STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2015-001823

THE STATE,

Respondent,

v.

VANESSA LAQUETTA FRAYER,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2015-001823

THE STATE,

Respondent,

v.

VANESSA LAQUETTA FRAYER,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's request for a jury instruction on mere presence because the evidence presented did not support such a charge.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for distribution of cocaine base. (R.151-152) On August 12, 2015,[1] Appellant proceeded to a trial before the Honorable Michael G. Nettles and a jury. Jason King, Esquire, and Shirene C. Hansotia, Esquire, represented Appellant, and Assistant Solicitors Stephanie Linder, Esquire, and Scott Maynor, Esquire, represented the State. The jury found Appellant guilty, and Judge Nettles sentenced her to twelve years' imprisonment after terminating her probation for a prior conviction. (R. 141, 150.)

Appellant filed a timely notice of intent to appeal and subsequently submitted a Brief in support of her appeal. This Brief of Respondent follows.

[1] The cover page of the trial transcript lists the date as "August 12, 2013," but the notice of appeal, the sentence sheet, and the verdict form all list the correct date, "August 12, 2015."

STATEMENT OF FACTS

On June 13, 2014, officers from the City of Charleston Police Department organized a "buy-walk" with the assistance of a confidential informant (CI).[2] The police searched the CI, fitted him with an audio wire and a camera, and gave him prerecorded money. (R. 36, line 24–R. 39, line 18). The police listened though the audio wire after dropping the CI off in the designated area. (R. 40, lines 7–13). The CI made a purchase, walked back to the designated meeting place, was re-searched by police, and wrote a statement. (R. 40, line 14–R. 41, line 6). Appellant was identified as the person who sold the CI the drugs, and police arrested her approximately three months later and charged her with distribution of cocaine base. (R. 81, line 24–R. 82, line 3; R. 88, line 22–R. 90, line 1; R.151-152).

Appellant proceeded to trial on August 12, 2015. She made a pretrial motion to redact portions of the buy video, which was a combined DVD of the video and audio recordings captured by the CI. (R. 5, lines 16–20). After much discussion, the trial judge watched the video. (R. 15, line 6–R. 19, line 4). Both parties agreed partial redaction was proper and agreed to meet during the lunch break to determine which portions of the video to mute when played for the jury, which they did. (R. 19, lines 17–25; R. 50, lines 8–19).

The State then proceeded to present its case. First, the State called Patrick Gill, a narcotics detective with the City of Charleston Police Department. (R. 33, line 10–R. 34, line 5). He explained the process of doing a "buy-walk" controlled drug buy and described what happened in this particular case. (R. 35, line 1–R. 41, line 6). He testified that the team met with

[2] According to Detective Patrick Gill of the City of Charleston Police Department, a "buy-walk" is when the department searches a CI, fits him with a wire and recording equipment, gives him prerecorded money, and takes him to a predetermined area where the CI then makes a controlled drug purchase and comes back to a designated meeting place. It differs from a "buy-bust," where the police immediately arrest someone following the purchase, because here the arrest took place three months later. (R. 36, lines 2–23).

the CI to do a briefing, during which the CI was searched, wired to an audio recorder and a camera, and given prerecorded money. (R. 37, lines 14–18). He stated that he was able to listen on a real-time wire as the CI walked and that the camera the CI wears gives a first-person view so the police can see everything he sees. (R. 39, lines 8–14).

Next, the State called Christopher Singleton, the CI. He testified he worked with the City of Charleston on June 13, 2014, and bought $60 worth of crack cocaine, although he thought it did not look like a "60." (R. 55, lines 3–20). When asked who he bought the drugs from, he identified Appellant. (R. 56 1-lines 1–11). Singleton identified the buy video, State's Exhibit #1, and testified it was a fair and accurate representation of what happened on June 13, 2014. (R. 58, lines 7–24). The solicitor played the video while Singleton was on the stand and asked him questions about it. She asked him who the female voice belonged to that can be heard talking about $60 on the video, and he identified the voice as belonging to "the lady in the courtroom." (R. 60, lines 23–25). He further identified her as the one sitting in the chair in the video. (R. 61, lines 1–4). To clarify, the following exchange took place:

> The State: So when you ordered up the 60 who did you order from?
>
> Singleton: The young lady in the courtroom.
>
> The State: And that lady sitting down on the video, who is that?
>
> Singleton: The young lady sitting in the courtroom.

(R. 61, lines 18–21). Singleton testified that when he got back to where the officers were, he gave the drugs he purchased to Detective Engles, the officers searched him again, and he wrote a statement. (R. 61, line 22–R. 62, line 25).

Detective Sean Engles, a narcotics detective with the City of Charleston Police Department, testified next. He explained he was the case agent for this particular drug buy. (R.

