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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Alison Renee Lee, Circuit Court Judge

JEROME WATSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001713

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEROME ELTON WATSON,

APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the judge err in charging the jury and submitting a verdict form that listed two separate offenses, possession of heroine with intent to distribute and purchasing heroine, when appellant was charged with the single offense of possession of heroine with intent to distribute?

2. Did the judge err in refusing to quash the indictment and allowing the State to proceed on a second amended indictment that was not presented to the grand jury when, at the close of the defense case the parties realized that the indictment alleged the purchase of or possession with intent to distribute cocaine rather than heroine?

3. Did the judge err in allowing a witness, who was an employee of the solicitor's office, to testify as an expert that a heroine dealer would have multiple vindles but a user would only have a two or three vindles when officers found 24 vindles (.43 grams) of heroine in appellant's car and his defense at trial was that he was a user not a dealer?

STATEMENT OF THE CASE

On March 25, 2010, the York County Grand Jury indicted Watson for possession of heroine with intent to distribute, indictment #2010-GS-46-1381. On April 22, 2010, the York County Grand Jury true billed an amended indictment #2010-GS-46-01381.

On April 26, 2010, Watson proceeded to jury trial before the Honorable John C. Hayes. Attorneys Erik Delaney and Ashley Anderson represented Watson at trial. The jury returned a verdict of guilty and Judge Hayes sentenced Watson to 30 years. A timely notice of intent to appeal was filed on April 29, 2010. This appeal follows.

ARGUMENTS

1. The judge erred in charging the jury and submitting a verdict form that listed two separate offenses, possession of heroine with intent to distribute and purchasing heroine, when appellant was charged with the single offense of possession of heroine with intent to distribute.

Watson was initially indicted on March 25, 2010, for possession of heroine with intent to distribute, indictment #2010-GS-46-1381. The body of the indictment specifically alleges that "Jerome Elton Watson, did possess with intent to distribute, dispense, or deliver a quantity of Heroine, a controlled substance under provisions of Section 44-53-370, et seq., Code of Laws of South Carolina (1976), as amended, or did otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase Heroin, all in violation of Section 44-53-370, Code of Laws of South Carolina (1976), as amended." (R. p. 194).

On April 22, 2010, the indictment was amended before the grand jury. The body of the amended indictment specifically alleges that, "Jerome Elton Watson, did **purchase**, or possess with intent to distribute, dispense, deliver, or otherwise aid, abet, attempt or conspire to manufacture distribute, dispense, purchase or deliver to another a quantity of **cocaine,** a controlled substance under provisions of Section 44-53-**375**, et seq., Code of Laws of South Carolina (1976), as amended, such distribution not having been authorized by law, all in violation of Section 44-53-370, Code of Laws of South Carolina (1976), as amended." (emphasis added) (R. p. 196). The amended indictment added the "purchase" language, changed the controlled substance from heroine to cocaine and referenced code section 44-53-375.

Prior to trial the indictment was again amended, without objection, to correct a "scribbler's" error and change the code section from 44-53-375 back to 44-53-370. (R. p. 2,

lines 4-14). The State, at this time, did not move to amend the language in the body of the indictment by changing the controlled substance from cocaine back to heroine.

The trial proceeded. Lieutenant B. J. Kennedy, with the Fort Mill Police Department testified that while working in the York County Multi Jurisdictional Drug Enforcement Unit he observed suspicious activity between two cars in the parking lot of the Kentucky Fried Chicken. (R. pp 17-20). When the two cars left the parking lot, Lieutentant Kennedy followed one of the cars, a green Isuzu Trooper. (R. p. 20, lines 20 – p. 21, lines 1-8). Another officer, Investigator Walton Beck with the York County Multi Jurisdictional Drug Enforcement Unit followed the other car, a silver Buick Century. Lieutenant Kennedy eventually lost the sight of the green Isuzu. (R. p. 21, lines 1-4).

