STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

vs.

RANDY HOWZE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

Post Office Box 691
1675-1E York Highway
York, South Carolina 29745

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in allowing testimony that crack dealers usually did not carry crack pipes while users often do carry crack pipes because it was proper testimony, and the testimony was not burden-shifting because it was merely evidence that the jury could weigh in conjunction with all the other evidence before it.

STATEMENT OF THE CASE

Appellant Howze was indicted for possession with intent to distribute cocaine base. The jury trial started October 17, 2012, before the Honorable Edward W. Miller. Howze chose not to attend. Howze was found guilty as charged, and Judge Miller sealed his sentence. On March 31, 2014, Judge Lee Alford unsealed the sentence. Howze was sentenced to twelve years imprisonment.

STATEMENT OF FACTS

Officer Justin Spencer was on patrol in Rock Hill on April 23, 2012, when he passed a car with a headlight out and initiated a traffic stop. Officer Spencer approached the driver side of the car to speak with the female driver. Howze sat on the passenger side. Officer Spencer called for backup, and two officers arrived. Officer Spencer asked Howze for his identification. Howze said he did not have one. Officer Spencer noted he became defensive and asked questions when Officer Spencer made this request. In contrast, the female driver cooperated with requests for identification. Officer Spencer asked Howze for his name and birth date. Howze said he was "Jeff Burris" and gave his birth date as March 6, 2000. Officer Spencer did the math and was certain that the full grown man before him was not twelve years old. Officer Spencer asked Howze to exit the car. As Howze got out of the car, he charged one of the backup officers, Officer William Morales, and struggled with the officers, who pulled his shirt off as he freed himself and took off running. ROA. pp. 51-55.

The officers caught up to him about a quarter to a half-mile away. They placed Howze in handcuffs. No drugs, crack pipes, or other drug paraphernalia were found on Howze when he was searched. Howze still would not say who he really was, but officers found out from the female driver and ran a warrant search (the female driver previously claimed she did not know who he was, but cooperated once she was arrested for hindering a police officer). Officer Spencer testified he was puzzled when the warrant check came back clean. He did not understand why Howze ran. But when Officer Spencer checked where the struggle occurred on the side of the road near the car, he found a clear plastic bag with crack cocaine inside. ROA. pp. 56-61; pp. 68-69. The

single piece of crack weighed 3.51 grams. ROA. p. 109.

Officer Spencer testified that no crack pipe or other drug paraphernalia was found in the car. ROA. p. 70. When Officer Spencer reviewed the patrol vehicle video later, which was introduced into evidence, he noted a white object flying out of Howze's jacket during the struggle. ROA. p. 67.

Officer William Morales testified he was assisting Officer Spencer during the traffic stop, which occurred in the nighttime. Officer Morales testified he was positioned on the passenger side of the vehicle while Officer Spencer was on the driver side speaking with the vehicle occupants. When asked for registration and proof of insurance, the female passenger indicated it was a new car and the male passenger, Howze, looked through the glove box for vehicle information. ROA. pp. 79-81.

Officer Morales testified as follows about what happened when Howze exited the car:

> Officer Spencer motioned to me to go ahead and get [Howze] out of the vehicle. I told him all right, let's come on step out of the vehicle. I opened the door and as he stepped out of the vehicle, he looked at me. Officer – there was a second or third officer, Officer Bryson started walking towards me. Officer Spencer started walking around the vehicle and he was out of the vehicle no less than three seconds, if that, when [Howze] basically ducked his head down, went at me, in the attempt to escape. I grabbed his shirt. We got into a little bit of a tussle. Well, I grabbed his sweatshirt he had on. Got in a little bit of a tussle. He was able to get loose and slip out of his shirt and we took off running after him and then Officer Spencer and myself ended up chasing after him.

ROA. p. 85, lines 6-20. Officer Morales explained that Officer Bryson grabbed the sweatshirt too. They dropped the sweatshirt to chase after Howze. Other officers were

on the scene as Howze fled, and as he approached woods, there were officers with flashlights in the woods. Officer Morales felt this might have prompted Howze to start running back towards him and Officer Spencer. Howze came out of the woods and seemed to see Officer Spencer but did not see Officer Morales. Officer Morales stealthily positioned himself and then caught Howze. ROA. pp. 86-88.

Officer Spencer found the bag of crack cocaine. However, the officers did not find drug paraphernalia or a crack pipe. ROA. pp. 89-90. Officer Morales noted that the crack can be seen falling out of the sweatshirt in the video. ROA. p. 91.

Commander Marvin Brown testified as an expert witness in the packaging and sale of narcotics. His qualifications were indubitable. Brown is the supervisor of the York County Drug Enforcement Unit, a county multi-agency unit. He had commander level training with the Drug Enforcement Agency and speaks at the commander school sometimes. Part of the courses he takes or teaches involves learning the street value of drugs, identifying drug paraphernalia, and understanding narcotics transactions. Commander Brown has been involved in thousands of drug arrests. Commander Brown made his first crack arrest in 1990. Commander Brown has been involved in drug enforcement for over thirty years. Commander Brown explained the following about his opportunities to interview crack users:

> We try to interview every single person we arrest. Believe it or not, we try to. That's one of our strong points. Every person we arrest, even if the drugs are in their pocket, we try to interview them and find out where the drugs came from and go from there.

