STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2015-002206

The State, Respondent,

vs.

Timothy Artez Pulley, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in charging a permissive inference that the defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control.

II. The trial court did not err in failing to charge the jury that the State must prove a complete chain of custody before they can convict because the determination of a chain of custody is a question for the court in determining the admissibility of the evidence.

III. The trial court did not err in admitting evidence seized from the automobile because a sufficient chain of custody was established by the State.

IV. The trial court did not err in failing to require the State to open fully on the law and facts and reply only to arguments of defense counsel. Further, even if error, any error was entirely harmless.

V. The trial court did not err in failing to suppress items seized from the automobile because the officers properly seized the drugs found in a search incident to arrest, it was found in plain view, and it was found during a proper inventory search. (Appellant's Issues V. and VI).

STATEMENT OF THE CASE

On September 6, 2013, the Laurens County Grand Jury indicted Appellant on charges of trafficking crack cocaine. His initial trial before the Honorable Donald B. Hocker and a jury ended in a mistrial. In his second trial on October 6-7, 2015, also before Judge Hocker, the jury found him guilty as charged and Judge Hocker sentenced him to twenty-five years in prison and a $50,000 fine. Appellant served and filed his Notice of Appeal on October 14, 2015.

STATEMENT OF FACTS

On Saturday, June 22, 2013, Appellant went to the paint shop to pick up his girlfriend's Dodge Challenger. She was at work driving another vehicle. The paint shop repaired the vehicle after Appellant's girlfriend was involved in an accident. (T.174-176; R.260-262). Appellant's girlfriend did not see Appellant again that day. She was not with him and did not know what he was doing until she received a phone call to retrieve her car from impound the next morning. (T.174; 176-177; R.260; 262-263).

Between 3:00 and 3:20 A.M. on June 23, 2013, Office Craven and Lieutenant Brewer left the scene of a call when they observed a Dodge Challenger traveling at a high rate of speed. (T.91; 115; R.172; 196).[1] They pulled in behind the vehicle and began pacing its speed. The vehicle was traveling at over fifty miles per hour in an area where the speed limit was thirty-five miles per hour. (T.91; R.172). Both officers activated their blue lights. (T.92; R.173). Appellant did not stop until after exiting the road into a McDonald's parking lot which had numerous people already present. (T.93-94; R.174-175). Prior to reaching the McDonald's parking lot, he sped up instead of stopping on the road. (T.95; R.176). Appellant pulled through the parking lot and ended up on the other side in one of the last parking spots. Officer Craven indicated the curb at the end of the parking spot stopped Appellant and kept him from running into the building. (T.95; R.176).

Appellant exited his vehicle and began heading towards the door of the McDonald's at a brisk pace. (T.96; 119; R.177; 210). Officer Craven recognized Appellant and instructed him to return to his vehicle. He also knew Appellant was driving under suspension. Lieutenant Brewer was also on scene and the two officers attempted to place Appellant in handcuffs. (T.97; R.178). Appellant struggled and resisted, which required Officer Craven to use his taser to dry stun

[1] The two officers were traveling in separate vehicles, but heading the same direction. (T.92; 115; R.173, 196).

Appellant in order to subdue him. (T.98-99; 122-123; R.179-180; 213-214).The officers handcuffed Appellant, but he attempted to pull away and was not complying even with the handcuffs on. (T.100; R.181). Officer Craven patted Appellant down and found marijuana in one of his front pockets, as well as $862 in cash. (T.100-101; 124; R.181-182; 215).

The officers walked up to the blue Dodge Challenger Appellant was driving, the one belonging to his girlfriend. (T.102; 173; R.183; 259). They were able to observe a yellow plastic bag behind the driver's seat on the floor. Inside the bag the officers saw clear bags containing crack cocaine. (T.102-103; R.183-184). The bag was not covered with anything, and was clearly visible. (T.103; R.184). Further, the bag was within arm's reach of Appellant in the driver's seat. (T.132; R.223). Appellant's girlfriend denied the drugs belonged to her. (T.178; R.264). According to the State's expert, the 16.5 grams of crack cocaine found were valued at approximately $1650. (T.144; R.235).

ARGUMENT

I. The trial court did not err in charging a permissive inference that the defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control.

Appellant contends the trial court erred in charging the jury with a permissive inference regarding the jury's use of evidence of constructive possession of the drugs. The instruction is a proper and constitutional instruction for a court to give the jury. Further, under the facts and circumstances of this case the instruction was reasonable and necessary for the jury to understand constructive possession.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "'In

reviewing jury charges for error, [the Court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" Brandt, 393 S.C. at 549, 713 S.E.2d at 603 (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). "Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict." State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (citing State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). "Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous." Id.

