STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2013-0001297

THE STATE,

Respondent,

v.

LEROY CLIFTON GIBBS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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Appellant opened the door to evidence that he had distributed crack cocaine on three prior occasions over the course of several weeks at various times of day from Home. Therefore, admission of the evidence was not error. In the absence of error in admitting the evidence, the trial court properly denied Appellant's motion for mistrial. (Appellant's Issues II and III.)

STATEMENT OF THE CASE

Appellant was charged with trafficking in crack cocaine (10-28 grams), manufacturing crack cocaine, and possession with intent to distribute powder cocaine. (R. p. ___, Indictments.) Appellant proceeded to a jury trial June 3-5, 2013. Appellant was found guilty on all counts. The Honorable W. Jeffrey Young sentenced him to an aggregate term of 15 years. (R. p. ___, Sentencing sheets.) This appeal follows.

STATEMENT OF FACTS

Around midday on December 23, 2008, police arrived at Home[1] with warrants for Appellant's arrest. (June 4-5 Tr. p. 31, lines 6-25.) Appellant's wife, Kimberly, answered the door. (June 4-5 Tr. p. 32, lines 12-23; pp. 136-137.) Appellant appeared from the direction of the bedroom in boxer shorts. (June 4-5 Tr. p. 32, line 23 – p. 33, line 2.) Appellant was placed under arrest, and he requested a pair of pants from the bedroom. (June 4-5 Tr. p. 33, line 21 – p. 34, line 4.) Cash in the amount of $1,355.00 was found in Appellant's pants pocket. (June 4-5 Tr. p. 34, lines 6-7.) Officers also detected an odor of marijuana in the home. (June 4-5 Tr. p. 35, lines 21-25.) Both Appellant and Kimberly were advised of Miranda rights. (June 4-5 Tr. p. 36, lines 4-22.) Investigator Wayne Dubose asked Appellant for permission to bring a drug dog into the residence. (June 4-5 Tr. p. 38, lines 9-12.) Appellant said he did not live there, but Kimberly consented to a search of the residence. (June 4-5 Tr. p. 38, lines 12-15; p. 39, lines 8-15; p. 40, lines 2-8; p. 138.)

During the search of the home, officers found:

- Materials used for manufacturing and packaging crack cocaine in a kitchen cabinet: a plastic bag containing white powder field testing positive for cocaine, baking soda, a measuring jar, pyrex dishes with residue field testing positive for cocaine, a fork, baggies, and four razor blades. (June 4-5 Tr. p. 43, line 24 – p. 50, line 4; p. 120, line 22 - p. 122, line 3 .)
- Three boxes of sandwich bags in a kitchen cabinet. (June 4-5 Tr. p. 64, lines 20-24.)

[1] Rather than list the address, for purposes of this brief, the residence where the warrants were served and the narcotics subject of this trial were found is referred to as "Home." Appellant's wife, Kimberly Gibbs, signed the lease for Home and listed Appellant and their young son as residents. (Tr. p. 129, line 20 – p. 130, line 3; p. 133, line 20 – p. 134, line 24; p. 157, lines 6-16; p. 174, lines 5-13.)

- A microwave with the glass turntable inside field testing positive for cocaine residue. (June 4-5 Tr. p. 50, line 5 – p. 51, line 3.)
- Marijuana (including a small blunt), cocaine, and crack cocaine in Kimberly's purse. (June 4-5 Tr. p. 54, line 5 – p. 55, line 17; p. 56, lines 20-23; p. 57, lines 15-23.) $40 was also found in the purse. (Tr. p. 58, line 5.)
- A Taurus .38 caliber revolver, a .45 caliber ammunition clip, and some 9mm bullets in the hallway closet near the bedroom. (June 4-5 Tr. p. 58, lines 10-13; p. 60, lines 15-22; p. 62, lines 12-14.)
- A .45 caliber handgun hidden in an air conditioner return vent. (June 4-5 Tr. p. 58, lines 13-19; p. 60, line 23 – p. 61, line 5.)
- A marijuana blunt in the ashtray in the bedroom where Appellant's pants were retrieved. (June 4-5 Tr. p. 57, lines 6-8.)

