STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

IVAN LAMAR TYRELL HARRIS,

APPELLANT

APPELLATE CASE NO 2018-002089

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether trial court abused its discretion when it replayed former lead Investigator Bryan Louis' testimony to the jury, where it was nonresponsive to the jury's questions about the weight of the drugs, and where replaying Louis' testimony unduly emphasized the strong prosecution testimony of the state's lead investigator?

STATEMENT OF THE CASE

During the November 2017 term, the Greenwood County Grand Jury indicted Appellant for distribution of heroin. R.* (indictment).

On November 6-7, 2018, Appellant proceeded to trial before the Honorable William A. McKinnon, and a jury. Tr. 1. Michael S. Gambrell represented Appellant. Id. M. Wade Dowtin and Anna W. Sumner represented the state. Id.

Appellant was found guilty of distribution of heroin. Tr. 172, ll. 17 – 21. Judge McKinnon sentenced Appellant to ten years' imprisonment, but upon the service of five years' imprisonment, the remaining balance is suspended upon five years' probation. Tr. 186, l. 16 – 187, l. 10.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

The trial court abused its discretion when it replayed former lead Investigator Bryan Louis' testimony to the jury, where it was nonresponsive to the jury's questions about the weight of the drugs, and where replaying Louis' testimony unduly emphasized the strong prosecution testimony of the state's lead investigator.

Relevant Facts

On February 21, 2017, a confidential informant, Roy Cooper, allegedly bought heroin from Appellant. Tr. 57, ll. 20 – 25. Cooper was "wired up" during the incident with audio and video equipment. Tr. 61, ll. 5 – 16.

Appellant purportedly picked Cooper up in his car where the transaction took place. Tr. 62, ll. 5 – 13. Cooper, who also had pending drug charges at the time of the trial, testified that he purchased heroin from Appellant and made an in-court identification. Tr. 79, l. 11 – 80, l. 3; Tr. 88, l. 18 – 89, l. 19.

During Appellant's trial, the state presented the weight of the heroin in question in two slightly different manners. Former Investigator Bryan Louis testified[1] that it was exactly ".07 grams" of heroin. Tr. 57, l. 20 – 58, l. 2. However, the SLED expert drug analyst, Maribeth McCormack testified to the weight by comparison. Tr 105, ll. 13 – 20. According to McCormack, her drug analysis showed "less than .10 grams" of heroin. Id.

[1] The state made a motion in limine to exclude from evidence Bryan Louis' personnel file. Tr. 26, l. 16. Louis was fired from the sheriff's department because, in a different matter, he used a confidential informant he was told not to use and during his polygraph examination, Louis attempted to utilize "counter measures" to deceive the testers. Tr. 27, ll. 4 – 13. Trial counsel was not allowed to admit the personnel file into evidence, but was permitted to cross-examine Louis on his firing. Tr. 32, l. 2 – 34, l. 22. Inexplicably, trial counsel allowed Louis to testify that he was let go from the sheriff's department because "they did not have a spot for him," and did not attempt to impeach that testimony. Tr. 67, l. 9 – 71, l. 14.

During its deliberations, the jury submitted four questions to the court. Tr. 155, l. 19 – 156, l. 5. Two of those four questions concerned a potential discrepancy in the weight of heroin. Id. The jury asked, "Did the state say .07 or .7 [grams of heroin] in their argument yesterday?" [hereinafter Question 1] and, "If the size discrepancy is indeed that large, does that create a reasonable doubt?" [hereinafter Question 2] Id.

During a conference out of the presence of the jury, the court determined how to answer the jury questions. Tr. 157, ll. 1 – 11; Tr. 158, l. 19 – 160, l. 9. The court decided that rather than play anything back to the jury, it would instruct the jury that "they should make [their] decision based on the evidence in the case," and to recharge them on reasonable doubt. Id.

After the jury restarted its deliberations, Solicitor Dowtin asked for clarification regarding the Question 1. Tr. 162, ll. 6 – 16. Dowtin was confused as to whether Question 1 referred to Solicitor Sumner's opening or Brian Louis's testimony. Id. Dowtin believed the jury's consternation could be remedied if Louis' testimony was replayed for the jury. Tr. 163, ll. 6 – 10. Although the jury did not ask for any testimony to be replayed, the court brought the jury in and suggested to them that evidence could be replayed if they wanted to hear it. 168, ll. 11 – 16. After this suggestion by the court, the jury requested that Bryan Louis' testimony be replayed. Tr. 169, ll. 4 – 23; Tr. 171, ll. 4 – 12.

Trial counsel Gambrell objected to replaying Louis' testimony to the jury. Tr. 169, ll. 4 – 23. He explained that replaying one witness' testimony would create a bias in the jury that the replayed evidence was paramount *because* it was replayed. Id. That bias would cause the jury to wrongfully put additional weight on the testimony replayed. Id.

The court overruled trial counsel Gambrell's objection because the jury is allowed to ask for testimony to be replayed. Tr. 170, ll. 9 – 12. Brian Louis' testimony was replayed for the jury, and Appellant was convicted of distribution of heroin. Tr. 172, ll. 17 – 21.