In the instant case, the State attempted to prove Appellant guilty of trafficking crack cocaine based on his constructive possession of the crack cocaine. In his instructions to the jury the trial court explained:

> Constructive possession means that the defendant had knowledge, dominion and control or knowledge and the right to exercise dominion or control over the crack cocaine itself.
>
> Mere presence at the scene where the drugs were found is not enough to prove possession. Knowledge can be proven by evidence of acts, declarations or conduct of the defendant for which the inference may be drawn that the defendant knew the existence of the drugs. Possession of drugs may be inferred from the circumstances and may be imputed to anyone who has the knowledge, power and intent to control the disposition or use of the drugs. The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control. However, these inferences are simply evidentiary facts to be taken into consideration by you along with all the other evidence in this case and to be given the weight you decide it should have. You are free to accept or reject these permissive inferences of knowledge and possession depending upon your own view of the evidence.

(T.277-278; R.360-361). The instructions given are a correct statement of law in South Carolina. See State v. Adams, 291 S.C. 132, 135–36, 352 S.E.2d 483, 486 (1987) ("The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may

be inferred if the substance was found on premises under his control. The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence.").

Appellant first argues the instruction provided by Adams has no basis in South Carolina law. In State v. Hudson, the South Carolina Supreme Court explained: "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." State v. Hudson, 277 S.C. 200, 203, 284 S.E.2d 773, 775 (1981). Hudson cites to State v. Ellis, in which the Supreme Court stated: "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974). These cases clearly support the instruction provided by our Supreme Court in Adams, which merely explained to the jury how it could consider constructive possession in addition to actual possession when determining whether the State met its burden.

Appellant then tries to indicate the unreasonableness of the inference in light of the facts of this case. The inference is entirely reasonable in this case. Appellant retrieved the vehicle from an auto paint and body service where the vehicle was being repaired after an accident. Appellant was the only person having dominion and control of the vehicle once he retrieved it from the paint and body shop. Appellant's girlfriend, who owned the vehicle, indicated he picked it up and she was not with him in the vehicle. This is not a case in which multiple people had access to the vehicle at or around the time the drugs were found in plain view directly behind where Appellant was driving.

Appellant points to several out-of-state cases, which are clearly inapposite and distinguishable from the current case. In Woolridge v. Texas, 514 S.W.2d 257 (Tx. Ct. Crim App. 1974), the court found the evidence insufficient to warrant sending a case to the jury on constructive possession. In that case, an individual borrowed a vehicle and was driving it for less than five hours. The main reason the court found the State failed to demonstrate knowledge was because the drugs were hidden so well it took multiple searches and a bit of luck for them to be found. The drugs were taped under the glovebox completely out of plain view of anyone in the vehicle. Id. at 259. The facts of the instant case are much more similar to the facts of Hahn v. State, 502 S.W.2d 724 (Tx. Crim App. 1973), which is cited by Woolridge. In Hahn, the driver of the borrowed vehicle had used it to travel from South Carolina to Texas. The bag of marijuana under the driver's seat was readily accessible to him. The Court found there was sufficient evidence to warrant the conclusion Hahn knew of the presence of the marijuana.

Additionally, Appellant cites to State v. West, 559 S.W.2d 282 (Mo. Ct. App. 1977). In that case, however, the defendant owner of the automobile did not have exclusive use of the automobile and their control of it at the time the drugs were found was seriously questioned. Other individuals were known to use the vehicle and have access to it. The defendant was arrested and the keys to the vehicle remained at a residence and not in possession of the defendant. After arrest, the defendant was informed the vehicle would be searched later by officers. The vehicle was not searched until sometime after the owner was released from custody, which occurred after others who were known to have used the vehicle in the past. The defendant knew the vehicle was to be searched and had opportunity to remove any contraband from the trunk, but did not even go into the truck prior to the officers arriving for a search. The Court found: "In view of the testimony indicating the keys were left in the mobile home while the

defendant was in custody, it is reasonable to believe that the vehicle was not in defendant's possession prior to the search. Perhaps the most compelling fact indicating the lack of knowledge of the drugs was the defendant's conduct. Her conduct was not such that an inference of knowledge could be drawn." State v. West, 559 S.W.2d 282, 285 (Mo. Ct. App. 1977). This stands in sharp contrast to the instant case in which Appellant was the only person with access to and control over the vehicle at the time the drugs were found directly behind his seat. Further, Appellant's behavior is the complete opposite of the behavior of the defendant in West. Appellant did not immediately stop for police, tried to get as far away as possible from them in the parking lot before stopping, got out of the car and walked away from the officers at a brisk pace toward a restaurant, and then resisted being handcuffed while refusing to cooperate with the officers.