Investigator Beck followed the silver car to the Wells Fargo parking lot. (Supp. R. p. 2, lines 14 – p. 3, 4, lines 1-12). Investigator Beck walked to the parked silver car and talked with the driver and sole occupant of the car, appellant Watson. (Supp. R. p. 4, lines 13-17). When the investigator asked Watson for his license, Watson told him he did not have a license. (Supp. R. p. 6, lines 1-13). According to the investigator, Watson consented to a search of his vehicle. (Supp. R. p. 7, lines 1-13). Investigator Beck testified that he found a cigarette pack containing several vindles of heroine. (Supp. R. p. 7, lines 17-20). A chemist testified that the vindles found in the cigarette pack contained .43 grams of heroine. (Supp. R. p. 10, lines 21-25). Investigator Beck testified that Watson told him he bought the heroine from the guy in the green Isuzu. (Supp. R. p. 11, lines 16-21). Watson testified that he was a user and that the heroine Investigator Beck found was his personal one week supply. (R. p. 116, lines 7-11).

At the close of the case the judge proposed a verdict form that contained two separate charges, possession of heroine with intent to distribute and purchasing heroine. (R. p. 121). Watson objected to the verdict form, arguing that Watson's alleged actions constituted one single offense rather than two distinct offenses. Watson argued that, under the facts of this case, double jeopardy would bar convictions for both purchasing and possession of heroine with intent to distribute. (R. p. 150, lines 15 – p. 151, lines 1-16). The judge denied the motion, finding there were two separate distinct offenses. The judge stated. "I find that he was not – does not violate double jeopardy that it's not a situation where he either or neither nor but that there are two distinct defenses purchasing heroine is a violation of the statute and that's even for your own use as I read the statute that the crime is purchasing. Those are a separate distinct defense possessing it with intent to distribute so I deny your motion." (R. p. 151, lines 17-24). The judge erred. The verdict form was improper.

During jury instructions the judge told the jury that Watson faced two separate charges. (R. p. 176, lines 18 – p. 177, lines 1-10; p. 181, lines 19 – p. 182, lines 1-25; Watson objected. (R. p 183, lines 9-20). The judge then re-charged the jury stating:

> I need to tell you members of the jury that the fact that this is broken down in two charges is of no importance. That is the fact that there are more than one charge under the A and B that I've given you is not evidence that Mr. Watson is guilty of either. I've just simply broken it down that way and the fact that there are two charges is not to be considered as any evidence that he committed either one.

(R. p. 184, lines 10-17). The judge told the jury that Watson faced two charges when in fact he only faced one charge of possession of heroine with intent to distribute.

S.C. Code §44-53-370 provides:

> a) Except as authorized by this article it shall be unlawful for any person:
>
> (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue;
>
> (2) to create, distribute, dispense, deliver, or purchase, or aid, abet, attempt, or conspire to create, distribute, dispense, deliver, or purchase, or possess with intent to distribute, dispense, deliver, or purchase a counterfeit substance.

The State can prove a violation of §44-53-370 through evidence of either a purchase or evidence of intent to distribute. The statute simply provides two different ways in which to prove the one offense. The body of the indictment correctly alleges that Jerome Watson purchased or possessed with intent to distribute.

The verdict form should have read:

> As to the charge of a purchase of heroine or possession of heroin with intent to distribute:
> ____ We the jury find the defendant guilty.
> ____ We the jury find the defendant guilty of the lesser included offense of simple possession of heroin.
> ____ We the jury find the defendant not guilty.

In State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), The South Carolina Supreme Court found that a verdict form that did not include a not guilty option was so prejudicial as to require reversal. While the verdict form in the present case included a not guilty option, the inclusion of the separate purchasing charge and the failure to include the lesser included offense of simple possession in regard to the purchasing charge renders this verdict form so prejudicial as to require reversal. When Watson's objection to the verdict form was overruled, Watson requested the judge charge the lesser included for both

possession of heroine with intent to distribute and purchasing heroine. (R. p. 142, lines 11-21). The judge refused to charge the lesser included offense in regard to purchasing. (R. p. 143, lines 2-8).

