STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

TRAVAS D. JONES,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court's jury instruction regarding a defendant's control of the premises as evidence of constructive possession was a substantially correct statement of law and therefore, the trial court did not err in declining Appellant's requested instruction; further Appellant was not prejudiced by the trial court's refusal to give this instruction.

STATEMENT OF THE CASE

Appellant Travas Jones was indicted for trafficking over ten grams of crack cocaine, possession with intent to distribute cocaine, and possession of a weapon during a crime of violence. A jury found Jones guilty as charged after trial on April 4-6, 2012, over which the Honorable R. Knox McMahon presided. On May 7, 2012, Judge McMahon sentenced Jones to concurrent terms of eighteen years' imprisonment for each drug conviction and five years' imprisonment for the weapons charge.

STATEMENT OF FACTS

Jones' arrest and conviction came about after Officer Edward Pereira did some surveillance on a house based on a report from a concerned neighbor. The neighbor [Neighbor] happened to be a Columbia Police Department Officer who observed heavy vehicular traffic at Jones' residence during all hours of the day. People would arrive in vehicles, go inside the residence, and leave after a few minutes. Neighbor testified she had experience as a law enforcement officer making drug cases and doing surveillance, so she was suspicious the house was a drug house. She did not have a take-home patrol car and was not wearing a uniform at work then because she was on light duty. She had seen Jones at the house before and talked with him about his dog that he kept in the yard at the house. She called Officer Pereira. ROA. pp. 104-112.

Officer Edward Pereira testified that he started surveillance after he received the tip from Neighbor. He observed a vehicle pull up to the house, the person enter, and then leave again within minutes. A vehicle in the drive way was registered to Bernice Pearson, Jones' mother. Pereira conducted a trash pull and found loose tobacco and residual amounts of a leafy green substance he submitted for testing. Pereira did his second trash pull on November 7 and found leafy green substances again. Additionally, he found Swisher cigars, which are often used to make marijuana cigarettes by taking the tobacco out of the cigar and substituting the marijuana. He also found a piece of paper with names and numbers. Periera obtained a search warrant which led to narcotics and drug paraphernalia being seized. Jones was arrested and an arrest warrant was issued for his brother, Theyatti Glover. ROA. pp. 30-47.

When Jones was arrested, he had $670 in cash in a wad in his pants. ROA. pp. 162-163.

Officer Caleb Thomas testified that the search warrant was executed on November 15 and he found Jones playing cards at a table with others. There was a bag of crack cocaine and a bag of powder cocaine behind a heater. Individually packaged rocks of cocaine and a bag of cocaine were found in the kitchen drawer. Also in the drawer were two digital scales. A Pyrex measuring cup was found, which Officer Thomas testified was commonly used to cook powder cocaine into crack cocaine. ROA. pp. 77-86; see ROA. pp. 141-144 (Officer Evan Antley's testimony that he observed Thomas open the drawer to find two crack cookies, a bag of powder cocaine, a playing card, and digital scales); ROA. pp. 208-209 (results of the forensic analysis identifying

the powder and rocks to determine they were powder cocaine and crack cocaine).

Willie Glover, Jones' stepdad, testified on behalf of Jones that he put the drugs in the kitchen drawer, but that the drugs behind the heater were not his. He claimed he was carrying them for a friend. ROA. pp. 220-225. Victoria Walker also testified for Jones and claimed Jones lived with her until November 2, 2011.

Ricky Williams is the property owner of the house where the Cayce Public Safety Officers executed the search warrant. He entered into a lease agreement with Bernice Pearson on June 25, 2011. However, from the start, Jones was at the house and paid the rent. He was familiar with Jones from the start and assume he was living there. Jones moved in November 2, 2011 and was added to the lease on November 15, 2011. ROA. pp. 120-125.

A gun was found in the middle of the mattress in one of the bedrooms. Also in the same bedroom was a Lexington County Medical Center folder with Jones' name on it. ROA. pp. 129-135.

