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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VANESSA LAQUETTA FRAYER,

APPELLANT

APPELLATE CASE NO. 2015-001823

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying defense counsel's request for a jury charge on mere presence where the video recording of the controlled buy showed at least six other people in and around the residence where the informant claimed he purchased the cocaine?

STATEMENT OF THE CASE

On June 13, 2014, the Charleston County grand jury indicted Appellant Vanessa Frayer on one count of distribution of cocaine base. R. * (Indictments).

On August 12, 2015, Frayer appeared for trial before the Honorable Michael G. Nettles and a jury. Frayer was represented by Jason King and Shirene C. Hansotia. The State was represented by assistant solicitors Stephanie Linder and Scott Maynor.

The jury found Frayer guilty of the above offense. Judge Nettles terminated her probation related to a prior conviction and sentenced her to twelve years incarceration.

This appeal follows.

STATEMENT OF FACTS

Frayer presented three alternate defenses at trial through counsel's cross-examination and argument. The defense averred that either (1) she was not the person shown on the video selling drugs to the confidential informant; (2) *she was shown in the video but was not involved in sale of drugs to the informant*; or (3) the drugs were picked up by the informant along his lengthy walking route.[1] Tr. 46, l. 14 – 48, l. 7; Tr, 79, l. 1 – 85, l. 3; Tr. 139, l. 15 – 143, l. 13. The State's case included testimony from confidential informant Christopher Singleton (hereinafter "the informant"), testimony from the officers and detectives who coordinated the buy operation, testimony regarding chain of custody and analysis of the drug evidence, and the buy video recorded from a camera worn by the informant. Tr. 48, l. 10 – 120, l. 6.

The informant admitted that he worked as a confidential informant sixteen times from May 29, 2014 through January 9, 2015, earning a total of eight hundred and eighty dollars. Tr. 79, l. 22 – 81, l. 25. The informant also admitted to his criminal history, which included both drug offenses and crimes of dishonesty. Specifically, the informant was convicted of possession of cocaine base in 2008, 2009, and 2012, six counts of fraudulent checks in 2008, shoplifting in 2009, petty larceny in 2009, and receiving stolen goods in 2013. Tr. 78, ll. 4-14; Tr. 83, l. 17 – 85, l. 2.

The informant testified that he was working as a confidential informant on June 13, 2012 and was given sixty dollars to get "a 60," i.e. sixty dollars' worth of crack cocaine. He

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[1] Twelve (12) minutes elapsed from the time the informant got out of the officer's van to the time he arrived at the closed-in porch where he allegedly purchased the drugs. Another seven (7) minutes elapsed from the time the informant left the porch to the time he returned to the van. See State's Exhibit 1 (Buy Video), on file with this Court.

was searched before and after the "buy" by Officer Engles and outfitted with a camera. He could not recall the street name where he purchased the drugs, but he said it was downtown near a Food Lion. The informant claimed that he "ordered the 60" from "the lady in the courtroom." Not surprisingly since she was sitting at the defense table, he pointed to Frayer. Tr. 70, l. 3 – 76, l. 4; Tr. 76, l. 18-21.

The video shows at least six other individuals outside the house and on the closed-in porch where the drugs were allegedly purchased by the informant. State's Exhibit 1 (Buy Video), on file with this Court.[2] Though the informant testified that Frayer is the individual who sold him the drugs, the woman sitting on the porch is only shown briefly and is never seen handing anything to the informant on the video. Tr. 71, ll. 1-11; Tr. 127, ll. 22-24; State's Exhibit 1 (Buy Video), on file with this Court. Notably, there was no evidence that the informant had ever met Frayer before. Rather, the police targeted a general area in response to other incidents that had been reported there. Tr. 87, ll. 6-17; Tr. 132, ll. 9-15.