ROA. p. 116, lines 19-23. Commander Brown testified he has interviewed hundreds of crack users and even more crack dealers. Commander Brown also interviews

confidential informants. At the time of trial, Commander Brown had testified as an expert twice in federal court and at least four times in state court. ROA. pp. 113-118. Commander Brown further testified, "I've interviewed hundreds of people about how crack cocaine is sold, used, the intoxicating dose, how it is packaged, the scale – type of scales you might use. Hundreds of people, so yeah, I'm pretty well versed on crack cocaine." ROA. p. 120, lines 2-6.

The trial court found Commander Brown was qualified as an expert in "how cocaine is packaged, sold, the going price, and the typical intoxicating dosage." ROA. p. 126, lines 20-23. The trial court declined to allow Commander Brown's expertise to be extended to "the different habits between the typical addict, the user, and the typical drug dealer" out of concerns that might constitute psychology, but found he could testify about his experiences with users and dealers based on his common day experiences. ROA. p. 117, lines 19-23; p. 120, lines 18-22; p. 122, line 21 – p. 123, line 21; p. 125, lines 5-11; p. 126, lines 11-23.

Commander Brown testified that the typical intoxicating dose for crack cocaine is a twenty-dollar rock. Crack cocaine is typically consumed with a crack pipe. Crack users will often carry two or three lighters because a rock may have to be constantly lighted. ROA. p. 128. Commander Brown testified as follows about packaging:

> Cocaine is placed into plastic because it is powdery. Crack cocaine, the bigger it is it can be placed in plastic but twenty dollar rocks oftentimes are sold – since it's hard like peanut brittle, they cut a piece off the larger piece and sell it without even baggies. In the old days it was in baggies and little vials, but the last five, ten years they just sell it straight out. Just hand you – cut it and hand it to you, two rocks or three rocks and it's not packaged in anything.

ROA. p. 128, line 23 – p. 129, line 6. Commander Brown further explained: "They buy a bigger piece and they cut it off and sell it in smaller pieces out on the street." ROA. p. 129, lines 18-19. Brown explained twenty dollar rocks are not typically weighed: "They are eyeballed because you can pretty much look at it. You get a tenth of a gram and once in a while it ends up being two tenths of a gram, . . . it's common for crack dealers not to have scales and baggies . . . It's common for them to have a bag in their pocket and they pull it out and they chip a piece off and sell it." ROA. p. 130, line 22 – p. 131, line 5.

Commander Brown testified that for a crack user, "we normally find crack pipes and oftentimes lighters and I don't know why, I guess because they're brave, but many times we will find more than one crack pipe on a user. We'll find two or three." ROA. p. 132, lines 7-11.

Asked again about finding a crack pipe on a user, Commander Brown responded:

> It's about fifty-fifty. If they are taking it home, sometimes we – crack users will not have a crack pipe on them but oftentimes they do, because they go behind buildings. They go where ever they are at and smoke it. They don't walk around with it that often, but if they are trying to take it home with them, they may not have a crack pipe, but probably more so than not, they – I said it was fifty-fifty, but we probably get crack pipes more so than not on a user.

ROA. p. 132, lines 12-23. Commander Brown testified that dealers normally do not have crack pipes. Commander Brown could not remember getting a crack pipe from a dealer in the last few years. ROA. p. 133, lines 3-7. Commander Brown testified that a crack user usually only buys one to three rocks. Users would not buy thirty-five rocks at a time. ROA. p. 133, lines 12-20. When cross-examined about whether dealers will have scales or baggies, Commander Brown explained:

> Higher level dealers normally have scales but the people who deal in eight balls – I'm sorry, 3.5. Three point five is an eighth of an ounce so they call them eight balls. That's a common amount to buy, is an eight ball, and resell. It's very common. Actually that's the most common street amount is an eight ball, which is 3.5 . . .

ROA. p. 137, lines 9-15. Commander Brown further explained that an eight ball was a popular amount, so it would not be uncommon for a dealer not to have any money on him because that is how much they bought. ROA. pp. 138-139.

ARGUMENT

The trial court did not err in allowing testimony that crack dealers usually did not carry crack pipes while users often do carry crack pipes because it was proper testimony, and the testimony was not burden-shifting because it was merely evidence that the jury could weigh in conjunction with all the other evidence before it.

Howze takes a rather novel approach on this appeal and contends a piece of evidence, not a jury instruction or closing argument, shifted the burden of proof. The testimony was Commander Brown's observations based on his considerable experience that dealers usually do not carry crack pipes, while users will often have crack pipes on them. This was admissible testimony, which like other properly admitted evidence, may be accepted or discounted by jurors. It did not serve to lessen the jury's responsibility to place the burden on the State to prove Howze was guilty beyond a reasonable doubt.

