STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case Tracking No. 2016-000291

The State, Respondent,

vs.

Kendrick Lamont Mims, Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly admitted Lieutenant Gunter's testimony regarding the valuation of the nearly one kilogram of cocaine Appellant stashed under leaves while trying to flee from Corporal Antley because the testimony was relevant and probative to proving the drugs were in Appellant's possession and not something placed in the location by a third party.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Corporal Antley was stationed on Interstate 20 monitoring traffic for speeding violations. (T.44-46; R. 21-23). Corporal Antley activated his radar at a Ford F150 pickup he saw travelling faster than the rest of traffic and saw the vehicle travelling 93 miles per hour in a 60 mile per hour section of highway. (T.51; R. 28). After the vehicle pulled over, Corporal Antley noticed lots of movement from the two occupants. (T.53; R. 30). Appellant was a passenger in the vehicle. (T.56; R. 33).

Appellant admitted consuming a beer, and Corporal Antley seized and poured out an open container of beer. (T.56-57; R. 33-34). After performing a field sobriety test on the driver, Corporal Antley spoke with Appellant, asking him to exit the vehicle. (T.62-63; R. 39-40). When he exited, it appeared Appellant was "holding his hands down around his pants" and "trying to hold something up in his pants." (T.65; R. 42). Corporal Antley performed a pat down of Appellant and found a hard object inside his pants that Corporal Antley believed could have been a weapon. (T.69; R. 46). Corporal Antley asked what Appellant had in his pants and then tried to get Appellant to his knees while watching his hands. (T.69-70; R. 46-47). Appellant refused to comply. (T.70-71; R. 47-48). Instead of complying, Appellant broke free and began to run. (T.72-73; R. 49-50).

Corporal Antley pursued Appellant, who was still trying to hold on to whatever it was in his pants. (T.74; R. 51). Corporal Antley deployed his taser, but it was not effective in stopping Appellant. (T.76-77; R. 53-54). As he attempted to pursue Appellant over a fence, Corporal Antley again deployed his taser, but again it failed to stop Appellant. (T.78-79; R. 55-56).

Corporal Antley caught up to Appellant, who appeared tired from running. (T.81; R. 58). Appellant put his hands toward his groin area, pulled up to remove something, and then is seen

by Corporal Antley placing a bag on the ground. After placing the bag on the ground, he immediately covered it with some leaves. Appellant then walked toward Corporal Antley and ultimately surrendered. (T.83; R. 69).

ARGUMENT

I. The trial court properly admitted Lieutenant Gunter's testimony regarding the valuation of the nearly one kilogram of cocaine Appellant stashed under leaves while trying to flee from Corporal Antley because the testimony was relevant and probative to proving the drugs were in Appellant's possession and not something placed in the location by a third party.

Appellant contends the trial court erred in allowing the expert testimony of Lieutenant Gunter regarding the valuation of the nearly one kilogram of cocaine located under some leaves in the woods near where Appellant was apprehended. He maintains the testimony was not probative or relevant. Further, he contends it was unduly prejudicial in violation of Rule 403, SCRE. However, the evidence was highly probative and relevant because it disputed any argument the drugs were in the woods at that location by happenstance or that they were left by some other third party and not Appellant. Even if the testimony is found to be irrelevant or more prejudicial than probative, its admission is entirely harmless in light of the evidence in the record.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Pagan, 369 S.C. at 208, 631 S.E.2d at 265.

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both 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." Risher v. S. C. Dep't of Health & Envtl. Control, 393 S.C. 198, 205, 712 S.E.2d 428, 432 (2011).

Pursuant to Rule 401, SCRE: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Additionally, under Rule 402, SCRE: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.' . . . If judicial self-restraint is ever desirable, it is

when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 357-58, 543 S.E.2d 586, 593-94 (Ct. App. 2001) (internal citations omitted), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In the instant case, Appellant's counsel argued to the jury, and attempted to show through questioning, it was illogical for the nearly one kilogram of cocaine to have been placed in the woods by the defendant. His argument at trial centered on whether the State proved Appellant possessed the kilogram of cocaine. During opening statement, counsel argues: "You'll hear the officer probably testify . . . that he actually sees my client burying something on the ground. Why my client would do it after all this running and after he - - he's clearly in the vision of the officer." (T.39; R. 16). During questioning, Appellant's counsel argues Corporal Antley failed to preserve the pants Appellant was wearing in order to demonstrate whether he could have carried the kilogram of cocaine as described by Corporal Antley; questions whether any other officers saw the location where the package was found; and asks whether they "perform[ed] any type of DNA or any type of fingerprint analysis to determine who had had control or possession of the item?" (T.137; 145-146; R. 113; 121-122). All questions clearly intended to raise doubt regarding Appellant's possession of the drugs. The following colloquy also involves the believability of the officer's testimony that Appellant just tried to cover up the drugs:

> Q. So he knows you're there. He calmly bends over and puts it on the ground and covers it up in leaves and turns around and looks at you; then he starts walking forward to you?
>
> A. Yes, sir. And as weird as it looks, that's the way it looked that day.
>
> Q. Okay. So he's too tried to do anything else. You, he lays -- lays down, you cuff him.

