ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

RECEIVED
NOV 15 2017
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CALVIN S. BARR,

APPELLANT

APPELLATE CASE NO. 2016-001367

INITIAL BRIEF OF APPELLANT

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2.

Did the trial judge err by instructing the jury on the dictionary definitions of "dominion" and "control" as these words relate to constructive possession when the instruction was erroneous and lowered the burden necessary for the jury to find Appellant guilty, as under this charge, Appellant merely had to have the right to use the property where the illegal substances were found to satisfy the element of constructive possession, which conflicts with our Supreme Court's holding in State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006), stating that mere access to the property is insufficient to establish constructive possession?

STATEMENT OF THE CASE

A Horry County Grand Jury indicted Appellant on September 17, 2015 for possession of marijuana with intent to distribute, possession of heroin with intent to distribute, and possession of cocaine. R. *. His case was called to trial on April 19, 2016 before the Honorable Larry B. Hyman, and a jury. Tr. 1. Assistant Solicitors David Caraker and Gray Ervin represented the state, and Stuart Axelrod and Jeffrey Lucas represented Appellant. Tr. 1.

On April 21, 2016, the jury found Appellant guilty as indicted. Tr. 344, l. 18 – 345, l. 9. He was sentenced to fifteen years for possession of heroin with intent to distribute, five years for possession of marijuana with intent to distribute, and five years for possession of cocaine. All sentenced were ordered to be served concurrently. Tr. 4, ll. 4-17 (June 13, 2016).

This appeal follows.

STATEMENT OF THE FACTS

On August 9, 2014, Dwight Tomlin, a uniform patrol officer with the Myrtle Beach Police Department, responded to 206 Maple Street in Myrtle Beach in response to a complaint made by Appellant's wife, Nicole Barr, who rented the residence. Tr. 107, l. 22 – 108, l. 18. Appellant and Barr had only been married for a few months and were having significant marital difficulties. Tr. 241, ll. 4-20. According to Barr, she complained to the police earlier that morning that Appellant had physically assaulted her. Tr. 241, l. 16 – 242, l. 4. She sought to have him arrested for criminal domestic violence. Tr. 241, l. 16 – 242, l. 4. Law enforcement, however, claimed Barr alleged "there was possible narcotics activity" at the home.[1] Tr. 108, ll. 12-18; Tr. 112, ll. 4-10; Tr. 123, ll. 13-17.

When Officer Tomlin arrived at 206 Maple Street, he knocked on the front door. No one answered. He called Barr and demanded she return to the home. Tr. 108, l. 19 – 109, l. 7. When Barr arrived, she unlocked the front door and allowed Officer Tomlin inside. Tr. 108, l. 19 – 109, l. 16. Tomlin, who had an arrest warrant for Appellant for criminal domestic violence based on Barr's complaint, found Appellant lying on the bed in one of the two bedrooms in the home. He was immediately arrested. Tr. 112, l. 14 – 113, l. 3.

Tomlin claimed that while he was arresting Appellant, he observed in plain sight numerous small plastic bags, a scale, a razor blade, and a wad of cash in the bedroom. Tr. 113, ll. 2-24. The home was also equipped with "some type of after market surveillance system." Tr. 115, ll. 15-19. Based on these observations, Tomlin suspected "some type of drug use" was

[1] Barr vehemently denied telling law enforcement that Appellant was selling drugs out of her home. Tr. 249, ll. 2-14. She testified that she went to the police department on August 9, 2014 to file a domestic violence complaint. Tr. 249, l. 14 – 250, l. 13.

going on inside the home. Tr. 114, ll. 4-13. He notified his supervisor who in turn notified the investigations division. Investigator Stephen Thackray responded to the home. Tr. 120, ll. 17-24.

Officer Tomlin walked Investigator Thackray through the house and showed him the evidence he found to be suspicious inside the residence. Tr. 120, l. 25 – 121, l. 15; Tr. 138, l. 12 – 139, l. 11. Thackray then obtained a search warrant based on the evidence allegedly found in plain view. Tr. 139, ll. 12-22.

During the execution of the search warrant, law enforcement found heroin, cocaine, and marijuana in a backpack in the laundry room. They also found additional scales, plastic bags, razor blades, and other drug related items in the laundry room. Tr. 143, l. 15 – 144, l. 9; Tr. 147, l. 1 – 148, l. 8; Tr. 160, l. 23 – 162, l. 5.