The inference certainly had a reasonable basis in the instant case. No other person had control or access to the vehicle at the time the drugs were located. It is illogical to believe the drugs were left by someone at the paint and body shop as they would not have likely forgot or left over $1600 worth of drugs. Appellant's girlfriend, while the owner of the vehicle, had no involvement with the vehicle until she retrieved it from impound after Appellant was arrested. As a result, the jury instruction was reasonable and was calculated to assist the jury in understanding application of the doctrine of constructive possession.

Finally, the jury charge is not confusing such that it would be similar to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Nor is it an impermissible comment on the facts rendering it unconstitutional like the charges in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), or State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

In Belcher, the Court found: "we are firmly convinced that instructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). In the instant case, there is no such contradiction. The jury was charged regarding the fact mere presence is not sufficient to warrant conviction and then explained how it is to consider the doctrine of constructive possession. The judge's instruction presented the two sides of the coin in this case, as opposed to "purposeful ambiguity" and "half-truth" found objectionable in Belcher.

In Stukes and Cheeks, the jury charges were impermissible comments on the facts by the trial court. In Stukes, the instruction isolated one type of evidence and set it apart from all others by indicating a victim's testimony need not be corroborated. The Supreme Court stated: "By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." State v. Stukes, 416 S.C. at 499, 787 S.E.2d at 483.

In Cheeks, the jury charge indicated that actual knowledge of the possession of drugs is strong evidence of intent to control its disposition or use. The Supreme Court found the charge "improperly weighs the evidence, and . . . largely negates the mere presence charge." Cheeks, 401 S.C. at 328, 737 S.E.2d at 484.

The charge at issue in the current case does not improperly comment on the facts, weigh the evidence, or isolate one type of evidence above others. Instead, it merely provides instruction to the jury on how to use the doctrine of constructive possession. This charge no more comments on a fact or isolates a particular set of facts than does the mere presence charge

which immediately proceeded it in the judge's instructions. Both the mere presence and the inference charge are instructions for the jury on how to use evidence, similar to reasonable doubt instructions, the instructions regarding direct versus circumstantial evidence, and instructions explaining the jury's role in weighing the evidence and determining credibility of the witnesses.[2] These are present to enlighten the jury and aid it in arriving at a correct verdict; they do not improperly comment on the facts, weigh the evidence, or provide a confusing or improper charge on the law. Accordingly, the trial court properly gave the permissive inference originating in State v. Adams as part of its charge to the jury.

[2] To the extent this Court found the permissive inference regarding knowledge and possession to be improper, the Court would have to find the mere presence charge improper because they are both the same type of charge providing the jury with the same type of explanation and instruction.

II. The trial court did not err in failing to charge the jury that the State must prove a complete chain of custody before they can convict because the determination of a chain of custody is a question for the court in determining the admissibility of the evidence.

Appellant maintains the trial court erred in refusing to charge the jury the State had to establish a chain of custody before evidence could be considered. Chain of custody is a prerequisite to admissibility and is a determination for the trial court. Further, the jury was properly and sufficiently charged on its role in considering and weighing the evidence, as well as determining the credibility of witnesses.

"The trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements . . . ." Watson v. Ford Motor Co., 389 S.C. 434, 456, 699 S.E.2d 169, 180 (2010). One of those preliminary determinations is whether a proper chain of custody has been presented prior to the admission of fungible evidence. See e.g, State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 754 (2011); State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007). Because the determination of whether the State provided a proper chain of custody is a gatekeeper function of the trial court prior to the admission of the evidence, there is no need for a jury charge regarding chain of custody.

Further, the jury charges provided by the trial court adequately informed the jury on how they were to consider and weigh the evidence presented in the case. "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472

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The trial court charged the jury fully on their responsibility in weighing the evidence and determining credibility of witnesses:

> In every case tried in this court before a jury, the jury becomes the sole and exclusive judge of the facts in the case. . . . As jurors, it is your duty to determine the effect, value and weight and truth of the evidence presented during this trial.
>
> . . . .
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence or some combination of the two. Necessarily, you must determine the credibility of witnesses who have testified in this case and any evidence submitted. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.
>
> In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety.
>
> You may consider whether any witness has exhibited to you any interest, bias, prejudice or other motive in this case. You may also consider the appearance and 1 manner of a witness while

> on the witness stand. Concerning witness testimony and evidence submitted in this case, it is up to you to give it whatever weight you think it deserves.

