STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FRED JACK SANDERS,

APPELLANT

APPELLATE CASE NO. 2014-001326

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the trial court err in denying Appellant Sanders' request to recharge the jury on the language of S.C. Code Section 44-53-375 (D) that possession of the equipment used in the manufacture of methamphetamine was prima facie evidence of the **intent** to manufacture because the trial judge omitted the word **intent** which was prejudicial to Sanders because the police found only the equipment because an active cook of methamphetamine was not in process?

2. Did the trial court err in denying Appellant Sanders request for a mistrial when the witness, Sara Bassell, testified that Sanders provided drugs to her which was a reference to a prior bad act and the trial judge had instructed the state to make no reference to prior bad acts?

STATEMENT OF THE CASE

On September 11, 2013, the Richland County Grand Jury indicted Fred Jack Sanders on the charges of manufacturing methamphetamine, possession with intent to distribute methamphetamine (PWID), possession with intent to distribute crack cocaine, possession of a firearm by a person convicted of a crime of violence, possession of a controlled substance (diazepam), possession with intent to distribute heroin. Sanders proceeded to trial on March 17-19, 2014 before the Honorable G. Thomas Cooper, Jr. and a jury. Sanders was represented by Lucas D. Hawks and John Christopher Shipman. The state was represented by Kathryn Cavanaugh and Foster M. Matthews. R.1. Following the pretrial motions, Sanders entered a guilty plea to the possession of a firearm by a person convicted of a crime of violence, and was sentenced to five years. R. 43, ll. 17 – R. 48, ll. 6; R. 262, ll. 6 – 25. The case was then tried by a jury. The jury returned verdicts of guilty of manufacturing methamphetamine, guilty of the lesser included offense of possession of methamphetamine, guilty of the lesser included offense of crack cocaine, guilty of PWID heroin, and guilty of the possession of a controlled substance (diazepam).R. 242, ll. 8 – R. 243, ll. 6. The trial judge sentenced Sanders to twenty years on the manufacturing methamphetamine; five years on the possession of methamphetamine; five years on the possession of crack cocaine; six months on the possession of a controlled substance; and twenty years on the PWID heroin. R. 262, ll. 6 – 25. Sanders' attorney filed a motion for reconsideration of the sentence. A hearing was held on June 9, 2014 before the trial judge. The judge reduced the sentences of twenty years on the manufacturing methamphetamine and PWID heroin to fifteen years each. Sanders' attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On April 23, 2013, Narcotics Investigators with the Richland County Sheriff's Department executed a search warrant on the home of the mother of Jack Sanders as he lived with her. R. 49, ll. 11 -18. The search warrant was based on a controlled buy made by a confidential informant and allegedly from Sanders. R 25, ll. 23 – R. 28, ll. 17.

When the officers entered the home, they found Sanders, Sara Brassell, and Joshua Johnson in the garage. A white rock substance was seen in plain view in an ashtray on the floor near the three which was determined to be crack cocaine. R. 125, ll. 4 – R. 128, ll.17.

The officers continued searching the home and found in Sanders' bedroom what appeared to be a potential methamphetamine lab. Lead investigator, Allison Ricardo, put on a hazmat suit to remove the items as she had the experience and training in "meth" labs or Basic Clandestine Lab Investigations. R.128, ll. 18 – R. 130, ll.1. There was a very strong chemical odor predominantly in Sanders' room which meant to her that a recent "cook" had occurred. She removed numerous bottles and plastic tubing; batteries that were stripped apart with the lithium removed. Sudafed was found along with a pill grinder. R. 130, ll. 2 – R. 132, ll. 11. This equipment was similar to the one-pot method which was very portable and could be used anywhere. There was not an active "cook" because the chemicals were not in the bottle producing 'meth" when the officers made entry. R. 133, ll. 1 – R. 135, ll. 23.

Investigator Ricardo called Phillips Recovery Incorporated, a hazardous cleanup crew, to dispose of the toxic items. They are required by OSHA to contact a cleanup company to handle the disposal according to the training provided by DEA and SLED. The Sheriff's Department's Lab was not allowed to accept hazardous chemicals and items

exposed to them in clandestine labs. Phillips made a list of each item they removed from the house. Investigator Ricardo explained that the sheriff's investigators documented each item as well and photographed it. R. 133, ll. 16 – R. 134, ll. 22.