It was later determined that nearly two thousand dollars in cash was found inside the home, along with 196.6 grams of marijuana, over 0.22 grams of heroin, and 0.42 grams of cocaine. Tr. 149, ll. 6-10; Tr. 186, ll. 8-13; Tr. 199, ll. 6-24. Significantly, no drugs were found in the bedroom where Appellant was arrested or on his person. Tr. 165, ll. 12-16.

Nicole Barr, Appellant's wife, admitted that in August 2014, she and Appellant "were having marital problems" and "weren't really together." Appellant was unfaithful and had fathered a child with another woman. Tr. 241, l. 16 – 242, l. 9. Barr was the sole renter of the house located at 206 Maple Street, her name was the only name on the lease and all the associated bills, and she paid all the expenses related to the home, including the water, electricity, and cable. Tr. 264, ll. 12-21. While Appellant stayed at the house "off and on," he was "never a full time resident" and was rarely at the home. Tr. 242, ll. 8-15.

In addition to her three children who lived in the home, Barr occasionally rented out the second bedroom. Tr. 242, l. 16 – 243, l. 2. One of her tenants was Basheba Worrell, who worked as an entertainer or dancer.[2] Worrell rented the second bedroom in the home for approximately two months until she suddenly disappeared. Barr had not heard from Worrell since she left, but later learned Worrell had been arrested and jailed for various drugs related offenses. Tr. 242, l. 16 – 243, l. 21. When Worrell disappeared, she left behind several possessions, including clothing and a backpack. Tr. 243, l. 7 – 244, l. 3. This backpack, which was in the laundry room, is where the police found the heroin, marijuana, and cocaine. Tr. 244, l. 25 – 245, l. 2.

Barr also testified that the scale and small plastic bags found in the bedroom where Appellant was arrested were hers. She liked to make jewelry, which she then sold to friends or over the internet. She used the plastic bags to store and organize beads and the scale to weigh the gold or silver jewelry to determine how much it was worth and how much to sell it for. Tr. 244, ll. 4-24.

Barr did not know there were drugs in her home or that Appellant had been arrested for drug related offenses until the following day when she attended Appellant's bond hearing, which she thought was only for the criminal domestic violence warrant. During the bond hearing, when the prosecution described the backpack where the drugs were found, Barr knew immediately that it belonged to Basheba Worrell. However, she did not initially come forward with this information because she wanted Appellant to remain incarcerated so that she had time to move. Tr. 244, l. 25 – 245, l. 25.

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[2] The assistant solicitor later made Barr clarify that Worrell was a stripper. Tr. 250, ll. 17-25.

Barr eventually spoke to Assistant Solicitor David Caraker, who was assigned to prosecute the case. She told the solicitor that the backpack where the drugs were found belonged to Basheba Worrell and not Appellant. However, the solicitor merely laughed at her and told her to talk to Appellant's attorney. Tr. 247, l. 10 – 248, l. 4.

After several hours of deliberation, the jury ultimately convicted Appellant as indicted. Tr. 344, l. 18 – 345, l. 9.

ARGUMENT

The trial judge erred by refusing to direct a verdict when the state failed to present any direct or substantial circumstantial evidence that Appellant was knowingly in constructive possession of the drugs found in his wife's home where the evidence established Appellant merely had a right to access the area where the drugs were found, not actual dominion and control over the property.

How the Issue was Presented Below

At the conclusion of the state's case in chief, Appellant moved for a directed verdict. Defense counsel argued the state had failed to present any evidence of possession, which is a material element of all three indicted offenses. Tr. 208, l. 9 – 209, l. 7. Citing State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006), counsel asserted that in order to prove constructive possession, the state must show the defendant had dominion and control, or the right to exercise dominion and control, over the illegal substance. He also made clear that mere presence is insufficient to prove constructive possession. Tr. 209, ll. 8-19. Counsel argued that while some circumstantial evidence was presented, there was absolutely no evidence of constructive possession. Tr. 210, l. 16 – 211, l. 5. He asserted that the evidence merely established Appellant had a right to access the home, which pursuant to Heath, was insufficient to prove Appellant had dominion and control, or the right to exercise dominion and control, over the property. Tr. 213, ll. 2-10.