"A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). There was evidence that Watson committed the lesser offense of possession rather than the greater offense of purchasing. The judge erred in refusing to charge the lesser included offense. While the inclusion of purchasing heroine as a separate offense was error, the failure to include the lesser included offense compounded the error. The improper verdict form improperly diluted Watson's defense that he was guilty of only the lesser included offense of simple possession of heroine.

The error was further compounded when the judge found that purchasing was a strict liability offense requiring no criminal intent. After the charge to the jury Watson requested a charge on criminal intent as to purchasing. (R. p. 183, lines 16-20). The judge refused the requested charge stating, "It just makes it illegal strictly illegal to purchase heroine and so I will not charge - - recharge on that." (R. p. 184, lines 1-2). Watson correctly argued that distribution is not a strict liability offense. (R. p. 149, lines 8 – p. 150, lines 1-6). In State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990) the South Carolina Supreme Court specifically held that distribution of cocaine was not a strict liability offense. Purchasing and distributing controlled substances are both addressed in the same code section, 44-53-370 for heroine and 44-53-375 for cocaine. As distribution is not a strict liability offense, purchasing is not a strict liability offense.

The judge erred in charging the jury and submitting a verdict form that listed two separate offenses, possession of heroine with intent to distribute and purchasing heroine, when appellant was charged with the single offense of possession of heroine with intent to distribute. The improper instructions and verdict form diluted Watson's ability defense that he was guilty of the lesser included offense of possession. The error requires reversal.

2. The judge erred in refusing to quash the first amended indictment and allowing the State to proceed on a second amended indictment that was not presented to the grand jury when, at the close of the defense case, the parties realized that the first amended indictment alleged the purchase of or possession with intent to distribute cocaine rather than heroine.

At the close of the defense case, the judge expressed concern about the amended indictment. (R. pp. 129-139). The amended indictment referenced cocaine rather than heroine. The judge stated, "I have some real concern with the grand jury true billing an indictment against somebody with possessing cocaine with intent to distribute when there is no way any evidence presented to the grand jury to that effect. That bothers me. I will let both sides adjourn and start back at Nine in the morning and let everybody chew on this over night and see where we are in the morning." (R. p. 135, lines 7-13).

The next morning the judge ruled, "So we are going forward with those two indictments being the operative indictments but only one the heroine as opposed to cocaine being sent to the jury." (R. p. 139, lines 5-8). Watson objected to allowing an amendment to the indictment and moved to quash the indictment. (R.p. 139, lines 12 – p. 140, lines 1-19). The judge denied the motion to quash. (R. p. 141, lines 4-5). At some point, an additional amended indictment was drafted which included the purchase language,

referenced the correct code section and referenced heroine. (R. p. 198). While the foreperson of the petit jury wrote "guilty" as the verdict on this indictment, this second amended indictment was not presented to the grand jury.

A motion to quash an indictment addresses only the sufficiency of the indictment, not the sufficiency of the State's evidence. *See* State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980), *cert. denied,* 449 U.S. 883, 101 S.Ct. 236, 66 L.Ed.2d 108 (1980). An indictment is adequate if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution. *Id.* at 477, 266 S.E.2d at 62.

The judge erred in not quashing the amended indictment that alleged cocaine instead of heroine and allowing the State to proceed on a second amended indictment that was not presented to the grand jury. An indictment alleging cocaine is not sufficient when the offense involves heroine. The judge should have quashed the first amended indictment. At that point the State could have proceeded on the original indictment or re-submitted a correct amended indictment to the grand jury. The judge erred in failing to quash the indictment and allowing the State to proceed on the second amended indictment, not presented to the grand jury.