Though the amount of cocaine that he actually received from the purchase "didn't look like a 60," the informant did not get any change back from the sixty dollars he allegedly spent. Tr. 70, ll. 17-20; Tr. 77, ll. 2-10. There was no testimony regarding what amount he expected to receive for sixty dollars. Regardless, there was a disparity in the weight of the substance recorded by the officer on his report of 0.4 grams and the weight

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[2] As a result of the trial court's ruling on defense counsel's pre-trial motion to redact, portions of the buy video were muted by the solicitor when the video was shown to the jury during the trial and upon the jury's request during deliberations. Tr. 20, l. 16 - 37, l. 5; Tr. 65, ll. 8-25; Tr. 73, l. 25 – 74, l. 24; Tr. 157, ll. 14-21; Tr. 158, l. 7 – 160, l. 19. The solicitor specifically noted the times that the video was muted in the record. Tr. 65, ll. 8-25 ("We agree that 7:45 to 12:15 needs to be muted; 13:50 to 14:04; 14:56 to 15:02; and 15:21 to 15:32. Those are all the times that need to be muted. We have watched it together and we are in agreement with all of those items.").

recorded by the drug analyst of 0.25 grams. Tr. 104, ll. 17-19; Tr. 119, ll. 13-22; Tr. 140, l. 25 – 141, l. 4; State's Ex. 2 (Lab Report). Defense counsel also pointed out that it took the police three months to even draft a warrant to arrest Frayer and that no marked money was recovered from her. Tr. 104, l. 20 – 105, l. 4; Tr. 142, ll. 5-17.

Defense counsel requested a mere presence charge. Tr. 127, ll. 8-12. The solicitor argued that "[t]here has been no testimony that she was merely present." She noted that the informant's testimony was that Frayer "had an active role taking the order and making the sale and doing the distribution itself." The solicitor agreed with defense counsel that there is no "hand to hand" shown on the video. Thus, she argued, "there is no way to really point it at someone else." Inexplicably, the solicitor further argued that "the language of the distribution includes conspiring, aiding, abetting, and all of that," which "would cover things better." Tr. 127, l. 16 – 128, l. 4.

The trial judge declined to give the charge, stating:

> Alright. You are protected on the record. I don't think it applies. And I think probably where you have a constructive possession case with where there is some amount of controlled substance in a room I think that would apply. This case is there is no evidence of that in this case.

Tr. 128, ll. 5-10. Defense counsel renewed his request for the mere presence charge after the jury instructions were given, before the jury began deliberations. Tr. 156, ll. 11-22.

ARGUMENT

The trial court erred in denying defense counsel's request for a jury charge on mere presence where the video recording of the controlled buy showed at least six other people in and around the residence where the informant claimed he purchased the cocaine.

A mere presence instruction should have been given in this case because, after viewing the video, the jury could have reasonably concluded that Frayer was merely present and was not the individual who sold the informant the drugs. While Frayer is alleged to be the one who spoke to the informant regarding "a 60," the camera did not show who was speaking at that time. Further, as the solicitor conceded at trial, the video did not show Frayer hand anything to the informant. Tr. 127, ll. 22-25. Thus, if the informant did in fact purchase drugs from someone on the porch, it was not clear that person was Frayer. The solicitor pointed to the informant's testimony that Frayer was the one who sold him the drugs. Tr. 127, ll. 16-21. However, it was up to the jury to weigh the evidence and determine whether to believe the informant's testimony, which was not substantiated by the video recording. See State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012) (noting that the jury's "core functions" are "to examine evidence and make factual determinations, weigh credibility, and perhaps most importantly, decide whether the State has proven its case beyond a reasonable doubt.").

The law to be charged to the jury is to be determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). The trial court commits reversible error when it fails to give a requested charge on an issue raised by the indictment and the evidence presented. Id. The defendant is entitled to a mere presence charge if the evidence supports it. State v. Franklin, 299 S.C. 133, 141, 382 S.E.2d 911,

915 (1989). The failure to charge "mere presence" may constitute reversible error. Lee, 298 S.C. at 364, 380 S.E.2d at 835.