In response, the assistant solicitor admitted the state was relying on constructive possession. He maintained the state had shown Appellant lived at the house. Tr. 213, ll. 23-25. This assertion was based on the fact that 206 Maple Street is the address that appeared on Appellant's driver's license as well as the "bond paperwork" when Appellant posted bond for the

charges for which he was on trial. Tr. 213, l. 25 – 215, l. 5. The solicitor ultimately argued, "He [Appellant] lived there, we are responsible for what goes on in our house. If we don't have dominion and control over our own house, we don't have dominion and control over anything." Tr. 215, ll. 6-12. The solicitor essentially argued that because Appellant lived at the home, he was in constructive possession of the drugs found in the laundry room.

The trial judge ultimately denied the motion. He found this case distinguishable from Heath and ruled there was "sufficient evidence [from] which the jury could reasonably infer that the defendant was in constructive possession of these drugs." Tr. 217, ll. 11-17. He later commented, "My only question here is whether or not taking the evidence in the light most favorable to the State, whether there's *any evidence* upon which the jury could base a conviction. And I think there is." Tr. 219, ll. 6-10 (emphasis added). The judge appeared to base his ruling on the fact that Appellant was the only person at the house when law enforcement arrived and was found in a bedroom near "drug related materials." Tr. 212, l. 2 – 213, l. 21. He also commented that he had not "heard any testimony about who else . . . lived" at the house. Tr. 212, ll. 11-12.

Appellant properly renewed his motion for a directed verdict after his presentation of evidence. Tr. 266, l. 18 – 267, l. 12. While the judge admitted there was now evidence through the testimony of Nicole Barr that someone else lived in the home, there was no evidence as to "when anybody else lived in the house." Tr. 267, ll. 13-17. In the light most favorable to the state, the judge found the evidence "certainly meets the threshold to allow the case to go to the jury." Tr. 267, ll. 17-20.

Appellant also renewed his motion after the state presented several rebuttal witnesses. The judge continued to deny the motion. Tr. 296, l. 19 – 297, l. 4.

Discussion

The trial judge erred by denying Appellant's motion for a directed verdict when the state failed to present any direct or substantial circumstantial evidence that Appellant was knowingly in constructive possession of the drugs found in the backpack in the laundry room at 206 Maple Street. The evidence established Appellant merely had a right to access the area where the drugs were found, not actual dominion and control over the property, which is required to prove constructive possession.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Odems, 395 S.C 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is *substantial* circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (citing State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

Likewise, a directed verdict is proper when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount

to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

Appellant was indicted for possession of marijuana with intent to distribute in violation of § 44-53-370(b)(2), possession of heroin with intent to distribute in violation of § 44-53-370(b)(1), and possession of cocaine in violation of § 44-53-370(d)(3). Section 44-53-370 provides in relevant part:

> (a) [I]t shall be unlawful for any person:
>
> (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or *possess with intent to* manufacture, *distribute*, dispense, deliver, or purchase *a controlled substance*. . .
>
> (b) A person who violates subsection (a) with respect to:
>
> (1) a controlled substance classified in Schedule 1 (b) and (c) which is a narcotic drug or lysergic acid diethylamide (LSD) and in Schedule II which is a narcotic drug is guilty of a felony and, upon conviction, for a first offense must be imprisoned not more than fifteen years or fined not more than twenty-five thousand dollars, or both. For a second offense, the offender must be imprisoned not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both.
>
> (2) any other controlled substance classified in Schedule I, II, or III, or flunitrazepam or a controlled substance analogue, is guilty of a felony and, upon conviction, for a first offense must be imprisoned not more than five years or fined not more than five thousand dollars, or both.
>
> (c) It shall be unlawful for any person *knowingly or intentionally to possess* a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of, a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article.
>
> (d) A person who violates subsection (c) with respect to:
>
> (2) cocaine is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than three years or fined not more than five thousand dollars, or both . . . For a second offense, the offender is guilty of a felony

> and, upon conviction, must be imprisoned not more than five years or fined not more than seven thousand five hundred dollars, or both.