(T.268; 272-273; R.351; 355-356). The judge's charge clearly explained to the jury its role in determining the facts of the case, in evaluating the testimony of the witnesses, and in assigning whatever weight they desired to the evidence presented.

Additionally, Appellant was able to argue to the jury that they should discount the reliability of the drugs and raised questions regarding the testimony supporting a chain of custody. (T.242-244; R.325-327). Through cross-examination and argument is exactly where a defense attorney should raise these questions so the jury can then use the charges above to determine what weight to give the evidence and what credibility to assign the witnesses. The trial court's instructions properly and sufficiently charged the jury on its responsibility in considering the evidence presented and no charge specifically related to a presentation of a chain of custody was warranted.[3]

[3] Additionally, a charge which required the jury to specifically consider a chain of custody related to the drug evidence in this case could be an impermissible charge on the facts.

III. The trial court did not err in admitting evidence seized from the automobile because a sufficient chain of custody was established by the State.

Appellant contends the trial court erred in admitting the drug evidence seized from the automobile because the State failed to provide a sufficient chain of custody. The State provided a complete chain of custody, as far as practicable, and therefore, the trial court did not err in making the gatekeeper determination that the drugs were admissible.

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). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

In order to admit the drug evidence:

> [A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.

State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007) (emphasis added) (citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)); see also State v. Kahan, 268 S.C. 240, 244–45, 233 S.E.2d 293, 294 (1977) (holding the standard stated in Benton v. Pellum had been met where the evidence was transported in accordance with normal protocol, even though every person who

may have handled it was not personally identified and there was no testimony regarding the care and handling of the item for an interval when it was being stored).

"South Carolina law does not require testimony as to the exclusion of any possibility of tampering." State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004). The Courts of this State have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the evidence was not established at least as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility, not admissibility." Carter, 344 S.C. at 424, 544 S.E.2d at 837. Importantly: "Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629 n.1, 614 S.E.2d 642, 646 n.1 (2005). The Supreme Court has stated:

> Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence."

State v. Hatcher, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-755 (2011). The Court in Hatcher indicated: "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." Id.

In the instant case, the State presented a sufficient chain of custody to indicate the drugs seized from Appellant were the same drugs analyzed and brought to trial. Appellant takes issue

with the sequence of events from seizure to the drugs coming into the possession of the evidence custodian for Laurens Police Department.[4] At trial, the State presented the testimony of Officers Craven and Brewer as well as the former evidence custodian to establish the chain of custody.

Officer Craven testified to finding a yellow Dollar General bag, which further contained plastic bags of crack cocaine, in the vehicle driven by Appellant. (T.103; 105; R.184; 186). He then testified he placed the dugs "in evidence inside the Laurens Police Department." (T.106; R.187). Officer Craven then described the evidence locker at the Laurens Police Department. He indicated:

> We take the evidence -- there's two evidence lockers that are upstairs at the Laurens Police Department. They are like the old mailbox now when you pull the handle and you [] drop stuff inside of it. They've got a padlock on the bottom. The only person at the time that had the key to it was John Stankus. Once the drugs were placed in there, he's only person that would be able to get them in and out for evidence purposes.

(T.106; R.187).

Lieutenant Brewer initially testified he did not take the drugs from the scene, but that normally the officer who made the charges would take possession of the drugs. (T.126; R.217). Lieutenant Brewer indicated he believed either Officer Craven or another officer, identified as Andrew Ashley, must have taken possession of the drugs. (T.126-127; R.217-218). Lieutenant Brewer indicated "I don't recollect as far as how the drugs got from there to the patrol office." (T.127; R.218). However, after viewing the video in which Officer Craven is seen leaving the scene while the drugs are still on Lieutenant Brewer's vehicle, he was recalled to testify. The following colloquy occurred:

Q Who seized the drugs?

[4] Appellant raises no argument regarding the portion of the chain of custody involving SLED and the ultimate analysis of the crack cocaine. The testimony of Ms. McCormick clearly established the relevant chain of custody once the drugs arrived at SLED. (T.186-187; R.272-273).

