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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Appellate No.: 2017-000281

The State of South Carolina

Respondent

Vs.

Jawan Rayel White

Appellant,

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. REPPONENT'S ARGUMENT THAT APPELLANT'S CONTENTION THAT THE COURT ERRORED IN INSTRUCTING THE JURY THAT APPELLANT COULD BE FOUND GUILTY OF TRAFFICKING UNDER THE THEORY OF CONSPIRACY WAS NOT PRESERVED FOR REVIEW IS MISCONSTRUED.

Appellant's post-trial motion for a new trial was based specifically upon the trial court's authority and obligations under the thirteenth juror doctrine. (R. pp. 15-17).

Appellant's underling argument supporting verdict inconsistency and jury confusion under the thirteenth juror doctrine was based upon the fact that they jury was erroneously instructed that they could find Appellant guilty of trafficking based upon the theory of conspiracy.

In Johnson v. Hoechst Celanese Corp, the trial court advised counsel for the parties that he intend to present the jury with a court exhibit of a color coded map of the plaintiffs' subdivision, categorizing the large number of plaintiffs into five geographical categories based upon the location of their property in proximate to toxic chemical land and water plumes alleged to have been created by defendant. Johnson v. Hoechst Celanese Corp, 453 S.E2d 908, 910, 317 S.C. 415 (S.C. App. 1994). The court instructed counsel to jointly prepare the court exhibit map and a corresponding verdict form. Id. The court exhibit map and the verdict form were reviewed by both parties, and they were present to the jury after neither party expressed objection upon inquiry by the judge. Id.

The jury return a defense verdict against all plaintiffs, except plaintiffs in certain geographical categories identified on the court exhibit map. Id. at 911. Three of the unsuccessful plaintiff's moved for judgement notwithstanding the verdict; a new trial based upon the contention that the court exhibit map and verdict form miscategorized their property in relationship to the contaminated plumes of land and water; and a new

trial on the ground that the verdicts was inconsistent and against the weight of the evidence under the thirteenth juror doctrine. Id. at 911. The trial court denied the plaintiffs' motion for a new trial on all grounds.

On appeal, the Johnson court concluded that the plaintiffs' motion for a new trial based upon the fact that the court exhibit map and verdict form were inaccurate and misleading was not preserved for review. Id. at 912. The court reasoned that:

We also note the landowners could have objected to the map and verdict form during the trial. Counsel discuss the classifications of the plaintiffs to be placed on the exhibit and had an opportunity to review it. There was no objection to the map or verdict form, nor was there an objection to the trial court's instructions to the jury on the use of the map and verdict form. The landlords did not call any purported error to the court's attention until after the liability verdict was rendered. Because they did not raise the alleged error at the first opportunity, we hold the landowners failed to preserve any issue regarding the court's exhibit and verdict form.

Johnson v. Hoechst Celanese Corp, 453 S.E.2d at 912. However the court distinguished the motion for a new trial based upon the argument that the verdicts were inconsistent and against the weight of the evidence under the thirteenth juror doctrine. The court stated:

Although we view any alleged error with the map and verdict form as a trial error which must be preserved for appeal, the landowners argument a new trial should have been granted because the verdicts were inconsistent and against the weight of the evidence [was preserve].

Id. The court stated that, "[u]nder the thirteenth juror doctrine, a trial court may grant a new trial if the judge believes the verdict is unsupported by the evidence. (Citations omitted). Similarly, a new trial may be granted if the verdict is inconsistent and reflects the jury's confusion." Id. (Citation omitted). A motion for a new trial based upon the thirteenth juror doctrine is not dependent upon the preservation of any particular issue at trial. Id.

Under the doctrine, “[t]he trial judge sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he [or she] is convinced that a new trial is necessitated by the facts in the case [in its entirety].” Youmans v. Dept. of Transp., 670 S.E.2d 1, 5, 380 S.C. 263 (S.C. App. 2008). “As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and it must be presumed [he or she] recognizes and appreciates his [or her] responsibility, and exercise the discretion vested in him [or her] with fairness and impartiality.” Id. “The judge as the juror ‘hangs’ the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Simply, because the result of the ‘thirteenth juror’ vote by the judge is a new trial rather than an adjustment to the verdict...” Id.

“‘[T]he grant or refusal to grant a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion.’ (Citation omitted). ‘An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.’” State v. Smith, 642 S.E.2d at 630 (S.C. App. 2007) (Citations omitted).

In the case before the court, Appellant’s post-trial motion to the trial court for a new trial under the thirteenth juror doctrine, based upon verdict inconsistency and jury confusion, was preserved for review on appeal because such a motion does not require the preservation of any particular issue at trial. The fact that the jury charge of conspiracy was erroneous is not grounds for a new trial in and of itself, but the factual basis upon which the motion for a new trial under the thirteenth juror doctrine rest. Under the doctrine a judge examines the facts of the case in its entirety, like any of the

other twelve jurors in the case, and grants or denies a motion under the thirteen juror doctrine base upon whether the verdict is supported by the evidence, or whether the verdict reflects inconsistency and jury confusion.