Substances found in the home totaled 12.25 grams of cutting agents (benzocaine and caffeine), 3.35 grams of powder cocaine, and 14.04 grams of crack cocaine. (June 4-5 Tr. pp. 113-120.)

Appellant was transported to jail while the search was being conducted. During the drive, Appellant was "steadily talking" and "rambling." (June 4-5 Tr. p. 85, lines 4-6.) Appellant mentioned "that selling drugs was a lifestyle to him." (June 4-5 Tr. p. 85, lines 7-20.) Kimberly remained in the home during the search. She granted officers permission to search her purse. (June 4-5 Tr. p. 140, lines 3-10.) When narcotics were found in her purse, Kimberly was shocked and said she did not know what the items were. (June 4-5 Tr. p. 55, lines 20-24; p. 140, line 11 – p. 141, line 21.)

Dubose met with Appellant at the detention center to serve warrants on December 24, 2008. (June 4-5 Tr. p. 67, lines 3-5.) Dubose read Miranda rights from a card. (June

4-5 Tr. p. 67, line 6 – p. 69, line 18.) Dubose asked about Appellant's prior statement that selling drugs was a lifestyle for him. (June 4-5 Tr. p. 70, line 17 – p. 71, line 6.) Appellant responded that he had to support his family. (June 4-5 Tr. p. 71, lines 7-8.) According to Dubose, Appellant "advised that none of the items was [sic] his because he did not live at the residence. ... [Appellant] said that his wife must have had someone else there because it wasn't his and it had to be hers." (June 4-5 Tr. p. 71, lines 18-22.)

Kimberly was also charged as a result of the search of Home. (June 4-5 Tr. p. 77, lines 19-23.) At trial, Kimberly testified she met Appellant in 2004 through a relative. (June 4-5 Tr. p. 127, lines 4-13.) At the time Kimberly was a construction electrician in the Navy. (Tr. p. p. 125-126.) They wed in 2006, and a child was born in 2007. (June 4-5 Tr. p. 127, line 14 – p. 128, line 23.) The couple moved back to Sumter in 2007, initially living separately with their respective parents. (June 4-5 Tr. p. 128, line 24 – p. 129, line 19.) Kimberly and Appellant then moved to Home. (June 4-5 Tr. p. 129, line 20 – p. 130, line 3.) Kimberly was employed at the time as a postal worker, and Appellant was unemployed. (June 4-5 Tr. pp. 129-130; p. 149, lines 6-9; p. 152, line 23 – p. 153, line 5.) Kimberly maintained that only she and Appellant lived at Home with their child, and the couple shared the master bedroom. (June 4-5 Tr. p. 142, line 20 – p. 143, line 8; p. 147, lines 5-22; p. 153, lines 7-16; p. 159, lines 12-13.) In addition to her denial that the items found in her purse belonged to her, Kimberly denied knowledge of the items found in the kitchen cabinet, stating she believed only canned goods to be in the cabinet. (June 4-5 Tr. p. 143, line 11 – p. 144, line 12; p. 145, line 18 – p. 146, line 22.) Kimberly also denied knowledge of the weapons in the home and the blunt found in the bedroom ashtray. (June 4-5 Tr. p. 144, line 13 – p. 145, line 17.) When asked if she had ever seen Appellant cook crack cocaine at Home, Kimberly again denied knowledge, stating, "I was at work so I

couldn't tell you his activities." (June 4-5 Tr. p. 146, line 23 – p. 147, line 4; p. 147, line 23 – p. 148, line 3; p. 151, lines 7-13; p. 152, lines 8-18.)