A Officer Craven.
Q Okay. And, uh, they were placed on the hood of your car? Was that your car in the video that we saw?
A That's correct.
Q Mr. Wise was asking you some questions about what happened to them after Mr. Craven left the scene. Do you remember him asking those questions?
A I do.
Q And watching the video, he clearly leaves the scene with Mr. Pulley while the drugs are on the hood of your car; is that fair to say?
A Yes, sir. It is.
Q During that window of time after he seized the drugs and then he put the drugs in the lock box, where was the crack cocaine?
A After having an opportunity to review the video -- because, like I said, it had been two years -- the drugs were left with me. And I turned them back over to Craven prior to the end of the shift.
Q All right. Just to recap, he seized the drugs. He left with Pulley. Do you know where he went with Mr. Pulley?
A Yes, sir. He took him to the Laurens Police Department where a DataMaster was offered to him.
Q At that time, he left the crack with you; is that your testimony?
A Yes, sir. It is.
Q You took the crack cocaine from McDonald's to where?
A To the police department.
Q Okay. And then what I did you do with the crack cocaine?
A I put it in Officer Craven's possession.
Q Okay. Then he would've taken them to the drop box?
A Yes, sir.

(T.198-200; R.284-286).

The former evidence custodian testified he retrieved the evidence out of the evidence lock box. He indicated the officer delivering the evidence to the evidence lock box would package it into the SLED BEST pack and then place it into the lock box. (T.150; R.241). He maintained the drugs in this case were retrieved from the lock box even though a chain of custody form indicated he received the items personally from Officer Craven. (T.155; R.246).

He also indicated the drugs were already in the BEST pack when he retrieved them from the locker. (T.154; R.245).

Appellant raises issues with regard to the credibility of the chain of custody. These issues are solely for the determination of the jury. The individuals who handled the drugs were all identified. While there may have been confusion initially regarding exactly who removed the drugs from the scene, the testimony ultimately established Officer Craven seized the drugs and placed them on the hood of Lieutenant Brewer's vehicle. Lieutenant Brewer then transported the drugs to the Laurens Police Department where he turned them over to Officer Craven. Officer Craven placed the drugs in the lock box, or evidence locker, where they were retrieved by the evidence custodian and ultimately transported to SLED. As a result, the State presented a complete chain of custody identifying all individuals involved. Any issue regarding the credibility of that testimony, any conflicts in that testimony, or the failure to immediately place the items in a tamper proof bag at the scene go to the weight of the evidence and not the admissibility.

Further, any discrepancy in whether the evidence custodian received the drugs personally from Officer Craven or from the lock box after they were delivered by Officer Craven does not create an admissibility issue. In State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct. App. 1995), two Officers testified to a different sequence of events and dates for how evidence was deposited into the secure evidence storage. The Court found "Although a discrepancy existed as to the dates Dailey received the evidence, no evidence was presented to indicate the drugs were not within the control of identifiable people during the entire time. A reconciliation of this discrepancy was not necessary to establish the chain of custody, but merely reflected upon the credibility of the evidence rather than its admissibility" Johnson, 318 S.C. at 196, 456 S.E.2d at

444. Any discrepancy in the form and testimony in this case goes directly to the credibility of the evidence and provided a basis for Appellant to challenge that credibility before the jury—something he did in both cross-examination and closing argument. It did not, however, go to the admissibility as found by the trial court. As a result, the trial court did not err in finding the State presented a sufficient chain of custody and admitting the drugs.

IV. The trial court did not err in failing to require the State to open fully on the law and facts and reply only to arguments of defense counsel. Further, even if error, any error was entirely harmless.

Appellant contends the trial court erred in failing to require the State to open fully on the law and facts and to reply only to arguments of defense counsel. Initially, the State notes the trial court applied to correct order of closing arguments based on the procedural precedent at the time of trial. Further, Appellant failed to object to any improper arguments made by the solicitor. Finally, any possible error in the order of closing arguments was entirely harmless in this case because the only instances Appellant indicated he would have responded were not examples of "sandbagging," Appellant was able to thoroughly present his theory of the case, and Appellant should not have been surprised by the arguments of the solicitor.

Historically, the right to the final closing argument has followed the party with the burden of proof. Stein Closing Arguments § 1:6: Right to open and close; order of argument (2011-2012 ed.) ("Generally, the right to make opening and closing follows the person having the burden of proof."); Nicole Velasco, Taking the "Sandwich" Off of the Menu: Should Florida Depart from Over 150 years of Its Criminal Procedure and Let Prosecutors Have the Last Word?, 29 Nova L.Rev. 99, 112 (2004) ("At common law, the widely accepted rule in the United States is that the party with the burden of proof has the right to open and conclude final argument before the jury.").