(T.140; R. 116).

Finally, in closing arguments, Appellant's counsel continues questioning the believability of Corporal Antley's version of events and raising the possibility Appellant did not possess the drugs:

> But anyway, he says for whatever reason, he's as far as from me as to this wall, 20, 30 feet, my client is walking. He places the bag, he covers it up with leaves; **it's incredible. I mean it's incredible. The same guy who ran all this distance is just going to say, okay, I'm going to cover it up; you don't see me.** I'm going to cover it up with leaves and then he comes back and then he's arrested.
>
> . . . .
>
> Speaking of the bag, do you remember how it was allegedly packaged? It was a Dillard's bag, I'm sorry. This package was inside a Foot Locker bag, which was inside a Dillard's bag and all that's in my client's britches.
>
> Well what happened to the Dillard's bag and the Foot Locker bag; I threw that away. Why did you throw that away? Why would you throw it away? Why wouldn't you just keep it? Why wouldn't you keep it to show that indeed that's what it was in; why wouldn't you take those items; **why wouldn't you fingerprint those items**; why wouldn't you do DNA? You've got two defendants that have been charged. Why wouldn't you do that to at least to **determine who had actually touched the drugs, if either one of them had**?

(T.310-312; R. 268-270) (emphasis added).

The testimony by Lieutenant Gunter was highly probative to establish the unlikelihood that the drugs belonged to anyone other than Appellant. His testimony established the drugs had a wholesale value of $30-35,000 and a street value of nearly $100,000. As the Solicitor argued, it is illogical a third party left something that valuable just under some leaves in the woods, and then Appellant happened to stop and be apprehended right beside cocaine with much value. Further, the value of the drugs he is carrying makes it quite likely Appellant would attempt to hide or discard the drugs, especially when he knew he was imminently going to be apprehended.

Significantly, this Court has already dealt with almost identical testimony in State v. Jamison, 372 S.C. 649, 643 S.E.2d 700 (Ct. App. 2007).[1] In Jamison, the defendant was charged with trafficking cocaine and trafficking crack cocaine. The drugs were found in a truck he was driving and Jamison asserted at trial the drugs belonged to someone else that used the truck. This Court specifically held: "We agree with the trial court that jurors typically do not know the current street prices of illegal drugs. Grounsell's valuation of the drugs, based on his years of law enforcement experience, allowed the jury to better determine whether a person would reasonably leave expensive narcotics unguarded and disguised as trash in a truck allegedly used by numerous people." Id. at 653, 643 S.E.2d at 702. This Court concluded: "If the jury did not believe Jamison's assertion that an unknown individual left thousands of dollars worth of drugs disguised as garbage in an area where other people had access to the drugs and might even throw them away, it reinforced the State's case that Jamison was knowingly in actual or constructive possession of the drugs at the time of his arrest, a key element of the trafficking charges." Id.

The same rationale applies in the instant case for why the testimony was relevant and probative and not unduly prejudicial. Appellant, whether during opening statements, throughout his questioning of Corporal Antley, or in closing argument, asserted the drugs were not his and the State failed to establish possession by Appellant. In demonstrating the drugs had a value between $30,000 and $100,000 dollars, the State demonstrated how unlikely and illogical it is to believe the drugs were just left at that spot unguarded in the woods. The testimony by Lieutenant Gunter was clearly probative and relevant and clearly not unduly prejudicial.

[1] Interestingly, Appellant's counsel fails to even mention the Jamison case although it is directly on point and was cited as the clear basis for the trial court's ruling allowing the testimony. It is arguable the issue is thereby waived for review on appeal. See State v. Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010) (affirming the ruling of the trial court because the appellant failed to appeal all grounds upon which the ruling was based); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case).

Finally, any possible error in admitting the valuation is entirely harmless in light of the testimony in the record. See State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (holding improperly admitted evidence was harmless error given the overwhelming evidence of guilt). Corporal Antley testified he witnessed Appellant remove the bag and place it on the ground. Appellant was seen in actual possession of the cocaine. Further, Appellant does not challenge the results of the drug report indicating it is nearly a kilogram (or 1000 grams) of cocaine, amply sufficient to satisfy the requirements for trafficking in excess of 400 grams. Accordingly, even if the trial court erred in admitting the testimony it was entirely harmless in light of the record in this case.

CONCLUSION

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

Respectfully submitted,

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January 23, 2017

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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 Informaiton in Appellate Court Filings."

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