3. The judge erred in allowing a witness, who was an employee of the solicitor's office, to testify as an expert that a heroine dealer would have multiple vindles but a user would only have a two or three vindles when officers found 24 vindles (.43 grams) of heroine in appellant's car and his defense at trial was that he was a user not a dealer

During Watson's trial, the State informed the Judge, in chambers, that they intended to call, as an expert, Mr. Marvin Brown, a witness not initially listed on the witness list. (R. p. 46, lines 5-10). Watson objected. (R. p. 46, lines 12-19). The State made a proffer in regard to Mr. Brown's qualifications. (R. pp. 49-54). Mr. Brown testified that he was employed with the Sixteenth Circuit Solicitor's Office, assigned to the drug enforcement unit. (R. p. 47, lines 11-16). After testifying about his prior experience in law enforcement, the State moved to qualify Mr. Brown as "an expert in the area of street level dealing and narcotics and the use of narcotics." (R. p. 50, lines 1-3). After cross examination by Watson, the State moved to qualify Mr. Brown as "an expert in the area of packaging, street value and use of heroin or legal narcotics." (R. p. 51, lines 13-15). Watson objected as to Mr. Brown's qualification as an expert in heroine specifically. (R. p. 51, lines 17-19). The judge found that Mr. Brown was qualified to testify on the drug of heroine. (R. p. 51, lines 20 – p. 52, lines 1-2).

Watson then objected to Mr. Brown's testimony based on the fact that he had no direct involvement in the case and notice was not given that Mr. Brown would be called as a witness. (R. p. 54, lines 12-20). The judge overruled the objection stating, "All right I am going to allow him to testify as I find him qualified." (R. p. 55, lines 3-4).

At trial, before the jury, the State moved to allow Mr. Brown to testify as an expert "in the field of street level narcotics." (R. p. 103, lines 6-7). The judge found Mr. Brown qualified. (R. p. 103, line 10). Watson renewed the objection to allowing Mr. Brown to

testify as an expert. (R. p. 104, line 23). The objection was overruled. (R. p. 104, line 24). Mr. Brown opined that a heroine dealer would have multiple vindles but a user would only have a two or three vindles. Mr. Brown testified, "So a user would never have more than two or three vindles on them at the time." (R. p. 105, lines 16-17).

The trial court's determination regarding a witness's qualification to testify as an expert will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct.App.1997). In Watson v. Ford, 389 S.C. 434, 446-447, 699 S.E.2d 169, 175 (2010), the South Carolina Supreme Court wrote:

> Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.
>
> *See* Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. *See* Rules 602 and 701, SCRE.
>
> For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See* State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Next, while the expert need not be a specialist in the particular branch of the field,

> the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See* Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *See* State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).
>
> Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. *See* State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence").

The subject matter to which Mr. Brown testified was not beyond the ordinary knowledge of the jury requiring explanation. The jury did not need an expert to understand heroine in the present case. Lieutenant Kennedy had already testified that the heroine found in Watson's car was packaged in twenty four vindles. (R. p. 24, lines 15-20). It was up to the jury alone to determine if the State met the burden of proving intent to distribute. Mr. Brown's testimony as an "expert" improperly bolstered the State's case.

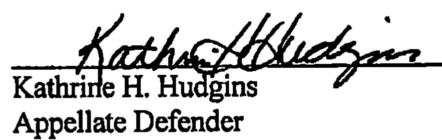
The error of allowing Mr. Brown to testify as an expert in this case was not harmless. Watson's defense was based on the fact that he was guilty of possession not

possession with intent to distribute. Watson testified that he was a user and that the heroine Investigator Beck found was his personal one week supply. (R. p. 116, lines 7-11). In closing argument counsel for Watson told the jury that Watson was guilty of possession and argued he was a drug addict not a drug dealer. (R. p. 153, lines 17-20). The State capitalized on Mr. Brown's testimony in their closing argument that Watson was guilty of the greater offense. (R. p. 164, lines 16 – p. 165, lines 1-12; p. 166, lines 18 – 23).

CONCLUSION

Based on the above arguments, Watson's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



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This 8th day of May, 2012.