In criminal trials in South Carolina, a solicitor is entitled to open and close the closing arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977). The initial closing argument must include a discussion of the law if demanded by the defendant; however, the solicitor is not required to open his initial closing with any argument on the facts although he may do so as a matter of discretion. State v.

Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (S.C. Oct 12, 2009); Rodgers, 269 S.C. at 25, 235 S.E.2d at 809. This was the procedure in place at the time of trial and utilized by the trial court in this case.

Totally denying a criminal defendant the opportunity for closing argument constitutes a denial of the defendant's basic right to make his defense. Herring v. New York, 422 U.S. 853, 858-859 (1975). While the right to make a closing argument cannot be circumvented, the order of argument is vastly different, particularly since argument is not evidence. See, e.g., Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649, 653 (2006), *quoting* S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511, 513 (Ct. App. 2003) ("'[a]rguments made by counsel are not evidence'"); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22, 24 (1987) ("the solicitor's closing argument is not evidence"). There is no constitutional right to a certain order or scope of argument.

The order of closing arguments is a matter of state procedural rule or practice rather than substantive law. State v. Huckie, 22 S.C. 298, 299 (1885) (alleged error in denying defendant final closing argument was "not a matter of error as to express law, but of practice"). The United States Supreme Court has consistently held the States are free to shape their own rules of procedure. See, e.g., United States v. Scheffer, 523 U.S. 303, 316 (1998), quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("we thus stressed that the ruling did not 'signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.'").

The practice followed by the trial court did not result in "sandbagging" by the State because all of the arguments made by the solicitor were entirely consistent with the State's

theory throughout trial. Appellant references a few instances he would have responded to if he had the opportunity to hear the State's entire argument before presenting his argument; however, all of the instances he notes were statements by the solicitor consistent with the theory that the drugs were Appellant's and not some third persons. The order of closing argument did not amount to a violation of Appellant's due process rights or any other constitutional right.[5]

Additionally, any error was entirely harmless. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). Appellant was fully aware of the State's theory of the case and nothing presented by the State in its closing argument should have surprised Appellant. He was not "sandbagged" by new arguments or theories being presented.[6] Instead, the State presented its theory of the case by referring back to the State's opening statement and by countering Appellant's theory that the State failed to prove the drugs actually belonged to Appellant and not someone else. A reading of the instances complained of by Appellant after the State's closing argument and his responses makes it clear any change in the order of the closing argument would not have changed the decision in this case because the jury was made fully aware of the two theories of the case and ultimately chose the State's.

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[5] The State notes this issue is currently before the South Carolina Supreme Court in State v. Beaty (Appellate Case Number 2015-000718). The Supreme Court issued an opinion in which the majority reinstated what it considered the proper handling of closing argument prior to Lee. In the opinion, the Court stated the party with the middle argument could ask the party with first and last arguments to open fully on the law and facts and then that party would only be able to reply to the middle argument in reply. The Supreme Court subsequently granted both parties' petitions for rehearing and oral argument is currently scheduled for June 15, 2017. The outcome of this case may or may not be dispositive of whether an error occurred in the instant case. It should be noted the original opinion concluded: "Further, we hold that in criminal cases tried after this opinion becomes final, if requested by the party with the right to second argument, the party with the right to open and close will be required to open in full on the law and the facts, and be limited in reply to addressing the other party's argument and not permitted to raise new matters." State v. Beaty, Op. No. 27693, 2016 WL 7474479, at *3 (S.C. Dec. 29, 2016). If similar language is included in the revised opinion then the holding would clearly not be applicable to this case.

[6] It should be noted Appellant did not object at any time during the argument that the State was "sandbagging," presenting new theories, or going outside the bounds of proper closing argument.

In sum, Appellant failed to demonstrate prejudice even assuming the trial judge erred. See State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him."); see also Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007) (finding errors in closing argument "do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.").

V. The trial court did not err in failing to suppress items seized from the automobile because the officers properly seized the drugs found in a search incident to arrest, it was found in plain view, and it was found during a proper inventory search. (Appellant's Issues V. and VI).

Appellant contends the trial court erred in failing to suppress the items from the automobile Appellant was driving because the officers failed to follow the written policy for inventory searches and because the search was not a valid search incident to arrest. First, search was a valid search incident to arrest after the officers found marijuana and a large amount of cash on Appellant's person during the struggle. Additionally, the failure to follow the internal inventory procedures did not render the search unconstitutional and did not warrant suppression. Further, Appellant cannot demonstrate how he was prejudiced by the officers' failure to have the tow truck driver sign the inventory, especially since the seized crack cocaine would not have been listed on the inventory. Finally, the crack cocaine was in plain view upon opening the vehicle, and as a result, the seizure was entirely appropriate.