Tara Kinney, the forensic drug chemist with the Sheriff's Department, reported that the process of making methamphetamine was very dangerous. The chemicals could cause burns and inhalation problems. In addition, they were very flammable. They could not accept them into their lab. R. 142, ll. 3 – R. 147, ll. 24.

Investigator Joseph Clarke helped execute the search warrant. He, along with other officers, found in Sanders' bedroom, cocaine, marijuana, valium, methamphetamine, and syringes filled with a liquid. He Mirandized Sanders who signed the waiver of rights and gave a statement. Sanders stated that all of the drugs were his. The liquid in the syringes was methamphetamine. Sanders admitted that he used all of the drugs. R. 90, ll. 14 – R. 106, ll. 18.

Investigator Chauncey Smith participated in the search and was part of the initial entry. R. 58, ll. 14 – R. 63, ll. 21. He found a green box similar to a tackle box in the garage. Sanders gave consent for him to open it. Inside were numerous compartments with individual packets of heroin and crack. The other two people in the garage with Sanders were arrested along with Sanders and charged with the crack. R. 64, ll. 1 – R. 86, ll. 25.

The drug chemist, Tara Kinney, provided the weights of the drugs found and tested. The green box contained 1.25 grams of heroin and .18 grams of crack. Spoons were found with white residue which proved to be .08 grams of methamphetamine. She did not test the liquid in the syringes due to the hazard of the sharp needles. The ashtray in the garage contained .02 grams of crack cocaine. Another .04 grams of crack was also found. Seven

tablets of diazepam, also called valium, were found. She did not receive any tablets containing pseudoephedrine (Sudafed). R. 148, ll. 10 – R. 158, ll. 19; R. 159, ll. 2 – 12.

In a pretrial motion, defense counsel moved that there be no mention of prior bad acts that Sanders had cooked methamphetamine before. The defense position was that Sanders had alluded to that in his statement to Investigator Smith and that it should be excluded under SCRE 404(b). Defense counsel argued that it would be prejudicial as propensity evidence. A *Lyle* hearing was held regarding Sanders' statement. R. 29, ll. 14 – R. 41, ll. 8. Following the hearing, the judge ruled:

> I think any mention of past---that's why I tried to get some clarification---cooking, burying, dealing is out. I'm going to allow—grant the motion to that extent. I don't know if this officer---I think you just need to caution him about prior bad acts.

R. 41, ll. 8 – 13.

During the trial, Sara Brassell, who was one of the two people in the garage with Sanders, testified for the state. When the solicitor asked her how she knew Sanders, she replied:

> I just met him when I ---one day whenever I was going there for drugs.

R. 118, ll. 7 – 9.

She said it was the day before she was arrested. On April 23, 2013, when she was arrested, she was with Sanders in his garage when the police entered. They were just using drugs when the police came in. She had been up all night getting high. She used every kind of drug including crack, heroin, and others. Sanders provided these drugs to her. Defense counsel objected and had a matter of law. The judge excused the jury. R. 116, ll. 21 - R. 119, ll. 15.

Defense counsel argued that he did not know about Sara Brassell's testimony. When he saw her name last week on the jail list, he emailed the solicitor asking what was going on and she did not reply. Although she was on the witness list, he had not been given any information about her testimony and if she was going to testify. The solicitor argued that her name was in the discovery. R. 119, ll.11 – R. 122, ll. 25.

Defense counsel moved for a mistrial as the witness mentioned another prior bad act. The judge denied the mistrial motion. Counsel then asked that her testimony be suppressed. The judge did grant that motion. The judge gave the jury a curative instruction that Sara Brassell was brought before the jury improperly as the rules of evidence adopted for the trial were not followed regarding this witness. R. 123, ll. 1 – R. 124, ll. 25.