Discussion

The trial court abused its discretion when it replayed former Investigator Bryan Louis' testimony because the jury's initial questions did not ask for testimony to be replayed, and replaying that testimony biased the jury into believing Louis' testimony was the most important evidence in Appellant's case. Tr. 169, ll. 4 – 23. In this case, the proper answer to Questions 1 and 2 was not to replay *one piece of evidence* to the jury, at the expense of the rest of the evidence, but rather to instruct the jury on reasonable doubt and that it is their duty to weigh the evidence as they see fit.

The court's answer to the jury questions exceeded the scope of the questions asked. In this case, Question 1 and 2 from the jury did not ask for testimony to be replayed. Therefore, the trial court should have answered the Question 1 and 2 as they were presented and not influenced the jury by suggesting further actions they *could* take.

In State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) one of the issues on appeal was that the trial court abused its discretion when it allowed the jury to review the direct testimony of a state's witness, but did not require the jury to review the cross-examination of that witness. Plyler, at 298, 270 S.E.2d at 129. Our Supreme Court held that the trial court acted within its discretion, "in light of the jury's request." Id. Therefore, *because the jury explicitly asked to hear the testimony* of Plyler's ex-wife, then specifically instructed the court to stop the playback when they heard what they wanted to hear, *the trial court acted within its discretion* when it decided not to replay the cross-examination for the jury. Id. (emphasis added)

In State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010) the South Carolina Supreme Court cited the decision in Plyler, when it held that the trial court did not abuse its discretion for allowing the jury to view the transcript of a 911 call while they listened to the tape of the 911 call during deliberations. Winkler, at 585, 698 S.E.2d at 602. In Winkler, the jury specifically asked to view the 911 call transcript. Id. The Court concluded no error occurred as, "the [trial] court is not required to submit evidence to the jury for review beyond that specifically requested." Id.

In this case, the court's suggestion to the jury that they could rehear testimony if they want to violated the principle set forth in Plyler and Winkler in that the Court went beyond what the jury "specifically requested." Id. Questions 1 and 2 from the jury were asking how much reasonable doubt they should have if there was a discrepancy in the testimony regarding the weight of heroin. Questions 1 and 2 specifically *did not ask to rehear any testimony until the court suggested that they may want to rehear something*. Tr. 155, l. 19 – 156, l. 5.

It is immaterial that the jury eventually did ask for former Investigator Bryan Louis' testimony to be replayed because they made that request *after* the court improperly suggested that the jury may want testimony to be replayed. Tr. 168, ll. 11 – 16; Tr. 171, ll. 4 – 10. That suggestion by the court exceeded the scope of the initial jury questions, such that it amounted advising the jury on how to conduct their deliberations. Therefore, the trial court abused its discretion when it replayed Bryan Louis' testimony to the jury.

In addition to exceeding the scope of the jury's questions, when the court replayed former Investigator Louis' testimony it biased the jury into putting additional weight on Louis' testimony at the expense of the rest of the evidence in the case.

The state presented two slightly different amounts of heroin that Appellant allegedly sold Cooper, such that Questions 1 and 2 could have stemmed from the different figures given during

the state's case in chief. While it is true that trial counsel Gambrell also mentioned in his closing that the weight of heroin was .7 grams, there was also a discrepancy between Louis and SLED drug analyst McCormack as to how much the heroin weighed. Tr. 148, l. 2 – 152, l. 19; Tr. 57, l. 20 – 58, l. 2; Tr 105, ll. 13 – 20.

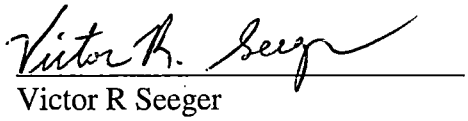
By replaying only Bryan Louis' testimony the jury was biased into believing that his testimony regarding the drug evidence was paramount. Tr. 169, ll. 4 – 23. Any concern the jury might have had regarding the discrepancy between Louis' and McCormack's testimony was extinguished when the court replayed only Louis' testimony because the jury likely believed that the replayed testimony must have been the correct version of the state's case. Id.

"The trial judge is required to charge only the current and correct law of South Carolina." State v. Jenkins, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct. App. 2014) (quoting State v. Brown, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004)). Thus, it is not the court's place to tell the jury how much weight they should put on each piece of evidence. Similarly, the court is prohibited from offering its opinion as to how the jury should conduct their deliberations. Id. When it suggested to replay Louis' testimony, the court implied to the jury that the replayed evidence is what they should base their verdict on.

Therefore, since the jury's initial questions did not ask for testimony to be replayed, the proper remedy was to instruct the jury on reasonable doubt and that they need to make their own determination on how much weight they want to put on the evidence presented. Accordingly, the trial court erred when it exceeded the scope of the jury questions by suggesting that the jury may want to rehear testimony, and abused its discretion when it replayed former Investigator Brian Louis' testimony because that biased the jury into thinking his testimony was the most important piece of evidence in the case.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate his conviction and remand his case to the Greenwood County Court of General Sessions to a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of August, 2019.

STATE OF SOUTH CAROLINA

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Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

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V.

IVAN LAMAR TYRELL HARRIS,

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 William M. Blitch, Jr., 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 Ivan Lamar Tyrell Harris, #378258, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 21st day of August, 2019.

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of August, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019