A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013); see also, State v. Groome, 378 S.C. 615, 618, 664 S.E.2d 460, 461 (2008); State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated, ..." U.S. Const. amend. IV. It is the "basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). As the South Carolina Supreme Court has explained:

> The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search.' " "The rule's sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth Amendment violations." Because "[e]xclusion exacts a heavy toll on both the judicial system and society at large," the Court has stated "the deterrence benefits of suppression must outweigh its heavy costs" for the exclusion to be deemed appropriate.

State v. Brown, 401 S.C. 82, 88–89, 736 S.E.2d 263, 266 (2012) (citing and quoting Davis v. United States, 564 U.S. 229 (2011)). However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). Recognized exceptions to the requirement of a warrant include: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, (7) abandonment, and (8) exigent circumstances. See State v. Counts, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015). "Furthermore, if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant." Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014).

Inventory of the Vehicle

As the officers explained, the drugs were properly seized during a valid inventory of the vehicle. The officers properly began their inventory search pursuant to their established procedures, and the fact that subsequent ministerial acts were not completed after finding and seizing crack cocaine does not render the search and seizure of the drugs unconstitutional.

In South Dakota v. Opperman, the United States Supreme Court held inventory searches of automobiles to be consistent with the Fourth Amendment. 428 U.S. 364, 375 (1976). "[I]nventory searches are now a well-defined exception to the warrant requirement of the Fourth Amendment." Colorado v. Bertine, 479 U.S. 367, 371 (1987). The policies behind the warrant requirement are not implicated in an inventory search. Opperman, 428 U.S., at 370, n. 5, 96 S.Ct., at 3097, n. 5. Further, the Court has stated: "The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. . . . The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations." Id.

The officers in this case were operating pursuant to their standard vehicle inventory policy when they instituted the inventory of the vehicle driven by Appellant. Officer Craven indicated the vehicle committed and offense on the highway and subsequently stopped in the parking lot of a busy McDonald's. He indicated it was policy to tow the vehicle and to inventory it before towing. (T.16-18; R.15-17). He explained the reason for conducting the inventory of the vehicle was to "make sure all the valuables are accounted for, make sure that when the vehicle does get towed that if anything that's in it is accounted for before it - - it left our custody." (T.17-18; R.16-17). He also explained that there is also the possibility that they could

have dangerous items. (T.18-19; R.17-18). The vehicle inventory policy was provided to the court and available for its consideration. (Vehicle Inventory Policy, Court's Exhibit 2; R.379-381). There is no question that upon opening the driver's side door to the vehicle, the officers were conducting a proper inventory of the vehicle. As soon as the officers opened the door, the bag became visible and was subject to search and seizure. (T.19-20; R.18-19).

Any failure to perform ministerial acts would not justify exclusion of evidence when the inventory was begun according to policy and there is no argument the inventory was merely a ruse for criminal investigation. The only argument is that a form was not properly filled out and signed prior to removal of the vehicle. Appellant cannot demonstrate how the failure to have the form signed by the tow truck driver prejudiced him as the crack cocaine would have been removed prior to the tow truck driver taking the vehicle and would not have been listed on the form of items in the vehicle. Additionally, the fact other procedures could have better protected either the police or Appellant is not the proper consideration. See Bertine, 479 U.S. 367, 374 ("We conclude that here, as in Lafayette[7], reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."). The policies implemented by the Laurens Police Department were reasonable and the officer's failure to complete the ministerial tasks which would occur after the drugs were already found and seized did not render the procedures unreasonable.

The case cited by Appellant to argue that a failure to follow procedures should result in the suppression of evidence is clearly distinguishable from the instant case. In Fair v. State, the Court noted:

[7] Illinois v. Lafayette, 462 U.S. 640 (1983)

> The search was conducted not at the impoundment lot but at the scene of the crime. The inventory was conducted by an officer responsible for criminal investigations and not the custody of impounded property. There is no evidence that formal inventory sheets were completed. The officer apparently did not make note of Fair's personal affects, but instead focused only on the contraband. Finally, it is not even clear from the record that the car actually ever was impounded.

