stated the trial court relied on Baskin's testimony to admit the drug evidence; not the record evidence. (Rec. p.149, LL.12-24; and p. 80, LL.1-5).

The evidence custodian, Officer Mike Baskin, admitted that he lied on the Form-B affidavit. The trial court then ruled that Officer Baskin had made a "bad affidavit", or a fraudulent affidavit. Officer Baskin's deceptions regarding the care, custody, and handling of the evidence against Ware are precisely the type of bad faith conduct prohibited by Hatcher. If Officer Baskin's fraud does not violate the tenants of Hatcher, then any type of police misconduct in the handling of evidence is

permissible. (Rec. p.149, LL.12-24).

II. THE TRIAL COURT ERRED TO REFUSE TO CHARGE WARE'S JURY WITH THE LESSER INCLUDED OFFENSE OF POSSESSION OF CRACK COCAINE, WHEN EVIDENCE WAS SUBMITTED TO THE JURY TO SUPPORT A CHARGE OF SIMPLE POSSESSION

After the Defense's motion for a directed verdict was granted on the charge of conspiracy, (Rec. p.164, L.22 thru p.165, L.1), the Defense request the court to include a simple possession instruction in the charge to the jury. (Rec. p.166, LL.19-24). The trial court denied Defense's request for a simple possession charge. Ware renewed the lesser included offense charge request, but that request, too, was denied. (Rec. 189, LL.8-15).

Evidence presented at trial which supported a lesser offense charge to the jury included:

1. The police collected crack pipes, and push-rods to clean the pipes, from the residence of the State's Witness, Virginia Richardson, where Ware was arrested. Ms. Richardson operated a "crack house" which was used to smoke crack. (Rec. 50, LL.10-15). Drug paraphernalia in the proximity of a small amount of drugs supports a theory that the drugs were intended for personal use, rather than for sale. Further, there was only 2.4 grams of crack cocaine found in the midst of five (5) persons, which also substantiates the defense's theory of simple possession. (Rec. p.50, LL.10-15).
2. Ware was only observed by police in possession of crack

cocaine. (Rec. p.65, LL.14-16).

3. Evidence custodian Mike Baskin collected only 2.4 grams of crack cocaine and crack pipes from the residence where Ware was arrested. (p.84, LL.23-24; and p.86, LL.5-7).

The South Carolina Supreme Court held in Suber v. State, 640 S.E.2d 884 (S.C.2007), that. "...the trial court is required to charge a jury on a lesser included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." There was ample evidence submitted to the jury that the crack cocaine discovered by police was intended only for personal use.

In State vs. Geiger, 635 S.E. 669 (S.C. App.2006), this Court held that, "...in determining whether the evidence warrants an instruction on a lesser offense, the court looks to the totality of evidence in evaluating whether such an inference has been created." The group of five persons, the presence of several crack pipes, and the small amount of crack cocaine all support of theory of use, not distribution. And even without the jury charge on simple possession, the jury was nonetheless convinced that Ware was not guilty of the greater offense of PWID.

The jury deliberated more than five hours in Ware's case. (Rec. p.219, L.6), and at one point the jury informed the trial court that the jury was unable to reach a verdict. (Rec. p.212, L.4). Faced with the choice of allowing Ware to go free, or convicting Ware of the greater offense of PWID, the jury chose the latter course. Given the option, the jury would have found

Ware guilty only of possession of crack cocaine. The only evidence supporting a charge of PWID is the self-serving testimony of Virginia Richardson, who received a probationary sentence on conspiracy charges in exchange for her testimony against Ware. (Rec. p.55, L.1 thru p.56, L.4).

CONCLUSION

WHEREFORE, having shown good and just cause, Appellant respectfully moves this Court to recall its opinion filed June 8, 2011, and remand this case to the Anderson County Circuit Court for retrial.

Respectfully submitted,

Dated: 6-22-2011.
Ridgeville, SC

/s/ Kevin Ware
Kevin Ware, #269271
Petitioner Pro Se

The South Carolina Court of Appeals

The State,

Respondent,

v.

Kevin M. Ware,

Appellant.

The Honorable J. C. Nicholson, Jr.

Anderson County

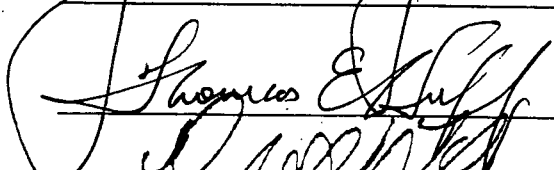
Trial Court Case No.

2007-GS-04-00971

2007-GS-04-00972

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.


C.J.

J.

Paul C. Thomas.

Columbia, South Carolina

FILED

August 15, 2011

CONTROL NO. B177531

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

FORM B (RULE 6)

**CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL
CUSTODY OR CONTROL
(Initial Custody)**

This is to certify that I Mike Baskin am employed by

(Name)

Anderson PD and that on

(Name of Agency or Department)

1-15, 2007, I seized from Kevin Montrell Ware/Virginia Gail Richardson

(Date)

(Name)

pursuant to Search Warrant/Drug Investigation

(State Whether Subject to a Warrant, Lawful Arrest or Otherwise)

at or near 305A E St, Anderson, SC

(Place Where Seized)

the following substance(s) or container(s):

(Describe substance or container with sufficient particularity to distinguish it.)