The argument is made in a conclusory fashion. Howze does not cite a single case regarding burden shifting. The Fourteenth Amendment to our federal constitution requires "the State prove very element of a criminal offense beyond a reasonable doubt." Sandstom v. Montana, 442 U.S. 510, 512 (1979). "A shifting of the burden of proof would impose a significantly greater onus on the defendant and, even more significantly, it would obliterate the presumption of innocence." State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 870 (1975). For instance, it is improper for the State to argue to the jury that they should cast a negative inference on the defendant when he fails to present any evidence at trial. State .v Posey, 269 S.C. 500, 504, 238 S.E.2d 176, 177 (1977). In some cases, a trial court's jury instruction may run the risk of shifting the burden of proof. See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, evidence,

otherwise admissible, merely adds, subtracts, or has no effect on the progress of removing a juror's reasonable doubt – the jury can take it for what it is worth.

Brown was properly qualified as an expert and his testimony is within the scope of his expertise. A witness "is competent as an expert when he or she has acquired knowledge, skill, or experience so that he or she is better able than the jury to form an opinion on the subject matter." State v. Robinson, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012) (finding Commander Brown's thirty years of experience and involvement in hundreds of crack cocaine cases sufficient for Commander Brown to be qualified as an expert).

Further, as testimony based on Commander Brown's observations from his experience with crack cocaine cases, the testimony was proper. State v. Williams, 321 S.C. 455, 464, 469 S.E.2d 49, 54 (1996) ("Some statements are not mere opinions but are impressions drawn from collected observed facts.").

In the instant case, Brown testified that users often have crack pipes on them:

> It's about fifty-fifty. If they are taking it home, sometimes we – crack users will not have a crack pipe on them but oftentimes they do, because they go behind buildings. They go wherever they are at and smoke it. They don't walk around with it that often, but if they are trying to take it home with them, they may not have a crack pipe, but probably more so than not, they – said it was fifty-fifty, but we probably get crack pipes more so than not on a user.

ROA. p. 132, lines 15-23.

In contrast, Brown testified that dealers rarely have crack pipes on them, explaining:

> [C]rack pipes aren't on the dealers. If the dealer is a user and a dealer, which you get that once in a while, but they

> are still a dealer, but dealers, we normally don't get crack pipes. I can't remember getting a crack pipe on a dealer in the last few years.

ROA. p. 133, lines 3-7.

This testimony hardly amounts to a declaration that a person in possession of crack without a crack pipe is a dealer. The testimony merely presents one factor to consider, and Brown makes clear that users do not always have crack pipes on them. The testimony does not foreclose the possibility that Howze was going to consume an eighth of an ounce of cocaine himself. The remainder of Brown's testimony is far more harmful to Howze because of its probative value. For instance, Brown testified that the amount Howze had in his possession, an eight-ball of crack, is a standard amount bought for distribution. ROA. p. 137, lines 9-15. Brown also noted that in the last five to ten years, street level dealers are not individually packaging twenty dollar rocks, but chipping away a gram at a time from a single rock in a single baggie. ROA. pp. 128-131.

The instructions to the jury made clear about their role as the sole fact-finder. The jury was advised that they must determine the credibility of the witnesses, and they may believe part or none of a witness' testimony. ROA. pp. 176-77. The trial court advised the jury that "[t]he burden of proof always remains on the State and the Defendant is never required to prove their innocence." ROA. p. 178, lines 3-4. The trial court advised the jury at length about the presumption of a defendant's innocence and the need for the State to prove guilt beyond a reasonable doubt. ROA. pp. 178-179. Specifically the trial court told the jury "the State must prove beyond a reasonable doubt that the Defendant possessed the crack cocaine with the intent to distribute it." ROA. p. 179, lines 2-4.

The trial court repeated itself as follows: "The State must also prove beyond a

reasonable doubt that the Defendant intended to distribute the crack cocaine." ROA. p. 179, lines 10-12. The trial court warned the jury that to convict Howze as charged, "You must find that the Defendant did not intend to have the crack cocaine solely for his own use." ROA. p. 179, lines 24-25. Speaking as to the statutory inference on weight, the trial court noted, "This inference [does] not relieve the State from proving beyond a reasonable doubt that the Defendant had the intent to distribute. It is simply an evidentiary fact to be taken into consideration by you along with all the other evidence in the case to be given the weight that you the jury thinks it should receive." ROA. p. 180, lines 1-9.

The admission of improper evidence is harmless where it has no effect on the outcome of trial. "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice." State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012). "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)).

In the instant case, the testimony was proper, but it also had no effect on the verdict, and any perceived error is harmless beyond a reasonable doubt. The conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 19, 2015

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By: _____
DAVID SPENCER
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Tiffany L. Butler, Esquire, Appellate Defender, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 19th day of May, 2015.

NORMA BIGBEE
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727