Appellant also testified at trial. The primary thrust of Appellant's defense consisted of a denial that he lived at Home, thereby denying constructive possession of the narcotics found there. Appellant stated that while he and Kimberly moved into Home in April 2008, by late 2008 he was no longer staying there as his primary residence. (June 4-5 Tr. p. 177, lines 12-25.) Appellant stated due to altercations, "eighty-five percent of the time, [he] would be staying at [his] mom's, and there was plenty of times that...she would have friends and...people that she deal with [boyfriends] at that – at the residence." (June 4-5 Tr. p. 173, lines 1-17; p. 178, lines 1-19.) After Appellant denied Home was his residence, the solicitor examined Appellant on several purchases of crack cocaine made by confidential informants: one on October 28, 2008, at 1:29 pm; one on November 24, 2008, at 12:28 pm; and another on December 1, 2008, at 4:43 pm. (June 4-5 Tr. p. 175, line 14 – p. 176, line 13.) Appellant denied the transactions. (Tr. p. 175, line 14 – p. 176, line 13; p. 183, line 11, line 23 & line 25.) Appellant was also asked about another incident, without objection, where it was alleged that he had traded drugs for 10 Loricet pills, and Appellant likewise denied that exchange. (June 4-5 Tr. p. 184, lines 1-14.)

Appellant also denied ownership or knowledge of any of the drugs and related paraphernalia seized from Home. (June 4-5 Tr. p. 168, line 1 – p. 169, line 4; p. 179, line 19 – p. 180, line 8.) While denying that the drugs belonged to him, Appellant also denied Kimberly had anything to do with the drugs in the residence. (June 4-5 Tr. p. 170, line 19 – 171, line 1.) Appellant conceded that, when Dubose confronted him about the drugs and associated items found in Home, he commented that "[Kimberly] must have had

someone there because it was not [Appellant's] and had to be hers." (June 4-5 Tr. p. 186, lines 1-5.) Appellant denied making the statement "selling drugs is a lifestyle for me," or stating that he was supporting his family through drug sales. (June 4-5 Tr. p. 169, lines 5-17; p. 184, line 25 – p. 185, line 11.) With regard to the alleged comment that drugs were a lifestyle for him, Appellant commented, "Why would I say drugs was a lifestyle for me whereas I had no knowledge of the drugs." (June 4-5 Tr. p. 182, lines 13-16.) Appellant maintained that the only statement he made to officers was a denial of knowledge of any drugs in the residence. (June 4-5 Tr. p. 169, lines 21-23.) Appellant also explained that the large sum of money in his pants came from a car accident. (June 4-5 Tr. p. 171, line 20 – p. 172, line 18.)

Following Appellant's testimony, Dubose was called in reply. Dubose provided details of the three undercover buys of crack cocaine from Appellant at Home on October 28, 2008, November 24, 2008, and December 1, 2008. (June 4-5 Tr. pp. 191-199.)

ARGUMENTS

I.

Failure to provide warnings regarding the pitfalls of self-representation in the absence of a timely and unequivocal request for self-representation is not reversible error. The trial court's denials of Appellant's requests regarding counsel's services are subject to review for abuse of discretion. The trial court did not abuse its discretion in denying Appellant's untimely and equivocal request to proceed *pro se*.

Appellant asserts that the trial court erred in denying his request to proceed *pro se* without conducting an inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975). Appellant's request was untimely and equivocal, thereby failing to trigger Faretta. The trial court's denial of the motion is subject to review under an abuse of discretion standard, and the State submits that no abuse of discretion occurred in this matter.

In Faretta, the United States Supreme Court recognized a defendant's right in a state criminal trial to proceed without counsel when he voluntarily and intelligently elects to do so. "A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). The rule is not without exceptions, however. A defendant "may waive the right to counsel and proceed at trial *pro se* only if the waiver is (1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely." U.S. v. Bernard, 708 F.3d 583, 588 (4th Cir. 2013) (citing United States v. Frazier–El, 204 F.3d 553, 558 (4th Cir.2000) (collecting cases)); Faretta, supra. After trial proceedings have commenced, the rights to proceed *pro se* or to substitute counsel are curtailed in the interests of administration of justice.