72, lines 4–8). He testified about using Singleton as a CI on many occasions because he was reliable and stated, "Everything that we later review on the video has been consistent with the statements he gives us after the buys." (R. 74, lines 2–10). Detective Engles related that Singleton bought $60 worth of crack cocaine, which field-tested positive at the scene. (R. 79, line 13–R. 80, line 4). He then testified he took the drugs to the police evidence drop box. (R. 80, line 24–R. 81, line 23).

The State called three more witnesses to complete the chain of custody: Linda Wilson-evidence technician, Susan Payne-evidence custodian, and Ashley Earl-controlled substance analyst. They each testified regarding their roles in handling the drug evidence. (R. 90–100).

At the close of the State's case, Appellant moved for a directed verdict, which the trial court denied. (R. 105, line 14–R. 106, line 17). The State asked for a jury charge explaining the trial court's rulings on which portions to mute on the video, but the trial court denied the request. (R. 110, line 7–R. 111, line 11). Defense counsel requested a jury charge on mere presence but made no argument supporting his request. (R. 112, lines 9–12). The State opposed the requested charge, arguing "[t]here has been no testimony that she was merely present" and added that "because the language of the distribution includes conspiring, aiding, abetting, and all of that . . . that would cover things better." (R. 112, line 16–R. 113, line 4). The trial judge determined a mere presence charge did not apply, stating, "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 [, but] there is no evidence of that in this case." (R. 113, lines 6–10).

The jury found Appellant guilty, and the trial judge sentenced her to twelve years' imprisonment after terminating her probation for a prior conviction. (R. 141, 150.)

ARGUMENT

The trial court properly denied Appellant's request for a jury instruction on mere presence because the evidence presented did not support such a charge.

Appellant argues the trial court erred in denying defense counsel's request for a jury charge on mere presence because the video recording of the controlled buy showed at least six other people in and around the residence where the informant purchased the crack cocaine. On the contrary, the trial court correctly denied the request because the evidence presented—namely the CI's testimony and the video itself—showed one person transacted the drug sale with the CI, and that person was Appellant. This Court should affirm the trial court's denial of the request.

"The law to be charged must be determined from the evidence presented at trial." State v. Holland, 385 S.C. 159, 165-66, 682 S.E.2d 898, 901 (Ct. App. 2009). In determining whether the evidence requires a particular charge, the trial court views the facts in a light most favorable to the defendant. However, "[a]n instruction should not be given unless justified by the evidence." Id. at 166, 682 S.E.2d at 901. "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." Id. Our appellate courts will not reverse the trial court's ruling regarding jury instructions unless the trial court abused its discretion. Id.

Two typical situations exist where a "mere presence" charge is applicable: accomplice liability cases and constructive possession cases.

> "Mere presence" 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 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 possession.

State v. James, 386 S.C. 650, 653-54, 689 S.E.2d 643, 645 (Ct. App. 2010) (quoting State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996)).

Neither of these circumstances is present in the instant case. It does not involve accomplice liability, nor is it a situation where drugs were simply found somewhere with no indication of who had possession. Appellant makes much of the comment by the solicitor that "the language of the distribution includes conspiring, aiding, abetting, and all of that" which "would cover things better." (App.Br.7; R. 113, lines 2–4). Indeed, she characterizes it as an inexplicable argument. However, the words "aid, abet, attempt" are contained in the indictment, and the solicitor was not arguing accomplice liability simply by mentioning the language of the statute. It is clear, and Appellant even notes in her brief, that the State's theory is that Appellant "had an active role taking the order and making the sale and doing the distribution itself." (App.Br.7; R. 112, lines 18–21). At no time did the State argue she had an accomplice-type role in the drug deal.

The evidence shows Appellant was the one who transacted the controlled drug buy with Singleton. The evidence presented here included Singleton's testimony at trial that Appellant was the person from whom he ordered the "60" of drugs. He also identified her as the lady who was sitting in the video. The video itself also provided evidence. While it is true the camera does not actually show the drugs changing hands, the audio recording provides evidence of a drug transaction. In the audio recording, Appellant can be heard asking what is going on, and Singleton can be heard telling her he needs a "60." (Buy DVD at approximately 13:32). One can then hear Appellant say something that sounds like, "I'll get the '60.'" (Buy video at approximately 14:10). She then directs him over to the side while another man comes in. In

another part of the video, Appellant tells Singleton what to do if he wants to pay to smoke it there. (Buy DVD at approximately 14:53). Appellant is the only one sitting in the video. The only other woman shown in the video, who Appellant indicated was her sister, is walking around the whole time. Additionally, Detective Engles testified Appellant delivered $60 worth of crack cocaine to him after the encounter. (R. 79, line 11–R. 80, line 4).