The law on "mere presence" has devolved over the past twenty-five years such that the courts have begun determining the propriety of such a charged based upon the State's theory of the case rather than based on the evidence. See State v. Peay, 321 S.C. 405, 468 S.E.2d 669 (Ct. App. 1996) (finding "a charge on mere presence is necessary only when the state attempts to establish constructive possession of contraband" and "[w]here the state alleges and proves actual possession, the court need not give a constructive possession or 'mere presence' charge"); State v. James, 386 S.C. 650, 689 S.E.2d 643 (Ct. App. 2010) (finding mere presence inapplicable where the State's theory of the case did not involve accomplice liability and the State did not seek to establish that James was in possession of cocaine). Even so, the facts of the case warranted a mere presence charge.

In State v. Peay, this Court held:

> A charge on mere presence is necessary only when the state attempts to establish constructive possession of contraband. State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974). Where the state alleges and proves actual possession, the court need not give a constructive possession or "mere presence" charge. See State v. Lee (the evidence produced by the state tended to show Lee exercised actual possession and control over the cocaine; thus, "mere presence" was not an instruction supported by the evidence presented by the state at trial).

321 S.C. 405, 468 S.E.2d 669 (Ct. App. 1996). However, a review of the cases cited reveals that they do not stand for those propositions. In State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974), there was no charge issue raised in the appeal. Rather, the co-defendants in Ellis argued that a directed verdict should have been granted because the State failed to present any evidence of possession beyond their mere presence. 263 S.C.

at 19-23, 207 S.E.2d at 412-13. Our Supreme Court agreed and vacated one of the defendant's convictions. Id.

In State v. Lee, our Supreme Court found that the evidence presented did not warrant a mere presence instruction. 298 S.C. 362, 380 S.E.2d 834 (1989). The State offered testimony of Agent Ramey of the South Carolina Alcoholic Beverage Control Commission, who was on patrol with an officer from the Charleston County Police Department's Narcotics Unit. Id. at 363, 380 S.E..2d at 835. A group of six people, who were standing in a semicircle, scattered when the officers drove up to them. Id. Ramey testified that she saw Lee, who was standing in the group as they approached, drop a plastic container containing white powder, which was later found to be cocaine. Id. The officers followed Lee around the corner of a nearby building and arrested him. Id.

Lee testified that he was walking along behind the building and saw the officers approach the group that scattered. Id. at 364, 380 S.E..2d at 835. When he was approached and searched, the officers did not find any drugs on him and he was released. Id. As he began to walk away, the officers found cocaine where the group had been standing and stopped him again. Id. Lee testified that the officers told him they were "going to frame him for what they found when he wasn't even no where around." Id. at 365, 380 S.E..2d at 836.

The Lee Court found that the State's evidence "tended to show Lee exercised actual possession and control over the cocaine" and that Lee's defense was that the officers knew he was not involved and were framing him. Id. Thus, the Court determined that "[t]he evidence presented at trial did not support a 'mere presence' instruction; therefore, the trial judge properly refused to so instruct the jury." Id. Thus,

the Lee Court did not look just to the State's theory and evidence. Id. ("This Court has held mere presence instructions are required where the evidence presented at trial reasonably supports the conclusion that the defendant was merely present at the scene where drugs were found, but it was questionable whether the defendant had a right to exercise dominion and control over them." (citing State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987))).

Later the same month that Peay was decided, the same panel of this Court issued its opinion in State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 (Ct. App. 1996), and explained that a "mere presence" instruction is "generally applicable in two circumstances":

> First, in instances where there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability, the trial court may be required to instruct the jury that a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. Secondly, "mere presence" is generally an issue where the State attempts to establish the defendant's possession of contraband because the defendant is present where the contraband is found. In such cases, the trial court may be required to charge the jury that the defendant's "mere presence" near the contraband does not establish his possession.

321 S.C. at 420, 468 S.E.2d at 678. Notably, the defendant in Dennis also denied ever being at the scene such that there was never any issue of accomplice liability. Id. at 420, 468 S.E.2d at 678. Unlike the defendants in Lee and Dennis, Frayer did not testify in the present case and pigeonhole herself into the defense that she was not present on the porch. Instead, she presented alternate defenses in the form of defense counsel's cross-examination and argument regarding the reasonable inferences that the jury could make – one of which was that she was merely present. See generally State v. Williams, 400 S.C.

308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012) (recognizing that the evidence may support charges on defenses that may otherwise seem inconsistent).