Appellant's request to represent himself, if it can truly be considered as such, was not raised in a timely fashion. The right to represent oneself "[is] not absolute and [can]

be limited or waived if not raised before trial." U.S. v. Dunlap, 577 F.2d 867, 868 (4th Cir. 1978). With regard to timeliness of a request for self-representation, "courts recognized, among other things, the need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury." Id. Further, if such a request made after the jury is selected but before the jury is sworn was to be granted, "the trial judge would have been obliged to postpone the commencement of trial for an extended period in order to allow [the defendant] a sufficient amount of time to prepare his defense." Robards v. Rees, 789 F.2d 379, 384 (6th Cir. 1986). Due to these concerns, while a timely and unequivocal request may generally be granted, in the case of an untimely request, the trial court's ruling regarding whether a defendant may relieve counsel and proceed *pro se* is reviewed for abuse of discretion. Id.; Dunlap, supra.; Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999). Judge Young did not abuse his discretion in denying Appellant's request in this case.

The case of U.S. v. Lawrence, 605 F.2d 1321 (4th Cir. 1979) is factually similar to the case at hand. In Lawrence, following several motions made in the year leading up to trial, the defendant's trial began on a Monday. The court "published the indictment to the venire and made some prefatory remarks, the attorneys proceeded with the voir dire of the jurors...resulting in a panel of twelve jurors and two alternates." Id. at 1322. There was an overnight recess. On Tuesday, following the resolution of another motion made by the defendant, defendant requested that his attorney move to be relieved. As in Appellant's case, Lawrence's request to relieve counsel was made before the jury was sworn but after the jury had been selected and some motions heard. The Lawrence court noted:

> A court should, of course, vigilantly protect a defendant's constitutional rights, but it was never intended that any of these rights be used as a ploy to frustrate the orderly procedures of a court in the administration of justice.

Id. at 1325. In Lawrence, the abuse of discretion standard of review was applied:

> ...we think it reasonable, and entirely compatible with the defendant's constitutional rights, to require that the right of self-representation be asserted at some time 'before meaningful trial proceedings have commenced,' and thereafter its exercise rests within the sound discretion of the trial court.

Id. at 1325. Lawrence found that the selection of the jury and the motions heard constituted meaningful trial proceedings. Therefore, Lawrence's request to represent himself was untimely, and the court found no abuse of discretion in the court's denial of that motion.

Appellant's case is strikingly similar. In the present case, Brooks represented Appellant on the same charges for some time, resulting in a hung jury and mistrial in February 2013. (May 23 Tr. p. 3.) On May 23, 2013, approximately 10 days before the trial was to begin, Brooks asked to be relieved as counsel, citing Appellant's complaint to the Office of Disciplinary Counsel and disagreement regarding an offered plea and other aspects of the representation. (May 23 Tr. pp. 4-5.) Appellant took no position on Brooks' request at that time. (May 23 Tr. p. 5.) Noting concerns that Appellant's grievance was a delay tactic, Judge James denied Brooks' motion to be relieved as counsel. (May 23 Tr. pp. 6-9.) On June 3, 2013, the jury was selected, pre-trial motions were made, and a hearing was held on the admissibility of Appellant's statement which included testimony from officers and Appellant. (June 3. Tr.) It was not until June 4 that Appellant made his request to be appointed co-counsel with Brooks, the denial of which prompted subsequent assertions that he would like another attorney appointed or would

like to proceed *pro se*. While the jury had not been sworn when the request was made, as in Lawrence, meaningful trial proceedings had commenced, and the request was thus untimely and subject to review for abuse of discretion. Further, in the present case, where Appellant had taken no position on the request to relieve counsel during the May 23 hearing, his requests to proceed as co-counsel or otherwise relieve counsel strongly suggest he lacked a genuine inclination to do so; his requests were a stalling tactic. Judge Young did not abuse his discretion where Appellant's request was untimely made.

