ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES TRAMAYNE MYERS,

APPELLANT

APPELLATE CASE NO. 2014-002392

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying Appellant Myers' motion for a directed verdict when the state did not present substantial circumstantial evidence that the drugs belonged to Myers and the evidence only raised a mere suspicion of Myers' guilt when there were no eyewitnesses, and no forensic evidence connecting Myers to the drugs?

2. Did the trial court err in charging the jury on the hand of one is the hand of all when Myers was the only person arrested and charged?

STATEMENT OF THE CASE

On June 3, 2013, the Charleston County Grand Jury indicted Charles T. Myers on the charges of trafficking in cocaine more than twenty-eight grams but less than one hundred grams, and possession with intent to distribute marijuana (PWID), and possession of a weapon during a crime of violence. On October 6-8, 2014, Myers proceeded to trial before the Honorable Knox McMahon and a jury. Myers was represented by Benjamin Lewis, and the state was represented by Lauren Mulkey and Lindsey Byrd. Tr. 1. The jury found Myers not guilty of the gun charge but guilty of trafficking cocaine and PWID marijuana as indicted. Tr. 498, ll. 17 – Tr. 499, ll. 14. Judge McMahon sentenced Myers to the minimum twenty-five years on the trafficking cocaine third offense, and to five years on the PWID marijuana with sentences to run concurrent. Tr. 513, ll. 13 – Tr. 514, ll. 4. Myers' attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

The police in North Charleston received an anonymous tip on the tip hotline that Charles Myers was selling drugs in the Saratoga community. The police conducted surveillance of the area. Tr. 94, ll. 8 – Tr. 98, ll. 23. Tow trash pulls were conducted at the location where Myers reportedly stayed in Saratoga on August 27, 2012 and October 15, 2012. Tr. 104, ll. 23 – tr. 109, ll. 20. Based on these activities, a search warrant was obtained for the residence where Myers allegedly resided. This warrant was executed on October 26, 2012. Tr. 321, ll. 4 – Tr. 323, ll. 19.

When the police arrived, Myers was in the passenger seat of a vehicle parked in the driveway of the incident location. His girlfriend, Crystal Nelson, was in the driver's seat. The vehicle was searched and approximately eighteen grams of marijuana were found in the glove compartment. Baggies were found in the center console and a digital scale was found under the passenger seat and some marijuana on the passenger seat. Tr. 324, ll. 21 – Tr. 326, ll. 15; Tr. 351, ll. 9 – 22.

In the house were found Crystal's mother, Shirley Nelson, and Crystal's sister. Tr. 324, ll. 21 – Tr. 325, ll. 1. In bedroom one were found male and female clothing. Mail was also found with the names of Crystal Nelson and Charles Myers. Under the bed was found a pink Victoria's Secret box which contained a 9 millimeter handgun, thirty-four grams of powder cocaine, and fifty grams of marijuana. Tr. 307, ll. 1 – Tr. 309, ll. 23; Tr. 315, ll. 17 – 25; Tr. 331, ll. 1- Tr. 332, ll. 14.

In bedroom two which belonged to Crystal's mother, Shirley Nelson, was found marijuana in the nightstand. It was a personal use amount. Tr. 332, ll. 17 – 23. Detective

Tireka Cerone testified that ten grams of marijuana was consistent with one serving for personal use. Tr. 345, ll. 1 – 25.

Crystal Nelson testified that Myers was her boyfriend and that he stayed overnight with her in her bedroom on a regular basis. However, she and her mother were the only people who lived there. Myers helped with the bills sometimes. The gun in the box found under her bed belonged to her. The drugs in the box did not. She did not know the drugs were in the box and was surprised when they were found. She did not say she saw Myers put the drugs in the box. The police did not arrest her. Tr. 299, ll. 20 – Tr. 312, ll. 18.

Shirley Nelson, mother of Crystal, testified that only she and her daughter, Crystal, lived at the residence. Myers was Crystal's boyfriend and he helped with the bills sometimes. Tr. 407, ll. 6 – Tr. 409, ll. 15; Tr. 422, ll. 1 – 16. She admitted that the police found a pipe and marijuana in her room and issued her a ticket which she paid. Tr. 410, ll. 17 – Tr. 411, ll. 18. Shirley Nelson never saw Myers with any drugs nor a gun. She would have kicked him out if she saw him with cocaine in her house. Tr. 421, ll. 5 – 25.

Officer Jamell Foster testified in the pretrial hearing that when Myers was found in the car at the incident location with the marijuana, he was placed in the police vehicle. Because Officer Foster was known for his ability to "reason" with people, his sergeant asked him to talk with Myers because they could get "no compliance" from Myers. Tr. 171, ll. 9 – Tr. 178, ll. 25.

Officer Foster told Myers that everyone in the house, including his girlfriend, was going to jail. Myers allegedly told him that the girl had nothing to do with this. Officer Foster admitted that he "encouraged" Myers to tell the truth. Officer Foster also admitted that he told Myers he needed to be a man and be truthful about the contraband. Myers gave

a statement claiming ownership of all of the drugs. Tr. 191, ll. 1 – Tr. 195, ll. 25; Tr. 197, ll. 14 – Tr. 213, ll. 25.

Myers testified at the hearing that he gave the statement claiming ownership of the drugs only because he did not want his girlfriend and her mother to go to jail, and he believed they would have if he had not given the statement. His only choices were to go to jail himself or they go to jail. Tr. 241, ll. 1 – Tr. 244, ll. 10.