Since Dennis, this Court decided State v. James, 386 S.C. 650, 689 S.E.2d 643 (Ct. App. 2010) and found a mere presence charge inapplicable under the accomplice liability theory where there was no evidence that anyone other than James was present at the scene and inapplicable under the possession theory where the State was not attempting to establish constructive possession of contraband. The next year, in State v. Burgess, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2011), *modified on other grounds by* State v. Burgess, 408 S.C. 421, 759 S.E.2d 407 (2014) this Court found a mere presence charge inapplicable because the State's case depended on Burgess' actual possession of the crack and the jury charge limited the State to proving actual possession and gave the jury no option to find constructive possession.

Unlike James, 386 S.C. at 654, 689 S.E.2d 645-46, where the defendant was the only person shown on the buy video, the video in the present case revealed that the informant was on the porch for only approximately three minutes and forty-five seconds. The woman who he claimed was Frayer was shown on camera at various times for only less than ten seconds in total. It further showed several other people around the alleged buy location such that even if the jury believed that the woman seated in the chair was Frayer, they could have also reasonably believed that someone else sold the informant the drugs and that Frayer was merely present. See State's Exhibit 1 (Buy Video), on file with this Court.

Additionally, the indictment in the present case read:

> That in Charleston County, South Carolina, on or about June 12, 2014, the Defendant, VANESSA LAQUETTA FRAYER, did manufacture, distribute, dispense, deliver, purchase; **or did aid, abet, attempt, or conspire** to manufacture, distribute, dispense, deliver, or purchase; or did possess with the intent to distribute, dispense or deliver a controlled dangerous substance or a controlled dangerous analogue, to wit: cocaine base; in violation of 44-53-375 of the South Carolina Code of Laws (1976) as amended.

R. * (Indictment) (emphasis added).[3] The jury was further instructed: "Distribute means to deliver or to actually **constructively** or attempt to transfer a drug other than administering or dispensing." Tr. 151, ll. 15-17 (emphasis added). They were also instructed: "To deliver means to actually, **constructively** or attempt to transfer a drug." Tr. 151, ll. 18-19 (emphasis added). Thus, while the State did not specifically argue accomplice liability, this language may have led the jury to believe that Frayer's presence alone was enough to convict her. Cf. Burgess, 393 S.C. at 405, 712 S.E.2d at 6 (where the jury charge specifically limited the State to proving actual possession and gave the jury no option to find constructive possession).

There should not be any different standard for a "mere presence" charge than any other charge requested by the parties. Though our courts have recited the correct standard that the law to be charged is determined from the "issue[s] raised by the indictment and the evidence presented," they have often failed to apply that standard to the request for a mere presence charge. See, e.g., James, 386 S.C. at 653, 689 S.E.2d at 645. It is not the function of the trial judge to weigh the evidence in deciding whether a charge is proper. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) ("It is well-settled

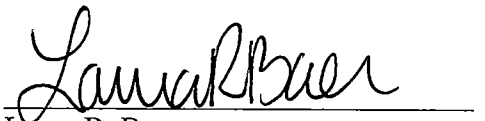
[3] It is not clear from the record whether the indictment was sent back with the jury in addition to the verdict form.

the law to be charged is determined from the evidence presented at trial, and if ***any evidence*** exists to support a charge, it should be given. The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." (emphasis added)). Thus, the State's theory of the case cannot dictate the propriety of the charge. See Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."). In the present case, where the jury could have reasonably believed that Frayer was present on the porch but did not actively particpate in the sale of the drugs, a mere presence charge should have been given. The need for such a charge was even more imperative because of the mention of aiding and abetting and constructive distribution in the indictment and jury instructions given. Therefore, the trial court erred in failing to give the mere presence charge requested.

CONCLUSION

Based on the foregoing, Appellant Vanessa Frayer respectfully requests that this Court reverse her conviction and grant her a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of March, 2016.

STATE OF SOUTH CAROLINA

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Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VANESSA LAQUETTA FRAYER,

APPELLANT

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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Vanessa Frayer, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 11th day of March, 2016.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of March, 2016.

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