THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2012-212801

The State,...Respondent.

V.

Loretta Galloway Branyon...Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. DID THE TRIAL JUDGE ERR IN HIS INSTRUCTION TO THE JURY BEFORE THE JURY DELIBERATED "JUST REMEMBER THAT'S METHAMPHETAMINE AND YOU DON'T NEED TO HAVE IT ON YOUR FINGERS."

STATEMENT OF THE CASE

On January 13, 2011, deputies of the Anderson County Sheriff's Office, subject to a search warrant, issued for property at 905 Shirley Store Road, Anderson, South Carolina belonging to the Defendant, Loretta Galloway Branyon, conducted a search of the property.

The search of the premises resulted in discovery of slightly over 7 grams of methamphetamine found to be present in four (4) separate zip lock bags located in a purse beside the Defendant.

On April 26, 2011 Defendant was indicted for possession of methamphetamine with intent to distribute.

Defendant pled not guilty and a jury trial was held on August 13 and 14, 2012 before the Honorable R. Lawton McIntosh in the Court of General Sessions, Anderson County, South Carolina.

The jury was out less than thirteen (13) minutes and Defendant was found guilty of the charge and sentenced to ten years. During the charges to the jury and before the jury began deliberations, the trial judge addressed the jury and told them "just remember that's methamphetamine and you don't' need to have it on your fingers" referring to the contents of the four zip lock bags in evidence. A Notice of Appeal was filed on August 23, 2012. Due to numerous miscommunication regarding the completion of the transcript Defendant's attorney did not receive the completed transcript until September 24, 2013.

ARGUMENT

I. DID THE TRIAL JUDGE ERR IN HIS INSTRUCTION TO THE JURY BEFORE THE JURY DELIBERATED TO "JUST REMEMBER THAT'S METHAMPHETAMINE AND YOU DON'T NEED TO HAVE IT ON YOUR FINGERS."

At the close of the trial, before the case was submitted to the jury, the presiding judge asked "any additions or exceptions from the state, anything before we send the evidence back to the jury?" (R. pp. 147 L 24 – p. 148 L 1) (Tr. p. 233 L 24 – Tr. p. 234 L 1)

The following responses occurred:

Solicitor Hogan: Nothing further, your Honor,

The Court: From the Defense?

Mr. Whiten. No your Honor.

Solicitor Hogan: Your Honor, I did want to bring up the drugs because we have taken them out of the Best kit, I want to make sure—the Court Reporter mentioned a case where the bags came back but the drugs didn't come back, so I want to make sure—I don't know if there is a way to address how they—I mean, --I don't how you want to-----

The Court: I think what we do is count them going in and count them going out. If not consistent, we would have a problem.

Solicitor Hogan: I think right now, your Honor, that they are sealed. So maybe you could instruct them not to take them out of these bags because the little baggies are in the bigger bag. Maybe you could instruct them not to open the little

bags, because they can see it through these bags pretty clear. I don't believe that they need to pull out each individual little baggie.

The Court: Do you think it would be appropriate for me to charge them not to take them out?

Solicitor Hogan: Do you want them to look at them?

Mr. Whiten: Your Honor, I think that—why would they take it out?

The Court: I don't know.

Solicitor Hogan: The only reason that I mentioned is because there are several bags. I don't know if you wanted to address it with them or – however you want to handle it.

The Court: Bring the jury back in real quick and I will do that.

Solicitor Hogan: That should be all.

The Court: There is also the danger of them getting it on their fingers.

Jury in at 11:18 a.m.

The Court: Madam Forelady and ladies and gentleman, one matter was brought to my attention. It's a very appropriate point for housekeeping matters. When you get back into deliberations we are going to send these exhibits back with you, which will include the baggies of drugs. What I would instruct you is ---that unless you feel it to be absolutely critical, -- they are in a big baggie, what they call a Best baggie. You can take these smaller bags out but do not open the smaller bags. I don't think that there is any need to. Just remember that's methamphetamine and you don't need to have it on

your fingers. (R. p. 147 L 24 – R. p. 150 L.9) (Tr. p. 233 L. 24 – Tr. 236 L.9)

South Carolina Constitution, Article 5 § 21. Charge to Jury states "Judges shall not charge juries in respect to matters of fact, but shall declare the law." (1985 Act No. 9, eff February 26, 1985.)