(emphasis added)

The state does not dispute that Appellant was not in *actual* possession of the marijuana, heroin, and cocaine. At the directed verdict stage, the assistant solicitor admitted the state was relying on constructive possession. Tr. 213, ll. 23-24. He also asserted during his opening statement:

> No one is going to get up on the stand and testify that they saw the Defendant sell drugs, not going to happen. No one is going to get up on the witness stand and testify that they saw it in his hands. We'll testify it was in his house.
>
> So you're going to hear some stuff about constructive possession and circumstantial evidence. And when the judge talks to you about that, think about this, constructive possession means that you have control over the premises where the drugs were found; his house, his responsibility, his control. That is the right thing to do.

Tr. 100, ll. 10-21.

Accordingly, the state had to prove Appellant was knowingly in constructive possession of the illegal substances.

"Mere presence is insufficient to prove constructive possession." State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006) (citing State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973)). In order to prove constructive possession, the state must show a defendant had dominion and control, or the right to exercise dominion and control over the illegal substance. Id. (citing State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980)). The state may establish constructive possession by either direct or circumstantial evidence. Id. "The defendant's knowledge and possession may be inferred if the substance was found on premises under his *control*." Id. at 329-330, 635 S.E.2d at 19 (citing State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987)) (emphasis in original).

In Heath, our Supreme Court held the evidence presented was insufficient to establish Heath was in constructive possession of crack cocaine and consequently directed a verdict of acquittal in his favor. Heath, 370 S.C. at 328, 635 S.E.2d at 18. Heath lived in a house with his mother and a young child. His mother owned the house. Id. at 328, 635 S.E.2d at 18. Law enforcement obtained a warrant to search in and around the house for crack cocaine. Id. When officers arrived to execute the search warrant, Heath and his brother were outside in front of the house. It appeared Heath had just finished washing his car. Id. Upon the officers' arrival, Heath's brother ran inside the house and locked himself in a bathroom. Id. at 328, 635 S.E.2d at 19. Officers ultimately found crack cocaine, numerous plastic baggies (allegedly the type used by crack dealers), scales, and twenty five hundred dollars in cash inside the home. Id. Additionally, a police dog discovered a car washing mitt in a recycling bin near the back door of the house containing 43.48 grams of crack cocaine. Id. at 329, 635 S.E.2d at 19.

The Supreme Court held the state presented no direct or substantial circumstantial evidence linking Heath to the crack cocaine. Id. at 330, 635 S.E.2d at 19. The Court further held the state failed to present evidence Heath could exercise dominion and control over the area where the crack was found. Id. In so holding, the Court noted that, while Heath lived in the home where the crack was found, the home was owned by his mother. Id. As a result, the Court concluded, "[I]t was arguable that [Heath] *merely had a right to access the area where the crack was found, not actual dominion and control of the property.*" Id. (emphasis added).

This Court should likewise hold there was no evidence Appellant, while he had access to the area where the illegal substances were found, had actual dominion and control of the property, or the right to exercise dominion and control over the property. The evidence established Appellant merely stayed at the house where the drugs were found "off and on"

indicating he was more of an infrequent overnight guest as opposed to a resident. Nicole Barr testified that she and Appellant "weren't really together" and that Appellant was rarely at the house. Significantly, there were no drugs found in the bedroom where Appellant was arrested or on his person.

Even if Appellant lived at the home, the state presented no direct or substantial circumstantial evidence linking Appellant to the marijuana, heroin, and cocaine found in the backpack in the laundry room. The assistant solicitor argued in opening statement, at the directed verdict stage, and in closing argument that simply because Appellant lived at the home, he must be in constructive possession of the drugs. This argument directly conflicts with the Supreme Court's holding in Heath where the Court found that despite the fact that Heath lived in the home owned by his mother, the evidence established he merely had access to the area where the drugs were found, not actual dominion and control of the property. Heath, 370 S.C. at 330, 635 S.E.2d at 19. Again, the same is true in this case. While there was evidence Appellant had access to the laundry room where the drugs were found, there was absolutely no evidence he had dominion and control of the property.

Because the state failed to establish an essential element of the crime charged, constructive possession, respectfully, this Court should reverse Appellant's convictions and direct a verdict in his favor.

2.

The trial judge erred by instructing the jury on the dictionary definitions of "dominion" and "control" as these words relate to constructive possession when the instruction was erroneous and lowered the burden necessary for the jury to find Appellant guilty, as under this charge, Appellant merely had to have the right to use the property where the illegal substances were found to satisfy the element of constructive possession, which conflicts with our Supreme Court's holding in *State v. Heath*, 370 S.C. 326, 635 S.E.2d 18 (2006), stating that mere access to the property is insufficient to establish constructive possession.