Appellant's request for self-representation was also equivocal. When Brooks moved to be relieved as counsel 10 days before trial, Appellant took no position on the request. (May 23 Tr. p. 5, p. 8.) Appellant was twice asked to take a position on the motion to be relieved with open-ended questions, but Appellant took no position at that time. (May 23 Tr. p. 5, p. 8.) Appellant first raised his motion on the second day of trial as a request to be appointed co-counsel along with Brooks. (June 4-5 Tr. p. 7, lines 13-14.) The court correctly denied this request, and Appellant does not challenge the ruling on appeal. United States v. Lang, 527 F.2d 1264 (4th Cir. 1975) (not error to deny defendant's motion to appear as co-counsel). Appellant never suggested that he should relieve counsel and proceed alone until pressed by the trial judge. Appellant first responded to questions indicating that he would like another attorney appointed in Brooks' place. (June 4-5 Tr. p. 8, lines 2-8.) The exchange continued:

> THE COURT: If you – if you want nothing to do with Mr. Brooks, then I can relieve Mr. Brooks, but the case will go on and you'll represent yourself.
> THE DEFENDANT: Okay.
> THE COURT: So you want to represent yourself?
> THE DEFENDANT: Yes, sir.

(June 4-5 Tr. p. 8, lines 9-14.) Due to Appellant's apparent vacillation, the court was justified in insisting Appellant proceed with appointed counsel. United States v. Bennett, 539 F.2d 45 (10th Cir. 1976) (defendant forfeited right to self-representation by vacillating positions); see also U.S. v. Frazier-El, 204 F.3d 553, 560 (Considering record as a whole and vacillation between request for substitute counsel and self-representation, court correctly insisted defendant proceed with counsel). "The requirement that a request for self-representation be clear and unequivocal also prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation." Frazier-El, 204 at 559. "In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." Id. Where Appellant's request for self-representation came only upon the heels of the denial of his request to appear as co-counsel and in response to leading questions by the court, the request was equivocal.

Judge Young did not abuse his discretion in denying Appellant's request to relieve counsel and proceed *pro se*.

> The requirement that the assertion be clear and unequivocal 'is necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional musings,' and it also 'prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation.'

United States v. Bush, 404 F.3d 263, 271 (4th Cir. 2005) (quoting Frazier-El, 204 F.3d at 558-59). Several factors may be considered in evaluating whether a trial judge has abused his discretion in denying a motion to relieve counsel:

> ...timeliness of the motion, adequacy of the trial judge's inquiry into the defendant's complaint, and whether the attorney-client conflict was so great that it resulted in a total lack of communication, thereby preventing an adequate defense.

State v. Sims, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991). As discussed at length above, Appellant's request was not timely made. To allow Appellant to proceed *pro se* at that juncture would cause unneeded delay and confusion. Appellant gave no new reason for his desire to proceed as co-counsel, stating only that he believed his "client [sic] is not going to represent me...to the fullest." (June 4-5 Tr. p. 7.) Judge Young was aware that another judge had denied a motion to relieve counsel after a thorough motion hearing. (June 4-5 Tr. p. 7, line 24 – p. 8, line3.) Brooks had already represented Appellant in a trial on these exact same charges which resulted in a hung jury. When Appellant addressed the court regarding Brooks on June 4, the court had already had the opportunity to observe Appellant and Brooks during jury selection and other pre-trial motions. There is no evidence that Appellant and Brooks had a "total lack of communication." It appears that Brooks was putting forth an able defense. For all these reasons, Judge Young did not abuse his discretion in denying Appellant's untimely and equivocal request to proceed *pro se*.

Appellant attempts to cast the court's failure to apprise him of the risks involved in self-representation as reversible error. "Faretta does not deal with the situation of a defendant attempting to proceed *pro se* after trial has begun." Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990). The "Faretta warnings" are a vehicle through which a trial judge may determine whether the defendant's waiver of his right to an attorney is made knowingly and intelligently, with a full understanding of the risks and pitfalls of his decision. Such inquiry may be required for a proper Faretta request. However, because

Appellant's motion, even if considered an unequivocal request to represent himself, was not made in a timely fashion, the court was not duty-bound to conduct a hearing. The right to represent oneself does not attach unless and until it is asserted – and it must be asserted in a timely and unequivocal fashion. See State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (request for self-representation must be clearly asserted); see also Raulerson v. Wainwright, 469 U.S. 966, 970–71, 105 S.Ct. 366, 369 (1984) (Marshall, J., dissenting from denial of cert.) ("If a request [for self-representation] is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire to waive a right to counsel.") The court's responsibility to make further inquiry is triggered by a proper request. In the absence of such a request, the failure to warn as outlined in Faretta is not reversible error. See McKee v. Harris, 649 F.2d 927 (2nd Cir. 1981) (While formal inquiry should have been made into reasons for dissatisfaction where defendant presented seemingly substantial reasons for complaint, failure to do so was harmless error).