The next day of trial, the judge again instructed the jury that the defendant was on trial for the charges in the indictments. Any reference to any prior conduct of the defendant was not admissible. The jury was to disregard any and all mention by any witness which "made reference to the prior conduct on the part of the defendant." R. 160, ll. 17 – R. 161, ll. 18.

Defense counsel objected to the curative instruction as being the appropriate remedy based on all his prior objections and motions. R. 161, ll. 19 – 23.

Sanders testified in his own defense. He denied manufacturing methamphetamine. He was addicted to methamphetamine, heroin, and crack cocaine. He did not intend to distribute the drugs but was using them himself. He injected heroin and methamphetamine. R. 166, ll. 7 – R. 168, ll. 25.

On cross examination, Sanders stated he was not giving drugs to Sara and Josh as he was using them. He sometimes snorted Sudafed to get high. Because heroin was a very

lethal and dangerous drug, he divided it and packaged it in an amount for one use to protect himself. R. 169, ll. 1 – R. 180, ll. 25.

In a pretrial motion, defense counsel moved to suppress the physical evidence, or equipment, and other items that had been destroyed because they were the basis of the indictment. R. 14, ll. 18 – 25.

The solicitor admitted that the evidence for manufacturing methamphetamine as the basis for the indictment was the equipment that was destroyed. However, the state had photographs of all of it to prove the manufacturing. The solicitor cited S.C. Code Section 44-53-375 (D) that provided that equipment collected in a manufacturing methamphetamine case was prima facie evidence of the intent to manufacture. They would prove it through the pictures. Defense argued that the state would have to prove more than just intent. R. 15, ll. 16 – R. 24, ll. 23.

Following the close of the evidence, the judge asked the attorneys for any jury charges. The solicitor had submitted Section 44-53-375 (D) as the applicable law for manufacturing methamphetamine, but substituted prima facie burden gives rise to permissive inference. Then the solicitor asked for the inference weight for the heroin as intent to distribute as the amount was over ten times the inference for PWID. R. 181, ll. 24 – R. 182, ll. 21.

Defense counsel argued that the statute concerning the possession of equipment and paraphernalia, actually read that there was a prima facie showing of intent. The state's charge read permissive inference of a violation. Counsel requested that the charge be changed to "gives rise to a permissive inference of an intent to manufacture." Counsel did

not want the jury to think that just having the equipment was a crime. The judge agreed, as did the solicitor, because that was how the statute read. R. 182, ll. 21 – R. 183, ll. 9.

The judge's jury charge to the jury on the law on manufacturing methamphetamine was:

> Now, our law provides under Section 44-53-375 (d) that possession of equipment or paraphernalia used in the manufacture of methamphetamine gives rise to what is called a permissive inference of a violation of manufacturing methamphetamine.

R. 224, ll. 3 – 9.

At the close of the jury charges, defense counsel objected to the jury charge on the law. Counsel argued that the judge read "the part about inference of the violation of the law instead of inference of intent." Counsel reminded the judge that they had agreed to make the charge "giving rise to a permissive inference of intent." R. 236, ll 12 – R. 237, ll. 9.

The judge agreed to read the manufacturing statute again. The solicitor had no objection to that. R. 238, ll. 1 – 17.

When the jury returned to the courtroom, the judge read the statute regarding the manufacturing of methamphetamine. He read:

> To manufacture means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly by extraction of substance –substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repacking of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use, or the preparation, compounding, packaging, or labeling of a controlled substance.

R. 238, ll. 20 –R. 239, ll. 1 – 13.

Defense counsel again told the judge that he did not read the language that "possession of the equipment gave permissive inference of intent to violate." The judge read again permissive inference of a violation of the statute instead of an intent to commit manufacturing. The judge said:

> Well, I'm going to leave it like it is. Thank you very much.

R. 240, ll. 21 – R. 241, ll. 5.

The jury found Sanders guilty of manufacturing methamphetamine; the lesser included possession of methamphetamine; the lesser included possession of crack cocaine; PWID heroin; possession of a controlled substance. The jury found him not guilty of PWID methamphetamine and PWID crack cocaine. R. 242, ll. 8 – R. 243, ll. 6.

After the verdict, defense counsel renewed all motions and objections, including his mistrial motions. R. 244, ll. 16 – R. 245, ll. 17.