ARGUMENT

The trial court's jury instruction regarding a defendant's control of the premises as evidence of constructive possession was a substantially correct statement of law and therefore, the trial court did not err in declining Appellant's requested instruction; further Appellant was not prejudiced by the trial court's refusal to give this instruction.

Jones claims the trial court erred in not instructing the jury that "proof of possession of an item requires more than proof of control over the premises where the item is found." ROA. p. 235, line 1 – p. 236, line 19 (trial counsel requesting language).[1] However, the trial court properly charged the substance of the law, including instructions to the jury that: "the State must prove beyond a reasonable doubt that the defendant had the intent to control the disposition or use of the crack cocaine" (ROA. p. 288, lines 10-13); "[m]ere presence at the scene where the drugs were found is not enough to prove possession" (ROA. p. 288, lines 19-20); and the State needed to prove dominion and

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1 Jones refers to the Supreme Court's recent decision in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), which found the jury instruction that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" was improper. However, this case seems to be cited in support of Jones' argument for prejudice. Jones did not object to the charge on this basis at trial. A party cannot argue one ground below then argue another on appeal. State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-91 (1995); see also Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702, (2005) (finding counsel's submission of a request to charge without further explanation of his point is insufficient to preserve for review the specific language of a charge). Further, Jones limits his statement of the issue to the instruction regarding control of the premises and not the "strong evidence" instruction. State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal."). The "strong evidence" instruction was in accordance with the law in effect at the time of trial. See Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) *overruled by* Cheeks, supra.

control over the contraband or premises **and** "knowledge of the presence of the drugs" before reminding the jury that "[m]ere presence in the area where the drugs are found does not constitute constructive possession." (ROA. p. 289, lines 1-5).

A jury instruction is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990). State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (noting the substance of the law, not any particular verbiage, must be charged to the jury); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding reversal is not warranted where the charge given is substantially correct and covers the applicable law).

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Indeed, the purpose of the instructions is to enlighten the jury and to aid it in arriving at a correct verdict. Id.

To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008); State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002).

If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009).

Constructive possession is proven by showing that the accused has dominion and

control, or the right to exercise dominion and control, over the contraband. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773, 774-75 (1981). Constructive possession may be established by circumstantial as well as direct evidence and possession may be shared. Id., at 775. "The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it." State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct. App. 2005). Possession of a controlled substance may be inferred from the circumstances of a particular case and may be imputed to a person with both the power and the intent to control the disposition and use of the drugs. State v. Brown, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995). "When 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." Hudson, 277 S.C. at 203, 284 S.E.2d at 775.

In the instant case, the trial court gave the following charge regarding constructive possession:

> To prove possession the State must prove beyond a reasonable doubt that the defendant had both the power and the intent to control the disposition or use of the crack cocaine.
>
> Constructive possession means that the defendant had dominion and control or the right to exercise dominion and control over either the crack cocaine or the property on which the crack cocaine was found.
>
> Mere presence at the scene where the drugs were found is not enough to prove possession. Actual knowledge of the presence of crack cocaine is strong evidence of the defendant's intent to control its disposition or use.
>
> Two or more persons may have joint possession of

> a drug. Proof of constructive possession requires a showing that the accused had dominion and control over either the drugs or the premises upon which the drugs were found, as well as knowledge of the presence of the drugs. Mere presence in the area where the drugs are found does not constitute constructive possession.

ROA. p. 288, line 10 – p. 289, line 5.

Jurors are presumed to follow the trial court's instructions. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). If the jury followed the trial court's instructions, they would not have convicted Jones merely because he resided at the drug house. The jury was instructed that they must be convinced he had knowledge of the drugs and intended to control their disposition.

In the instant case, the trial court's instructions were an accurate statement of law and the substance of the law, as requested by Jones, was charged, even though the precise verbiage was not. Accordingly, the trial court did not err.

CONCLUSION

For all of the foregoing reasons the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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August 14, 2013

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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Lanelle C. Durant, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina, 29211.

I further certify that all parties required by Rule to be served have been served.

This 14th day of August, 2013

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