II.

Appellant opened the door to evidence that he had distributed crack cocaine on three prior occasions over the course of several weeks at various times of day from Home. Therefore, admission of the evidence was not error. In the absence of error in admitting the evidence, the trial court properly denied Appellant's motion for mistrial. (Appellant's Issues II and III.)

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

Prior to trial, Appellant attempted to secure a ruling from the court *in limine* regarding prior sales made to a confidential informant ("CI buys"). The trial court agreed that the prosecution would not mention what the offenses named in the arrest warrants which prompted their visit to Home on December 23, 2008. The prosecution would say

only that there were arrest warrants to be served. In so ruling, the court effectively issued a tentative ruling that evidence regarding the three CI buys would be excluded on the basis of Rule 403, SCRE.

Counsel raised an additional concern: "...if my client gets up and says and I don't live here. I don't live here is that going to be equivalent of opening the door for Officer Dubose to come up and say, well, in November so and so we sent a CI and he was there then. And then in December so and so we sent a CI and ---." (June 3 Tr. p. 47, lines 4-9.) The trial court opined "that may very well... he can't say I don't live here and then say, well, they can't ask me any questions about it." (June 3 Tr. p. 47, lines 10 & 15-17.) The trial court withheld any ruling on the matter pre-trial. (June 4-5 Tr. p. 48, lines 2-5.)

Appellant did ultimately take the stand to deny possession or narcotics in Home. This led to logical questions regarding whether Appellant lived there. It stands to reason that if Appellant lived in the home, he must know of the items. Appellant denied residence in the home in order to contest his constructive possession of the items. In doing so, Appellant opened the door to evidence tending to show that he did in fact live at Home. Appellant painted himself as an occasional visitor to the home late in 2008, coming over only at Kimberly's behest or as a sometime caregiver for his son when Kimberly's parents were unavailable. (June 4-5 Tr. p. 171, lines 6-17; p. 174, line 17 – p. 175, line 1 & lines 14-19.) Even when watching his son, Appellant stated that he would often watch the child at his mother's residence, not Home. (June 4-5 Tr. p. 171, lines 6-17.) Appellant claimed that "eighty-five percent of the time, [he] would be staying at [his] mom's," and Kimberly would have boyfriends and other friends at Home. (June 4-5 Tr. p. 173, lines 1-21.) Appellant minimized his contact with Home and injected the

claim that others stayed at the home in order to cast doubt on his constructive possession of the narcotics and associated items found there.

Indeed, evidence of prior bad acts is only admissible in limited circumstances. State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (Evidence of prior bad acts admissible to show (1) motive, (2) intent, (3) the absence of mistake or accident, (4) commons scheme or plan, or (5) identity of the person charged with the commission of the crime on trial). Admission of evidence under Lyle is still subject to the balancing test reflected in Rule 403, SCRE. State v. Culbreath, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). "Notwithstanding, a defendant may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination." Id. As noted by the trial court upon granting Appellant's pre-trial request not to reveal that the arrest warrants being executed were for CI buys, "[Appellant] can't say I don't live here and then say, well, they can't ask me any questions about it." (June 3 Tr. p. 47, lines 15-17.) "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012).

In his testimony, Appellant placed in issue not only whether he resided in the home but also whether another person could have been the owner, distributor, and manufacturer of narcotics found inside. Appellant placed in issue whether he was merely present in the home where narcotics were found as he denied any knowledge of the narcotics. As summarized in State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 n. 3 (Ct. App. 1995):

> Proof of constructive possession requires a showing that the accused had knowledge of and dominion or control over either the drugs or the premises upon which the drugs were found. State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974). Mere presence in the area where drugs are found does not constitute constructive possession. State v. Tabory, 260 S.C. 355, 196 S.E.2d 111 (1973). Constructive possession may be proven by circumstantial evidence. State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988).