PPD Item # 15805-S, Plastic Baggie Containing Off White Rocklike
Substance

On 1-27, 2007, I made delivery of the above described

(Date)

substance(s) or container(s) to SLED of

(Name)

SLED in substantially the same condition

(Law Enforcement Agency)

as when I received it.

2 -

(Signature)

Place: SLED

Date: 1-29-2007

Sworn before me on this 16th day of Jan, 2007

Army W. Smith
Notary Public for South Carolina
My Commission expires Sept. 2009

Seizures

Date: 01/15/2007 Type Item: Drug, illicit
Description: Crack
Quantity: 2.80 Grams Value: 280 Location: Evidence

Date: 01/15/2007 Type Item: Vehicle
Description: 95 Honda Accord 2dr
Quantity: 1.00 Each Value: 5000 Location: City Garage

Informants

Witnesses

Name: Marsée, Kevin
Involvement: Case Agent
Name: Bracone, Mike
Involvement: Assisted

Evidence List

Item Type: CRACK

Item#: 1 Description: PLASTIC BAGGIE CONTAINING OFF WHITE ROCKLIKE SUBSTANCE (FIELD TESTED POSITIVE FOR COCAINE) ,MIKE BASKIN COLLECTS 1/15/2007 16:41 HOURS FROM MIKE BRACON, ORIGINALLY COLLECTED 1/15/2007 16:00 HOURS BY MIKE BRACON FROM [REDACTED] CONTROLLED DRUG BUY BY [REDACTED] AT 305A E ST 1/15/2007 , MIKE BASKIN SECURES IN BEST KIT B177531 TO GO TO SLED

Item Type: VALIUM

Item#: 2 Description: PLASTIC BAGGIE CONTAINING 10 BLUE ROUND PILLS SCORED & MARKED 2684 ON ONE SIDE & MARKED WITH A V ON THE OTHER SIDE,MIKE BASKIN COLLECTS 1/15/2007 16:41 HOURS FROM MIKE BRACON, ORIGINALLY COLLECTED 1/15/2007 16:00 HOURS BY MIKE BRACON FROM [REDACTED] CONTROLLED DRUG BUY BY [REDACTED] AT 305A E ST 1/15/2007 , MIKE BASKIN SECURES IN BEST KIT B177531 TO GO TO SLED

Item Type: CRACK PIPE

Item#: 3 Description: WASH CLOTH CONTAINING STRAIGHT METAL CRACK PIPE & METAL PUSH ROD,MIKE BASKIN COLLECTS 1/15/2005 21:15 HOURS AT 305A E ST , FROM THE RIGHT FRONT PANTS POCKET OF BETTY JEAN MORRISON, MIKE BASKIN SECURES IN 13E EVIDENCE ROOM

Item Type: CRACK PIPE

Item#: 4 Description: STRAIGHT METAL CRACK PIPE WRAPPED IN NAPKIN,MIKE BASKIN COLLECTS 1/15/2005 21:22 HOURS AT 305A E ST , FROM BATHROOM CABINET, MIKE BASKIN SECURES 13E EVIDENCE ROOM

Evidence List

Item Type: CRACK

Item#: 5 Description: PLASTIC BAGGIE CONTAINING BEIGE ROCKLIKE SUBSTANCE (FIELD TESTED POSITIVE FOR COCAINE) APPROXIMATELY 2.8 GRAMS ,MIKE BASKIN COLLECTS 1/15/2005 21:30 HOURS AT 305A E ST.FROM FLOOR UNDER DEFENDANT KEVIN MONTRELL WARE, MIKE BASKIN SECURES IN BEST KIT B177531 IN EVIDENCE ROOM TO GO TO SLED,MIKE BASKIN LOGS IN AT SLED 1/29/2007 & RELEASES TO AMY STEPHENS L07-01365

Item Type: CELLPHONE

Item#: 6 Description: BLACK SPRINT CELL PHONE # 864-367-4090 , MIKE BASKIN COLLECTS 1/15/2005 21:36 HOURS AT 305A E ST.FROM FLOOR UNDER DEFENDANT KEVIN MONTRELL WARE, MIKE BASKIN SECURES IN 13E EVIDENCE ROOM

Case Log

01/15/2007 20:59 ALL UNITS ENTRY

SEARCH WARRANT TEAM MAKES ENTRY 1/15/2007 20:59 HOURS AT 305A E ST

01/15/2007 21:18 MIKE BASKIN SEARCH WARRANT

MIKE BASKIN GIVES VIRGINIA GAIL RICHARDSON COPY OF SEACH WARRANT 1/15/2007 21:18 HOURS FOR 305A E ST

01/15/2007 21:47 MIKE BASKIN ITEMS TAKEN

MIKE BASKIN GIVES VIRGINIA GAIL RICHARDSON LIST OF ITEMS TAKEN 1/15/2007 21:18 HOURS FROM 305A E ST

01/15/2007 22:16 ALL UNITS LEAVE

ALL UNITS LEAVE SCENE 1/15/2007 22:16 FROM 305A E ST