How the Issue was Presented Below

While the jury was deliberating, it asked the trial judge whether he could "offer any clarification as to what the phrase 'right to exercise dominion and control' means?" Tr. 336, l. 24 – 337, l. 1; R. * (Court's Exhibit No. 2). The trial judge told the parties that he obtained a dictionary definition of the words dominion and control and believed the definitions would assist the jury. The judge said he intended to instruct the jury that "dominion as used in [his] charge means the power, authority, or right to use or dispose of property" and that "control means to have power over a thing." Tr. 337, ll. 2-8.

The assistant solicitor had no objection. Tr. 337, ll. 10-12. However, defense counsel objected and expressed his concern that the definition conflicted with our Supreme Court's holding in State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006), which indicated mere access to the property where the illegal substance was found was insufficient to establish constructive possession. He asked the trial judge to instruct the jury accordingly. When the judge refused, defense counsel requested the judge merely reread his original instruction on constructive possession, i.e., dominion

and control. Tr. 337, l. 17 – 339, l. 13. The judge denied the request to which Appellant took exception. Tr. 339, ll. 16-22.

When the jury returned to the courtroom, the trial judge instructed the jury as follows:

> Mr. Foreperson, I got your note asking if we could give clarification to the phrase, right to exercise dominion and control. And of course, I would refer you back to my charge. I think there's guidance in the charge that should help you.
>
> But as additional clarification, I would tell you that the words in my charge should be given their ordinary meaning. I've tried to craft some definition of the key words, dominion and control, as they relate to my charge that may help you in that regard.
>
> **The word dominion as used in my charge means the power, authority, or right to use or dispose of property or a thing. Control means to have power over the thing.** I hope that that will help you in your deliberations. If you need further instructions, I'll be happy to give them to you. But I hope that will answer your question.

Tr. 341, ll. 3-21 (emphasis added); See R. * (Court's Exhibit No. 3).

At the conclusion of this supplemental instruction, defense counsel renewed his objection. He asserted the instruction was improper and prejudicial based on the Supreme Court's holding in Heath. Tr. 342, ll. 9-16.

Less than an hour after this supplemental instruction was given, the jury returned with a guilty verdict on all three indictments. Tr. 342, ll. 3-4; Tr. 344, l. 2 – 345, l. 9.

Discussion

The trial judge erred by instructing the jury on the dictionary definitions of dominion and control when the supplemental instruction was erroneous and lowered the burden necessary for the jury to find Appellant guilty since, under this charge, Appellant merely had to have the power, authority, or right to use the property where the illegal substances were found to satisfy the element of constructive possession. This, however, directly conflicts with our Supreme

Court's holding in Heath stating that mere access to the property where the drugs were found is insufficient to establish constructive possession.

"The trial judge is required to charge the current and correct law of South Carolina." State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000) (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)). "A jury charge is correct, if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting State v. Adkins, 353 S.C. 213, 318, 577 S.E.2d 460, 464 (Ct. App. 2003)) (internal quotation marks omitted). "The substance of the law is what must be charged to the jury, not any particular verbiage." Id. (quoting Adkins, 353 S.C. at 318-319, 577 S.E.2d at 464) (internal quotation marks omitted).

During his initial instruction on the law, the trial judge properly charged the jury on constructive possession. As it relates to the indictment for possession with intent to distribute heroin, the judge asserted:

> Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the heroin itself or the property on which the heroin was found.
>
> Mere presence at the scene where the drugs were found is not enough to prove possession. The defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control.

Tr. 329, ll. 14-22.

The judge likewise properly charged the jury on constructive possession as it relates to the indictments for possession with intent to distribute marijuana and possession of cocaine. See Tr. 331, ll. 9-15 and Tr. 332, l. 24 – 333, l. 7. However, the judge's supplemental instruction where he provided the jury with the dictionary definitions of dominion and control was both improper, since it was an incorrect statement of the law, and prejudicial.