Under Lyle and its progeny, as well as Rule 404(b), SCRE, evidence of other crimes or bad acts is generally not admissible to prove a defendant committed the specific crime charged unless the evidence tends to establish motive, intent, the absence of mistake, identity, or a common scheme or plan. Appellant opened the door to this evidence where he denied residence at Home and denied knowledge of drugs there. Evidence of three prior instances where Appellant sold crack cocaine from Home proved by circumstantial evidence that (a) Appellant did in fact reside at Home since he had been there on the three random occasions in which an informant had purchased narcotics, (b) Appellant had knowledge of and control of narcotics at Home because he had sold the same narcotics there on three prior occasions, and (c) the narcotics seized as a result of the search on December 23, 2008, were part of Appellant's ongoing scheme to manufacture and distribute narcotics at Home.

"A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's

interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." Id.

Here, the trial court did not abuse its discretion in denying Appellant's request for a mistrial based on testimony about the CI buys. As discussed above, there was no error upon which to consider such a request where the trial court properly permitted questioning of Appellant regarding the prior CI buys and testimony regarding the CI buys. Without the requisite error, there is no need to consider a motion for mistrial.

Here, the evidence was not unfairly prejudicial. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." Wilson, supra, at 8, 545 S.E.2d 830. In Wilson, the defendant was charged with possession with intent to distribute crack cocaine. Law enforcement officers entered the hotel room Wilson shared with his girlfriend and discovered .78 grams crack cocaine, baggies, a beer can modified as a smoking device, and $761 cash. Wilson claimed that the lights were out when he returned to the room at 4:30 am, and he was unaware of the crack cocaine and associated items in the room. Wilson's girlfriend testified that she saw Wilson give a woman a bag containing a white rock substance in exchange for $20 two days before. The court found, "In light of the State's reliance on

circumstantial evidence to prove intent, the evidence of a prior drug transaction only two days earlier at the same location was especially probative. Further, its probative value was not substantially outweighed by the danger of suggesting a decision on an emotional or other improper basis." Id.[2]

In State v. Gore, 299 S.C. 368, 369, 384 S.E.2d 750 (1989),

> Appellant was charged with constructive possession of drugs and drug paraphernalia found in the trailer where his mother, brother, and sister resided. At trial, appellant denied residing at the trailer at the time in question. Upon cross-examination by the solicitor, he denied ever selling drugs out of the trailer. Over appellant's objection, the trial judge allowed reply testimony by a confidential informant who stated he had purchased cocaine from appellant at the trailer on two prior occasions.

The court held that evidence of the purchases made one month earlier tended "to establish his intent regarding the cocaine in his possession at the time in question." Id. at 370, 384 S.E.2d 751.

This case closely resembles the scenarios in Wilson and Gore. The evidence of prior drug transactions in the present case is particularly probative in light of the State's reliance on circumstantial evidence to prove Appellant's constructive possession of the items found in Home, particularly so where Appellant denied residence, denied knowledge of the narcotics and related items, and suggested that other individuals may be responsible for the narcotics. Evidence that he in fact distributed crack cocaine on prior occasions from the home where crack cocaine, materials to make crack cocaine, and plastic bags commonly used to distribute cocaine were found is probative of Appellant's intent to manufacture narcotics, to distribute narcotics found at the home, his knowledge

[2] While the amount of crack cocaine in Wilson did not give rise to an inference of distribution and the amount found in the present case did, the State is still entitled to present evidence of intent to distribute as proof of the amount alone does not relieve the state of its burden of proving intent to distribute beyond a reasonable doubt.

of their presence, and his business plan or scheme. As in Wilson and Gore, the probative value of this evidence was not outweighed by the danger of suggesting a decision on an emotional or other improper basis.

For all these reasons the evidence of three prior drug transactions was properly admitted by the trial court.

CONCLUSION

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

Respectfully submitted,

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