Fair v. State, 627 N.E.2d 427, 436 (Ind. 1993) (internal citations omitted). Further, and most significantly the Court explained:

> The fatal defect in this search is that the provisions of the Indianapolis Police Department's inventory policy are not established in sufficient detail by the record. . . . There was no testimony whatsoever that provided the particulars of the policy and, therefore, it is not possible for this Court to determine whether the seemingly suspicious circumstances which attended the search were in fact irregular.

Id. This stands in sharp contrast to the instant case where the written policy is in the record, the officers operated pursuant to the policy other than the timing of the form and getting it signed by the tow truck driver. The policies were otherwise appropriately followed and implemented by the officers. Additionally, the failure to perform the ministerial acts, without showing how they prejudiced Appellant, should not result in suppression. State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) ("This Court has held on a number of occasions that violations of procedure go to the weight, rather than the admissibility of evidence.") (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

Additionally, once the officers began the inventory search, which they had every right to do without a warrant as discussed above, the drugs were seen in plain view immediately upon opening the door. "Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." State v. Wright, 391 S.C. 436,

443, 706 S.E.2d 324, 327 (2011). Therefore, for evidence to be lawfully seized under the plain view exception, the State must show: (1) the initial intrusion which afforded the police officers the plain view of the evidence was lawful; and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. Id. The drugs were clearly incriminating and the officers could lawfully open the door in order to perform the inventory of the vehicle.

As a result, even if the failure to ultimately follow inventory procedures after finding the drugs somehow invalidated the ultimate outcome of the inventory, the drugs were still properly seized as they were in plain view, immediately recognizable as contraband, during a time when the officers were lawfully allowed in the vehicle.

Search Incident to Arrest

In addition, an exception to the requirement to obtain a warrant is when the search is done incident to arrest. "In Belton, the Supreme Court, '[i]n order to establish the workable rule this category of cases requires,' held 'that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.'" State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (*quoting* New York v. Belton, 453 U.S. 454, 460 (1981)). In Gant, the United States Supreme Court limited the application of its decision in Belton. The Court enounced: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search **or it is reasonable to believe the vehicle contains evidence of the offense of arrest**." Gant, 556 U.S. at 351 (emphasis added).

In the instant case, the second ground for a warrantless search applies. During the arrest, Officer Craven discovered marijuana in Appellant's pocket as well as a large sum of cash, $862.

The combination of finding drugs and finding a fairly large sum of money supports a reasonable consideration Appellant was involved in more than the personal use of the drugs. It is certainly reasonable to believe there could be further evidence of drugs in Appellant's vehicle, thereby justifying the search under the second prong of Gant. As Justice Scalia explained:

> In this case, as in Belton, petitioner was lawfully arrested for a drug offense. It was reasonable for Officer Nichols to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest.

Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J. concurring). It was Justice Scalia's sound rationale which was cited by the Supreme Court in Gant for allowing the second basis for a search of the automobile upon a defendant's arrest. The analysis is directly on point with the facts of this case and was correctly found by the trial court as a basis to deny the suppression of the drugs found in a search of the vehicle. (7/29T. 58; R.57).[8]

Automobile Exception

Finally, the search was proper under the automobile exception to the warrant requirement.

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Carroll v. United States, 267 U.S. 132, 153 (1925). In United States v. Ross, the Supreme Court continued to recognize its ultimate holding in Carroll: "a warrantless search of an automobile

[8] Appellant was charged with possession of marijuana which, based on the transcript and representations by Appellant's counsel, was dropped. (T.25-26; R.24-25).

stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment." United States v. Ross, 456 U.S. 798, 799 (1982). Finally, the United States Supreme Court acknowledged the broad scope of the automobile exception in Gant. A search is allowed pursuant to the automobile exception:

> If there is probable cause to believe a vehicle contains evidence of criminal activity, United States v. Ross, 456 U.S. 798, 820–821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by Justice Scalia's opinion concurring in the judgment in Thornton, which we conclude today are reasonable for purposes of the Fourth Amendment, Ross allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader.

Gant, 556 U.S. at 347.

Even if the ultimate search of the vehicle was not permitted under a previously discussed exception to the warrant requirement, it was certainly valid under the automobile exception. The finding of a bag of marijuana and significant sum cash on Appellant's person, indicative of distribution of drugs, provided the requisite probable cause for a search of the automobile to discover evidence of criminal activity. Accordingly, the trial court did not err in denying Appellant's motion to suppress the drugs found in the vehicle he operated.

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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August 2, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2015-002206

The State, Respondent,

vs.

Timothy Artez Pulley, Appellant.

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 Information in Appellate Court Filings."

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