It has long been established in the Courts of South Carolina that "even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury. Vested as the trial judge is with superior authority, disinterested, and possessing experience not available to the ordinary laymen, jurors as a rule, are anxious to catch his view, upon which to found their conclusions. The rule prevails, under constitutional limitations that a trial judge is not at liberty in his charge to comment on the weight or sufficiency of the evidence. As a corollary to that rule it is generally held that in the course of the trial of a criminal case the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of the witnesses, the guilt of the accused, or as to the controverted facts, for the jury are the sole judge of the facts and the credibility of the witnesses, and the Constitution expressly prohibits the judge from charging them as to the facts." *State vs Pruitt* 196 S.E. 371(SC 1938)

There are numerous cases in the Courts of South Carolina that have followed this caveat to judges in criminal cases. And that Constitutional prohibition still stands.

In the case of *State vs. James* 31 SC 218 at page 235, 9 S.E. 844, the Court stated that "the judge must be careful to avoid expressing or even intimating any opinion as to the facts and if he does so whether intentionally or unintentionally, a new trial must be granted." Under our Constitution the jury are exclusive judges of the facts and the true meaning of the rule of this

section of the Constitution is that they must be left to form their own judgment unbiased by any expressions, or even intimations, of opinion by the judge.

When the trial judge in this case told the court to "just remember that's methamphetamine and you don't need to have it on your fingers." he intimated several things. The first thing he intimated was that they were to "remember" that the bags contained methamphetamine emphasizing they should "remember" a fact that they alone are left with the decision to make. Further, the trial judge took a major decision away from the jury by stating that "that's methamphetamine". In other words, the jury did not have to determine the credibility of the officers who did a field test, or the chemist who tested the drug as to the content of the bags or even whether the contents of the bags were methamphetamine. The judge gave the jury the answer to the very first question they must determine to wit: that the contraband taken from the Defendant's home was indeed methamphetamine.

As wrong as it was for the judge to comment on the fact that the contraband was methamphetamine, the most egregious comment he made to the jury was that "you don't need to have it on your fingers". By making that remark the judge painted the Defendant as a person having a substance in her possession that was extremely dangerous to the extent that "you don't need to have it on your fingers". The remark strongly suggested guilt of the Defendant of possession with intent to distribute methamphetamine even to the extent of her not having the material for her own use.

So before going into the jury room to deliberate, the judge had already advised the jury that the contraband was methamphetamine. From the judge's comment, the jury would believe that the Defendant would not have such material for her own use. Thus the Defendant had no chance of the jury deliberating as to the weight or sufficiency of the evidence, the credibility of

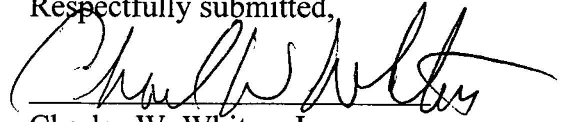
the State's witnesses, the guilt of the accused, or as to the controverted facts as required by Article 5 §21 of the South Carolina Constitution. Even if the judge's remark was apparently innocent in his language, it not only probably had a decided weight in shaping the opinion of the jury, but would more probably make up their mind before they entered the jury room. Adding credence to this argument is the fact that the jury of twelve (12) began deliberations at 11:22 a.m. and the Court was notified of their verdict at 11:35 a.m. just thirteen (13) minutes of total time, (R. p. 151 L. 5 – R. p. 152 L. 17) (Tr. p. 237 L. 5 – Tr. p. 238 L. 17) and if you subtract a couple of minutes for the jury to knock on the door and tell the bailiff they had a verdict, the time would have been less than twelve (12) minutes. There is no possibility at all that this jury could have discussed the evidence before taking a vote or even that they voted before reporting it to the Court within a time period of less than twelve (12) minutes. The amount of the drug in question was 7.2 grams according to the testimony of the chemist. The Defense argued that such a small amount might be for Defendant's use only. That portion of the Defense argument without question, was not deliberated by the jury in any form. The untoward comments by the presiding judge as the jury left the courtroom for the last time greatly hindered the jury's province to deliberate the facts and the elements of the offense charged.

CONCLUSION

For the aforesaid reasons, Defendant respectfully request that this Court reverse the decision of this trial court and remand the case for a new trial.

March 21, 2014

Respectfully submitted,



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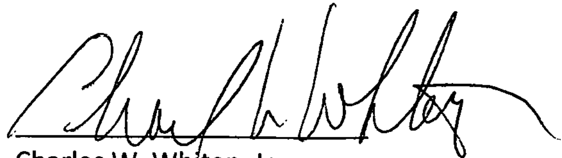
CERTIFICATE OF COUNSEL

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

March 21, 2014



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