STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton B. Newman, Circuit Court Judge

THE STATE,

Respondent,

vs.

OSCAR LEE DANTZLER,

Appellant.

Appellate Case No. 2015-000192

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

The trial court did not err in providing the indictment to the jury; Appellant was not prejudiced by surplusage in the indictment since the jury was advised the indictment was not evidence and evidence overwhelmingly supported the verdict for forgery.

STATEMENT OF THE CASE

Appellant Dantzler was indicted for forgery. At the conclusion of his trial on January 12-13, 2014, the jury found Dantzler guilty as charged. The Honorable Clifton B. Newman sentenced Dantzler to three years imprisonment.

STATEMENT OF FACTS

Denise O'Neal, a fraud investigator for First Citizen's Bank, received an alert from the Dentsville branch in Columbia of suspicious activity on the Covert Homes account. O'Neal contacted owner John Covert who confirmed that he did not issue the check. Covert noted the check was a good replica of the checks he uses except that it does not contain his cell phone number that appears on the checks he uses. The check was for $1,561.30 and made out to Appellant Oscar Dantzler. Dantzler is seen in State's Exhibit No. 4 entering the bank branch. ROA. pp. 8-15; p. 21; pp. 26-27; pp. 31-34.

Detective Jason Merrill arrested Dantzler. He noted that when he met Dantzler, Dantzler limped just like the individual in the video. ROA. pp. 42-43. Dantzler said he was never at the bank before and claimed that was not him in the video. Dantzler claimed he had a twin brother. Then he said the alleged brother was not a twin. Dantzler never provided the name of the purported sibling. ROA. pp. 47-48. Dantzler verified he had pins in his leg and cannot bend the leg well. ROA. p. 50. Detective Merrill opined on cross-examination that it was "a pretty good case in my book." ROA. p. 52, line 15.

ARGUMENT

The trial court did not err in providing the indictment to the jury; Appellant was not prejudiced by surplusage in the indictment since the jury was advised the indictment was not evidence and evidence overwhelmingly supported the verdict for forgery.

Dantzler argues he was prejudiced by the trial court's decision to provide the indictment to the jury during deliberations because it contained language alternatively alleging Dantzler assisting in the forgery as well as being the principle in the forgery. The trial court advised the jury that the indictment was not evidence, and Dantzler concedes that the trial court properly instructed the jury on the elements of the case. Therefore, there is no error and no prejudice.

The body of the indictment alleges the following:

> That Oscar Lee Dantzler did, in Lexington County, South Carolina, on or about October 23, 2013, falsely make, forge, or counterfeit; cause or procure to be falsely made, forged, or counterfeited; or willfully act or assist in the false making, forging, or counterfeiting of any writing or instrument of writing; or willingly act or assist in any of the premises, with an intention to defraud any person, to wit: did utter a forged counterfeit check, such having a value of less than ten thousand ($10,000) dollars, in violation of § 16-13-0010 of the South Carolina Code of Laws of 1976, as amended.

ROA. at 133 (emphasis removed).

The trial court advised the jury that the indictment was not evidence, advising the jury as follows:

> Now the fact that the Defendant, Oscar Lee Dantzler, was charged and indicted in this case is not evidence in this case and cannot be considered by you as evidence of guilt; nor does it create any presumption or inference of guilt. This

> indictment is simply the formal written instrument which contains a charge made against the defendant. This indictment is the formal document by which this case is brought into court.

ROA. p. 110, lines 2-9. Further, the trial court admonished the jury to base their verdict "solely on the testimony of the sworn witnesses who took the stand, the exhibits received into evidence, and the law which I have stated." ROA. p. 113, lines 20-22. The trial court provided the trial court's instructions to the jury. ROA. p. 114, lines 19-25.

"A variance between an allegation of the indictment and the proof is immaterial if the unproved allegation is surplusage." State v. James, 321 S.C. 75, 75, 472 S.E.2d 38, 43 (Ct. App. 1996). A conviction will not be overturned if evidence supports a narrower charge than the language contained in the indictment if the narrower charge is fully contained within the indictment. Id.

In James, the defendant argued that his conviction for trafficking under a state-wide grand jury indictment should have been reversed because the indictment alleged a multi-county conspiracy and alleged that the defendant provided financial assistance or aided and abetted the trafficking of crack cocaine. Evidence tended to show only conspiracy and only in York County. Id. at 75, 472 S.E.3d at 41-42. This Court rejected the defendant's argument because multi-county involvement was not an element of trafficking. This Court further noted that the indictment was sufficient because it contained the narrower charge of conspiracy even though there was no evidence supporting the financial assistance or aiding and abetting language in the indictment. Id. at 75, 472 S.E.2d at 43.

In State v. Evans, 23 S.C. 209 (1885), an indictment alleged the defendant stole three

pigs belonging to Toney Jackson. The evidence at trial proved that only one of the three pigs belonged to Jackson. In dicta, the Supreme Court noted the evidence was sufficient to survive directed verdict on the charge of larceny of livestock since evidence proved one of the pigs belonged to the alleged victim. Id. at 20.

In State v. Batchelor, 377 S.C. 341, 661 S.E.2d 58 (2008), the evidence indicated that Batchelor decided he was too intoxicated to drive his truck and made one of his three minor sons drive. The son was also intoxicated. All three sons died in a crash with an oncoming vehicle while other minors in the vehicle were injured. The indictment for the felony DUI offenses charged Batchelor as a principal even though he was not driving at the time of the crash. The Supreme Court rejected Batchelor's argument that the indictment was insufficient because it failed to allege he was aiding and abetting the crime based on the well-settled rule that an indictment charging the defendant as a principal will support a conviction for the defendant based on evidence of aiding and abetting. Id. at 344-345, 661 S.E.2d at 59-60. Interestingly, Dantzler is arguing the opposite in this case – he is alleging error for an indictment charging him both as a principal and as aiding and abetting.

Dantzler's reliance on Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) is misplaced. In Bailey, the indictment for homicide by child abuse alleged Bailey inflicted injuries on the victim – in other words that Bailey abused the victim. However, the trial court instructed the jury they could find Bailey guilty if the State proved abuse or neglect. Accordingly, the Supreme Court found the trial court's charge enlarged the scope of the charges beyond what was alleged in the indictment. Id. at 435-36, 709 S.E.2d at 678. In the instant case, the trial court simply reduced the scope of the indictment, the opposite of what

occurred in Bailey. Therefore, Bailey has no application to the present case.

Further, Dantzler is unable to show prejudice. In United States v. Coward, 669 F.2d 180 (4th Cir. 1982), the Fourth Circuit found no prejudice when the district court sent a copy of the indictment to the jury room as required by local rule. Coward complained the indictment was not edited to exclude language in the indictment referring to a co-defendant. The Fourth Circuit noted that "the jurors were instructed repeatedly that an indictment is only a formal charge and does not constitute evidence" and the district court informed the jurors he was omitting the portions that do not relate to the defendant. Id. at 184. The Fourth Circuit found the "admonitions effectively offset any hypothetical prejudice resulting from the jury's receipt of the unedited indictment." Id.

Therefore, the hypothetical prejudice alleged was offset by the trial court's instructions. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). "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)). An "error without prejudice does not warrant reversal." State v. Page, 406 S.C. 272, 287, 750 S.E.2d 623, 631 (Ct. App. 2013) (citation and internal quotation marks omitted).

CONCLUSION

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

Respectfully submitted,

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August 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.

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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: Robert M. Pachak, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 19th day of August, 2015.

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