The trial judge ruled that the state had not proved that the statement was given voluntarily. The judge held that based on the totality of the circumstances, Myers' statement was not admissible given the fact that his girlfriend and her mother could have been arrested. Tr. 282, ll. 22 – Tr. 286, ll. 8.

Detective Cerone admitted on cross examination that the police had no forensic evidence in this case nor any eyewitness as to the drugs. There were no fingerprints, no DNA, no cameras, and no eyewitnesses as to who put the drugs in the pink box. Detective Cerone also agreed that only eighteen grams of marijuana were found in the car. According to her, ten grams was one unit and there two people in the car. Tr. 348, ll. 1 – Tr. 351, ll. 25.

At the close of the state's case, defense counsel moved for a directed verdict. Counsel argued that the state had only shown mere suspicion that Myers was responsible for the drugs. Other adults had access to the drugs. Counsel pointed out that there was as much evidence in the record that Crystal had control and dominion over the gun and drugs as Myers did. There was no other evidence of Myers' guilt. Tr. 428, ll. 15 – Tr. 429, ll. 11.

The state argued there was substantial circumstantial evidence which reasonably tended to prove Myers' guilt. The judge denied the directed verdict motion. Tr. 429, ll. 12 – Tr. 432, ll. 17.

Defense counsel moved again at the close of all of the evidence for a directed verdict on the same arguments. The judge denied the motions again. Tr. 440, ll. 22 – Tr. 444, ll. 25.

During the charge conference, the judge stated that the theory of the hand of one is the hand of all did apply in this case. Defense counsel objected to the charge because he argued there was no evidence of any conspiracy or that Myers was working with anyone. Counsel argued that the guilty party was either Myers or someone else. Crystal Nelson was never charged nor arrested. No one else was arrested. The judge ruled that there was sufficient evidence in the record for the charge because Myers was sleeping in the bed with his girlfriend and her gun was in the box along with the drugs. Tr. 432, ll. 18 – Tr. 434, ll. 17.

ARGUMENT

The trial court erred in denying Appellant Myers' motion for a directed verdict when the state did not present substantial circumstantial evidence that the drugs belonged to Myers and the evidence only raised a mere suspicion of Myers' guilt when there were no eyewitnesses, and no forensic evidence connecting Myers to the drugs.

On appeal of a denial of a directed verdict of acquittal, the Supreme Court must look at the evidence in the light most favorable to the state. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Arnold, *supra.* A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014), the Supreme Court held that if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. Citing State v. Cherry, *supra.*

In Myers' case, there was only a mere suspicion of Myers' guilt. There were no witnesses nor any forensic evidence. The state did not present any witnesses who had bought drugs from Myers or who had seen him sell drugs. There were no witnesses who told of heavy traffic to the incident location.

The marijuana in the car was in the amount described by Detective Cerone for personal use only for two people. The drugs were found in Crystal Nelson's bedroom in her pink box with her gun inside. The logical conclusion would be that the drugs in the same box were hers.

There was not substantial circumstantial evidence of Myers' guilt sufficient to send the case to the jury. Without Myers' statement, the state had bare circumstantial evidence.

ARGUMENT

The trial court erred in charging the jury on the hand of one is the hand of all when Myers was the only person arrested and charged.

Under the "hand of one, the hand of all theory", one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. " State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999); State v. Jackson, 410 S.C. 584, 765 S.E.2d 841 (Ct. App. 2014).

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

The Supreme Court held in State v. Day, 341 S.C. 439, 452, 529 S.E.2d 431 (2000), that the failure to tailor jury instructions to adequately reflect the facts and theories presented by the defendant constituted reversible error. In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Supreme Court reversed and remanded Fuller's conviction of voluntary manslaughter because the Court held that it was reversible error where the trial court failed to charge on the elements of defense which were applicable to the issues raised by the defendant.

In State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010), the Supreme Court again reiterated that the law to be instructed to the jury must be determined from the evidence presented at trial. Citing State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001).

Just as a judge should give a requested jury charge if supported by the evidence presented, a judge should not give a charge if the evidence does not support that charge. In Myers' case, there was no evidence that any other person was charged with this crime.

Myers was prejudiced by the "Hand of one is the hand of all charge" because there was a reasonable probability that the jury could have believed that the drugs belonged to Crystal. There was no forensic evidence linking Myers or anyone else to the crime scene. Therefore, the jury could have found him not guilty and blamed the crime on the third party but for the jury charge.

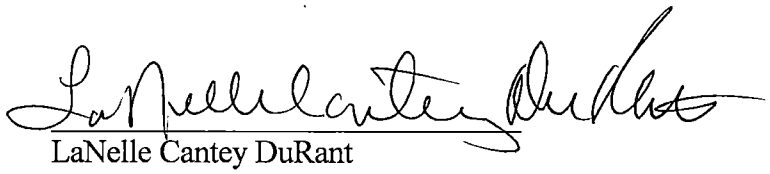
In Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (2014) (cert granted Nov, 20, 2014), the Court of Appeals held that the PCR court was correct in finding that the trial court erred in charging the jury on accomplice liability when no evidence was presented that anyone other than Wilds was the shooter in this murder case. And the PCR court properly found that appellate counsel was ineffective for failing to raise the issue of accomplice liability on appeal.

In Myers' case, no evidence showed that Myers and Crystal were working in concert to own the drugs. Therefore, the trial judge erred in charging the jury on the hand of one is the hand of all.

CONCLUSION

Based on the above, the conviction and sentence should be reversed and the case remanded for a directed verdict on Issue One and a new trial on Issue Two.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of July, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Charles Tramayne Myers, #294203, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 13th day of July, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.