In State v. Buckner, Buckner was charged with unlawful use of a telephone based on a voicemail message she left on another individual's telephone. 341 S.C. at 244, 534 S.E.2d at 17. The trial judge instructed the jury not only on the statute for unlawful use of the telephone, but defined all the statutory terms, such as lascivious, lewd, profanity, indecent, vulgar, and immoral. Id. at 246, 534 S.E.2d at 18. In order to be convicted under the statute, the telephone call must be made with the intent and sole purpose of conveying an unsolicited obscene or imminently threatening message or made to harass the recipient. Id. at 247, 534 S.E.2d at 18-19. In holding that the instruction was erroneous, this Court asserted that the charge as given lowered the burden necessary for the jury to find Buckner guilty since, under the charge, the telephone call only had to contain one indecent or immoral word for the jury to convict Buckner. Id. at 247-248, 534 S.E.2d at 19. The telephone call made by Buckner clearly contained vulgar, profane, indecent, and immoral language as defined by the trial judge. Id. at 247, 534 S.E.2d at 18-19. Consequently, this Court found the erroneous charge contributed to the verdict, reversed Buckner's conviction, and remanded for a new trial. Id. at 248, 534 S.E.2d at 19.

The supplemental instruction given in this case, particularly the definition of dominion, was erroneous because it conflicts with our Supreme Court's holding in Heath, which asserted that mere access to the area where the drugs were found is insufficient to establish constructive possession.

In Heath, as summarized above, our Supreme Court held the evidence presented was insufficient to establish Heath was in constructive possession of crack cocaine. Heath, 370 S.C. at 328, 635 S.E.2d at 18. Heath lived in a house with his mother and a young child. His mother owned the house. Id. at 328, 635 S.E.2d at 18. Law enforcement obtained a warrant to search in and around the house for crack cocaine. Id. When officers arrived to execute the search warrant, Heath and his brother were outside in front of the house. It appeared Heath had just finished

washing his car. Id. Upon the officers' arrival, Heath's brother ran inside the house and locked himself in a bathroom. Id. at 328, 635 S.E.2d at 19. Officers ultimately found crack cocaine, numerous plastic baggies, scales, and twenty five hundred dollars in cash inside the home. Id. Additionally, a police dog discovered a car washing mitt in a recycling bin near the back door of the house containing 43.48 grams of crack cocaine. Id. at 329, 635 S.E.2d at 19.

The Supreme Court held the state presented no direct or substantial circumstantial evidence linking Heath to the crack cocaine. Id. at 330, 635 S.E.2d at 19. The Court further held the state failed to present evidence Heath could exercise dominion and control over the area where the crack was found. Id. In so holding, the Court noted that, while Heath lived in the home where the crack was found, the home was owned by his mother. Id. As a result, the Court concluded, "[I]t was arguable that [Heath] *merely had a right to access the area where the crack was found, not actual dominion and control of the property.*" Id. (emphasis added).

The power, authority, or right to use property is equivalent or comparable to the right to access property. By informing the jury that dominion means the right to use property, the trial judge essentially instructed the jury that it could find Appellant guilty if it found he had access to the property where the illegal substances were found. This was error because it is an incorrect statement of the law. See Buckner, 341 S.C. at 246, 534 S.E.2d at 18 ("The trial judge is required to charge the current and correct law of South Carolina."). The power, authority, or right to use property is not sufficient to satisfy constructive possession as defined by our Supreme Court.

Not only was the supplemental instructive erroneous, it was also prejudicial to Appellant. "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." Buckner, 341 S.C. at 247, 534 S.E.2d at 18 (citing State v. Taylor, 323 S.C. 162, 473 S.E.2d 817 (Ct. App. 1996)). In determining whether the error was

harmless, this Court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. Buckner, 341 S.C. at 247, 534 S.E.2d at 18 (citing State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996)).

The charge given was extremely prejudicial to Appellant because, again, this erroneous instruction lowered the burden necessary for the jury to find Appellant guilty of all three indicted offenses. Pursuant to the charge, the jury merely had to find Appellant had the power, authority, or right to use the property where the illegal substances were found to convict Appellant. The instruction clearly contributed to the verdict rendered where the evidence presented merely established Appellant had a right to access the area where the drugs were found.

Consequently, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court direct a verdict of acquittal in his favor. In the alternative, Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Honorable Larry B. Hyman, Circuit Court Judge

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Calvin Solomon Barr, #262098, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 15th day of November, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of November, 2017.

Mary M (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.