II. RESPONDENT’S ARGUMENT THAT THE COURT’S CHARGE WAS APPROPRIATE IS INACCURATE AND THE TRIAL COURT’S REFUSAL TO GRANT APPELLANT’S MOTION FOR A NEW TRIAL UNDER THE THIRTEENTH JUROR DOCTRINE WAS AN ABUSE OF DISCRETION.

Respondent alleged that the trial court’s charge of conspiracy to the jury was appropriate because, “[t]he trial court gave a nearly verbatim definition of the crime charged.” (Initial Brief of Respondent, p. 10). “Where a statute defines the elements of a crime in plain and ordinary terms, it is proper for the court’s charge to track the language of the statute.” (Initial Brief of Respondent, p. 11). Appellant cited multiple foreign jurisdiction cases, including Accord v. Zichko, 129 Idaho 259, 264, 923 P.2d 966 (1996) (“Ordinarily the language employed by the legislature in defining a crime is deemed to be best suited for that purpose, and error cannot be predicated on its use in jury instructions.”); Accord Lloyd v. State, 152 A.3d 1266, 1271 (Del. 2016) (“An instruction which tracks the statutory language is adequate to inform the jury.”).

However, the jury charge failed to merely track the language of the trafficking statute. After following the language of the trafficking statute, the jury charge additionally instructed the jury that:

Under trafficking in heroin, twenty-eight grams or more, the presence of only imitation heroin at the transaction is irrelevant if the State proves, beyond a reasonable doubt that the Defendant conspired or attempted to purchase more than twenty-eight grams of real heroin.

(R. p. 170). The jury instructions didn’t simply leave it to the ordinary intelligence and common sense of the jury to decide which among the multiple available theories of guilty

available under the trafficking statute (i.e., “sold, manufacture, cultivate, delivered, purchased, brought into this State, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, manufacture, cultivate, deliver, purchase or bring into this State”) were applicable based upon the specific evidence presented at trial. To the contrary, the jury charge specifically singled out two theories of guilt, conspiracy and attempt, from the multiple theories available, and instructed the jury that despite the fact that the control buy in the case involve imitation drugs, which were not illegal, it could still find Appellant guilty under the theory of conspiracy. In Field v. Gregory, our Supreme Court expressly stated that generally it is not error for the jury charge to track the language of a statute where the law governing the case is expressed in the statute; however, the court warned that an error of law may in fact occur where the charge departs from the language of the statute. 94 S.E.2d 15, 20, 230 S.C. 39 (S.C. 1956).

Appellant does not contend that a jury charge is improper where the jury charge merely track the plain language of a statute that provides multiple theories of liability, and the charge leaves it to the judgment of the jury to determine which theories, if any, were applicable based upon the facts of the case. However, a jury charge is improper where the charge takes the extra step to single out for the convenience of the jury the theories of guilty the court believes applicable, and instructs the jury that guilty can be found using such theories, where a general verdict form is employed.

In the case before the court, the jury verdict is inconsistent with the facts of the case and reflects confusion where: (1) the prosecutor argued to the jury during opening remarks, “[a]nd on August 20th, 2011, Jawan White fully attempted, fully conspired to purchase four ounces of heroin, gave Adrian Chavez (the State CI) Ten Thousand Dollars

cash for what he fully believed to be four ounces of black - - brown powder heroin;” (R. p. 66, lines 6-10; see also, R. p. 64) (2) where the jury was instructed by the trial court that it could find Appellant guilty of trafficking in heroin if it found beyond a reasonable doubt that Appellant conspired or attempted to purchase more than twenty-eight grams of real drugs; (R. p. 170) and (3) where the verdict form was general in nature, and fail to give the jury the option of choosing guilty or not guilty on the theory of conspiracy and guilt or not guilty on the theory of attempt. (R. p. 172).

As previously established in the Brief of Appellant, governmental agents such as confidential informants, can't be counted for purposes of reaching the two or more persons necessary to establish a criminal conspiracy. See, Brief of App., p. 7-8; See also, State v. Holmes, 277 S.C. 232, 233, 285 S.E.2d 353 (S.C. 1981) (“This would contradict the rule that one cannot enter into a conspiracy with another who only feigns acquiescence in a crime; such as an informer or undercover agent.”). The jury charge didn't include a definition for conspiracy, nor was the jury informed that they could not count any confidential informants employed by the government in connection the control buy for purposes of reaching the requisite number of persons to constitute a conspiracy. Had the jury been so instructed, it would have had the requisite knowledge to conclude that conspiracy was not applicable to Appellants case, because the alleged conspiracy involve only Appellant and two other governmental confidential informants, which were disqualified for purposes of counting conspirators. As a result there is a two thirds (2/3) probability that all or part of the jury's members based their decision to find Appellant guilty of trafficking upon an erroneous belief that he had conspired to purchase heroin

with the other parties (i.e., government confidential informants) involved in the control buy.

