

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appellate Case No. 2018-00103

**APPEAL FROM YORK COUNTY
Grace Gilchrist Knie, Circuit Court Judge
Trial Court Case No. 2018-GS-46-2505**

The State,..... Respondent

v.

Warren Tremaine Duvant,..... Appellant

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AUG 01 2019
SC Court of Appeals

REPLY BRIEF OF APPELLANT

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REPLY BRIEF

The State argues that the trial court properly denied Appellant's motion for directed verdict because the evidence presented to the jury was sufficient to demonstrate Appellant's guilt for the offense of trafficking cocaine. The State then argues, based on this premise, that the improper jury instruction regarding actual knowledge of the presence of cocaine did not prejudice the jury because the evidence against Mr. Duvant was overwhelming. The State's arguments are misplaced.

As demonstrated in appellant's initial brief, evidence of Mr. Duvant trafficking cocaine was not overwhelming. The quality of circumstantial evidence against Mr. Duvant did not and could not warrant the verdict rendered against him. First, his purported statement indicated only that he was aware of drugs located in the room in which he slept. It is unknown whether he knew the quantity of the contraband, whether he had even handled the materials or if he knew what the contraband really was. Second, there was no evidence demonstrating that the drugs actually belonged to him or that he possessed the drugs. Possession requires the intent to exercise dominion or control over a thing. The State did not prove that Mr. Duvant intended to possess the cocaine located in the tote bag. That Mr. Duvant knew drugs were located in the tote bag may be suspicious. But suspicion alone is insufficient to justify a finding of guilt.

Appellant avers that, at best, the evidence merely created a suspicion that Mr. Duvant intended to possess the contraband found in the room where he had slept, and that there was no evidence to support an inference that Appellant had any connexity to the paraphernalia in the kitchen. The jury's verdict, *a priori*, rested on evidence of drugs belonging to Carolyn Johnson and her inconsistent testimony about the drugs and paraphernalia found in HER home, to ultimately convict Mr. Duvant of trafficking cocaine. The inference that Mr. Duvant trafficked

cocaine does not hold water. Mr. Duvant's purported statement informing law enforcement about the drugs in the tote bag could not reasonably support a finding that he possessed the remaining drugs at the location, or that he was responsible for the materials found in the kitchen. Indeed, this is not a matter in which "all of the circumstances taken together point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." *State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48 (2011). The State's case against Mr. Duvant was entirely circumstantial. In *Odems*, the evidence was insufficient to support a finding of guilt beyond a reasonable doubt, because the State had failed to produce substantial circumstantial evidence that the defendant had committed the charged crimes. Likewise, in this matter, the State did not meet its burden. Contrary to the State's argument, the appellant did not "ignore" the State's evidence produced at trial. Instead, Mr. Duvant has demonstrated that the evidence produced was insufficient to support a finding of guilt for trafficking cocaine.

The State presented Mr. Duvant's alleged statement concerning knowledge of drugs that were present in the room he stayed in the previous night. There was no evidence that the drugs actually belonged to Mr. Duvant and the State conceded that the drugs could have belonged to anyone. No fingerprints were lifted from the container or bag of drugs found. There was no connexity between the paraphernalia in the kitchen—scales, heat/vacuum sealer, plastic sandwich bags, rubber bands, bag of glutamine—and Mr. Duvant. The State did not produce evidence that Mr. Duvant even constructively possessed the drugs or paraphernalia, as constructive possession requires more than mere presence of an individual in the vicinity where drugs have been located. The jury found Mr. Duvant guilty of trafficking based on the insupportable inference that the drugs in the tote and the paraphernalia in the kitchen were under his dominion and control. Like *Odems*, the conviction in this matter cannot stand. Contrary to

the State's belief that it presented overwhelming evidence of cocaine trafficking by Mr. Duvant, the evidence produced at trial did not rise to the level of substantial circumstantial evidence, nor was it sufficient to support a finding of guilt. The South Carolina Supreme Court clearly enunciated that suspicious circumstances alone will not and cannot support a finding of guilt beyond a reasonable doubt. *See State v. Odems*, 395 S.C. at 592. That the State presented overwhelming evidence of guilt, is simply not supported by the record.

But for the erroneous jury instruction that "Actual knowledge of the presence of the cocaine is strong evidence of the defendant's intent to control it's [sic] disposition or use," the jury could not have filled the chasmic gap in connexity between the contraband found at the location and Mr. Duvant. The charge directly commented on the facts *and* the weight to be given those facts. This instruction specifically contradicted—even negated—the "mere presence" language also given. There was no evidence connecting Mr. Duvant to the trafficking charge, let alone overwhelming evidence that he committed such an offense.

The State would have this Honorable Court elevate the quality of circumstantial evidence presented, to that of *overwhelming*, simply because that evidence was presented. Circumstantial evidence is not **de facto** *substantial* circumstantial evidence; neither is it overwhelming evidence of guilt. These are not interchangeable terms. The State must still prove its case. There must still be a reasonable connection linking circumstantial evidence to the defendant and the offense charged. In this matter, that connection was provided by an erroneous jury charge that filled gaps left by the State's case. But for the instruction, the jury could not and would not have reasonably found that Mr. Duvant trafficked cocaine. *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013). How else could the jury reconcile Carolyn Johnson's inconsistent statements? How else could the jury infer that the drugs located in the tote actually belonged to Mr. Duvant, or that

he could exercise dominion and control over the contraband found in the kitchen? The substantial probability that the jury's verdict was attributable to this erroneous charge cannot be ignored. Due process and fundamental fairness demand that the State be required to meet its burden at trial, and that unconstitutional burden-shifting will not be excused. Accordingly, Appellant respectfully avers that his conviction and sentence should be vacated, and this matter remanded for new trial, as the jury's verdict was constitutionally infirm.

CONCLUSION

For the reasons stated, Appellant, Warren Tremaine Duvant's conviction and sentence should be reversed.

July 29, 2019.

Respectfully submitted,

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