ARGUMENT

The trial court erred in denying Appellant Sanders' request to recharge the jury on the language of S.C. Code Section 44-53-375 (D) that possession of the equipment used in the manufacture of methamphetamine was prima facie evidence of the **intent** to manufacture because the trial judge omitted the word **intent** which was prejudicial to Sanders because the police found only the equipment because an active cook of methamphetamine was not in process.

South Carolina Code Section 44-53-375 (D) provides:

> (D) Possession of the equipment or paraphernalia used in the manufacture of cocaine, cocaine base, or methamphetamine is prima facie evidence of the intent to manufacture.

The law to be charged must be determined from the evidence presented at trial. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008); 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).

If there is any evidence to support a jury charge, the trial judge should grant the request. State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).08); State v. Knoten, *supra.*

The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Commander, 396 S.C. 254, 270,

721 S.E.2d 413, 421-22 (2011). An appellate court will not reverse the trial court's decision regarding a jury charge absent an abuse of discretion. Id.

A jury charge that is substantially correct and covers the law does not require reversal. State v. Drayton, 411 S.C.533, 769 S.E.2d 254 (Ct. App. 2015).

The trial judge erred in not granting defense counsel's request to recharge the jury on section 44-53-375 (D) to include the word "intent" as included in the statute. The solicitor did not object to this reading, and the judge had initially agreed to do it. Therefore, not recharging the jury including the word 'intent" after all parties agreed it was the law was an abuse of discretion and requires reversal.

Not including the word "intent" was prejudicial to Sanders because the charge was manufacturing methamphetamine—not intending to manufacture. The judge had given the jury a curative instruction earlier that Sanders was on trial for the charges in the indictment. R. 160, ll. 17 – R. 161, ll. 18. The charge was manufacturing methamphetamine. Since only the equipment was found and an active "cook" was not occurring, the judge charged Section 44-53-375 (D) that the equipment was evidence of the intent to manufacture. Therefore, there was a reasonable probability that the jury would have found him not guilty of manufacturing if the judge had included the word **intent** because the only evidence the state produced were pictures of the equipment. [emphasis added].

ARGUMENT

II

The trial court erred in denying Appellant Sanders request for a mistrial when the witness, Sara Bassell, testified that Sanders provided drugs to her which was a reference to a prior bad act and the trial judge had instructed the state to make no reference to prior bad acts.

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. Id.

The party moving for a mistrial has the burden to show not only error, but resulting prejudice. State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014) citing State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). In State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2006), the Supreme Court ruled that the curative instruction removed any prejudice because the curative instruction made it clear that the question asked by the prosecutor was improper and asked the jury to disavow that question from their minds.

In State v. Culbreath, *supra,* the Court of Appeals ruled that the state's witness's references to prior drug dealings with the defendant did not warrant a mistrial. In that case, the Court found that defendant's counsel opened the door to the prior drug dealings by asking the witness whether the drugs he sold were fronted to him, and the witness replied: "Yes, by Culbreath."

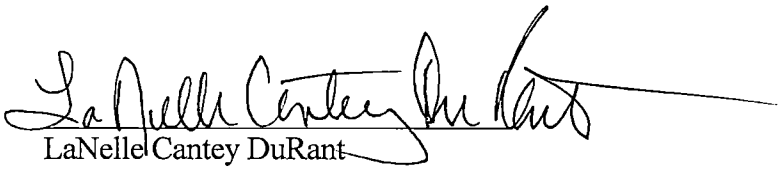
Sanders' case is distinguished from Culbreath in that defense counsel did not open the door. The trial judge had ruled that no reference to prior bad acts could be admitted. He instructed the state specifically on that issue. The state knew that Sara Brassell would likely testify that she obtained drugs from Sanders.

The judge's curative instructions were not sufficient because the damage was done and the prejudice could not be removed from the minds of the jurors. The jury found him guilty of distributing the heroin.

CONCLUSION

Based on the above, Sanders' convictions and sentences should be reversed and his case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of November, 2015.

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CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 17 , 2015

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of November, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of November, 2015.

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