Appellant argues six people were in and around the area where the drug transaction took place in support of her argument that the trial judge erred in denying her request for a mere presence charge to the jury. However, even though two men were seen outside the door, and two men and Appellant's sister were inside the house, this was not a case where some drugs were simply found on some property and dominion and control of those drugs were at issue. This was a controlled, orchestrated "buy-walk" where the CI went into the house, bought drugs from one person—Appellant—and delivered those purchased drugs to the police. The transaction was captured on video and audio, and as noted above, the recordings, in addition to Singleton's testimony, provide evidence that Appellant was the one selling the drugs. Therefore, the number of people in and around the house is of no significance to this particular set of facts.

Appellant takes issue with this Court's decision in State v. Peay, 321 S.C. 405, 468 S.E.2d 669 (Ct. App. 1996), specifically suggesting that this Court's assessment of State v. Ellis and State v. Lee is incorrect.[3] Specifically, she argues Ellis is a directed verdict case rather than a jury charge case. While this is true, the case still provides guidance on the relationship between constructive possession and mere presence, which the Peay case expands and applies to the jury charge issue. Though Appellant argues both Ellis and Lee do not stand for the propositions this Court cited them for in Peay, the parenthetical about Lee is practically a

[3] State v. Ellis, 263 A.C. 12, 207 S.E.2d 408 (1974); State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989).

verbatim quotation out of the Lee case except for the omission of the word "below," the use of a lower case "s" in the word "state," and the replacement of a semicolon for a period to combine the two sentences into one. Lee, 298 S.C. at 365, 380 S.E.2d at 836. Regardless of whether Ellis has anything to do with a jury charge, Peay is still good law in South Carolina and makes clear that when actual possession is alleged and proved by the State, as is the case here, "the court need not give a constructive possession or 'mere presence' charge." Peay, 321 S.C. at 411, 468 S.E.2d at 673. Singleton's testimony was that Appellant sold him the drugs. This demonstrates actual possession and does not require a "mere presence" charge.

Appellant also argues that "mere presence" law has "devolved" from being based on the evidence in a case to being based on the State's theory of a case and argues "the State's theory of the case cannot dictate the propriety of the charge." (App.Br.9, 14). She cites State v. Burriss, 334 SC. 256, 513 S.E.2d 104 (1999), for the proposition that "if any evidence exists to support a charge, it should be given" in support of her argument that "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." (App.Br.11, 13–14) (emphasis added). However, contrary to Appellant's statement, she did not present any evidence or argument to support a defense that she was merely present, including during opening, cross-examination, or closing. In her statement of facts, Appellant states that she presented three alternate defenses at trial: "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." (App.Br.5). However, upon reviewing the transcript pages cited to support this statement, the State is unable to discern how Appellant

came to this conclusion. The only defense actually mentioned in defense counsel's opening statement was that Appellant was not arrested until three months after the controlled buy and no prerecorded money was found on her. It would be quite a stretch to translate that defense into a claim that "she was not the person shown on the video selling drugs to the confidential informant." During cross-examination of Singleton, in another section of pages cited by Appellant, the only thing that could possibly be characterized as a defense was questioning Singleton about his criminal history and implying he was not an honest person, possibly calling into question his credibility. And finally, in the last section of cited transcript pages, defense counsel highlighted Singleton's history of dishonesty and then pointed out that he claimed he was not given $60 worth of crack cocaine and that the video was not clear. While attacking Singleton's credibility could certainly make the jurors wonder whether they could believe him, defense counsel did not *aver* that Appellant was shown in the video but was not involved in the sale of drugs to the informant or that the drugs were picked up by the informant along his lengthy walking route. In short, none of the cited portions of the transcript appear to show anything that rises to the level of the claims made above.

In sum, because no evidence was presented that Appellant was merely present, and accomplice liability was not the State's theory of the case and was not an issue, the trial judge correctly denied Appellant's request for a charge on mere presence. This Court should affirm the trial court's decision.

CONCLUSION

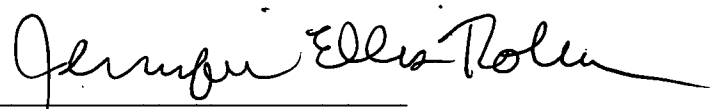
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 30, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2015-001823

THE STATE,

Respondent,

v.

VANESSA LAQUETTA FRAYER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: Jennifer Ellis Roberts
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 30, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2015-001823

THE STATE,

Respondent,

v.

VANESSA LAQUETTA FRAYER,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, 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:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 30th day of June, 2016.

ANGELA BENNETT
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727