In Wertz v. State, Wertz was charge with second degree burglary in count one of the indictment. 349 S.C. 291, 293-294, 562 S.E.2d 654 (S.C. 202). The trial court charged the jury with second degree burglary, and the lesser included offense of third degree burglary as an alternative theory of guilty on the burglary. Id. The jury was given a general verdict form with options of guilty or not guilty on count one of the indictment. Id. at 294. The jury return a verdict of guilty on count one, with no designation as to whether guilt was based on the theory of second degree or third degree. Id. The Court sentence Wertz to fifteen years in prison for burglary second degree. Id. Wertz's attorney failed to request to have the jury polled, or that the judge otherwise clarify the verdict. Id.

On petition for post-conviction relief, the court ruled that Wertz's attorney didn't render ineffective assistance for failing to request the court to clarify which degree of burglary the verdict was based. Id. at 295. On writ of certiorari before the South Carolina Supreme Court, the court found that Wertz's attorney was ineffective for failing to request the trial court for clarification on the general verdict of guilty for burglary.

The court reasoned as follows:

"A verdict should be certain and import a definite meaning free from ambiguity." Lorick & Lowrance v. Julius H. Walker & Co., 153 S.C. 309, 319, 150 S.E. 789, 792 (1929) (citation omitted).

If a party believes there is confusion in the wording of a jury's verdict that party should call it to the attention of the trial court at the time the verdict is rendered so that any confusion in the verdict's language can be easily cleared up. Howard v. Kirton, 144 S.C. 89, 142 S.E. 39 (1928). It is "the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it [is] his duty to take into consideration not

only the language of the verdict, but all the matters that occurred in the course of the trial." *Id.* at 101, 142 S.E. at 43. *See also Durst v. Southern Ry. Co.*, 161 S.C. 498, 159 S.E. 844 (1931) (to determine what jury intended to find construction of verdict can and should depend upon language used by jury and other things occurring in trial).

A verdict of a jury should be upheld when it is possible to do so, and carry into effect what was clearly the intention of the jury. When a verdict is so confused, however, that it is not absolutely clear what the jury intended to do, the safest and best course for the court to pursue is to order a new trial. Judges and parties should not be required to guess as to what verdict a jury sought to render. *Lorick & Lowrance, supra* at 320, 150 S.E. at 793.

In *State v. Wilson*, 162 S.C. 437, 161 S.E. 104, 113 (1931) (quoting *State v. Smith*, 18 S.C. 149 (1882)) (emphasis added by *Wilson* court), the Court stated:

"... a general verdict of guilty furnishes ... no ground for a new trial, *provided the jury have been explicitly instructed that the effect of a general verdict will be to find the party accused guilty of the highest offense charged in the indictment*, and that they have the right to designate in their verdict which one of the particular offenses charged they believed the accused to be guilty of." *See also State v. Johnson*, 186 S.C. 202, 195 S.E. 329 (1938) (same).

In the instant case, the trial court's instructions to the jury on how the verdict should be rendered were unclear. The trial court, as noted previously, instructed the jury regarding the forms of the verdict:

Count One, burglary. You could be guilty or not guilty, depending upon your view of the facts and circumstances, or it could be guilty of burglary in the third degree or not guilty.

In *Wertz*, the uncertainty as to whether the jury's verdict was based on the theory of second degree or third degree burglary was not just some academic exercise, but represented real prejudice. Third degree burglary would had meant a maximum possible sentence of five years, oppose to the fifteen years *Wertz* was sentence to for second degree.

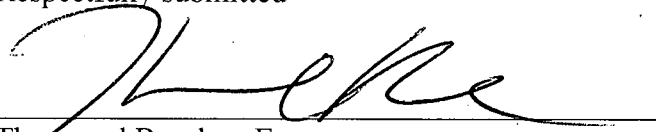
In the case before the cause, Appellants was likewise prejudice by the uncertainty in whether the jury's verdict was based upon conspiracy or attempt. If the jury's verdict

was based upon conspiracy, the verdict would not be support by the evidence and Appellant would have his freedom.

CONCLUSION

The trial court abuse its discretion in failing to grant Appellant's motion for a new trail based upon the facts that the verdict reflects inconsistency and jury confusion, and that Plaintiff has been prejudiced.

Respectfully submitted



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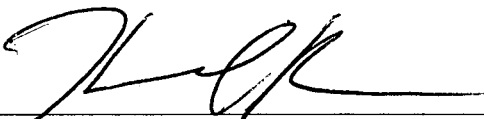
Appellant,

CERTIFICATE OF COUNSEL

Counsel for Appellant hereby certifies that the Reply Brief of Appellant complies
with Rule 211(b), SCACR.

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