STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable William A. McKinnon, Circuit Court Judge
Appellate Case Tracking No. 2018-002089

The State, Respondent,

vs.

Ivan Lamar Tyrell Harris, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not abuse its wise discretion in replaying testimony for jurors.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). The determination of whether a trial court properly allowed a jury to review testimony after it had begun deliberations and the extent of that review are left to the discretion of the trial court. See State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980) ("The trial judge, in his discretion, may permit the jury at their request to review . . . testimony after beginning their deliberations [and] [t]he extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request."). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is based on findings of fact that are without evidentiary support." State v. Perez, 423 S.C. 491, 496–97, 816 S.E.2d 550, 553 (2018).

ARGUMENT

I. The trial court did not abuse its wise discretion in replaying testimony for jurors.

Appellant contends the trial court erred in replaying the testimony of Officer Bryan Louis[1] for the jury. He asserts the trial judge erred by informing the jury of their right to rehear testimony and that the playing of only Officer Louis' testimony was prejudicial because it placed undue emphasis on his testimony.[2] The trial court properly reminded the jury of their ability to rehear testimony, especially in light of the confusion in their question. Additionally, counsel specifically consented to the jury reminding the jury. The replay of Officer Louis' testimony did not place undue emphasis on that testimony and was a proper response to the jury's request.

During the presentation of evidence, Officer Louis testified he utilized a confidential informant named Roy Cooper to purchase heroin from Appellant. (11/6T.60; R.60). The officers were able to listen to a live audio feed during the controlled buy. (11/6T.62; R.62). The drugs were seized from Cooper, tested, and weighed prior to being sent to SLED. (11/6T.63-66; R.63-66). Officer Louis testified the drug weighed .07 grams. (11/6T.58; R.58).

Maribeth McCormack, a SLED drug analyst, testified to receiving the drugs in this case. (11/6T.102; 104; R.102; 104). She testified the drugs were heroin and that it weighed less than .1 grams. (11/6T.105-106; R.105-106).

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[1] His last name is also spelled Lewis in the transcripts.

[2] Appellant also attempts to inject commentary about Officer Louis being fired from the sheriff's department. The issue was and is totally unrelated to Appellant's case as Louis was fired after the case concluded and for attempting to counter a polygraph examination regarding his use and treatment of an unrelated confidential informant. Significantly, when Appellant's counsel was directly asked by the court: "Is there any connection with your client's case?" his counsel had to respond: "Not that I, not that I discern from the report, no, sir." (11/6T.31-32; R.31-32).

During closing arguments, the State made it very clear that the amount of drugs at issue was less than a tenth of a gram. Right at the beginning of the closing the State indicated: "It was less than a tenth of a gram. I'm not trying to say Mr. Harris is the biggest drug dealer in Greenwood, but at the end of the day he distributed heroin." (11/7T.17; R.133). A little later the State misspoke and immediately corrected the statement: "And in this case we have a confidential informant who gave Ivan Harris $100 cash for a little less than 10 grams or a tenth of a gram of heroin." (11/7T. 17; R.133). In describing the testimony of witnesses, the State again referred to the weight as "A little less than tenth of a gram." (11/7T.25; R.141).

On the other hand, Appellant's trial counsel specifically indicated incorrect weights and attempted to make an argument indicating the substance bought by the informant and the substance analyzed by SLED were two different things. He indicated: "Roy Cooper testified they gave him $100 to buy a gram, right? That's 1.0. Detective Lewis testified that when they weighed it, it weighed .7 grams.[3]" (11/7T. 32; R.148). Then Appellant's counsel accurately indicates: "A SLED analyst weighed it. The first thing she did. Said it weighed .1 or less." (11/7T. 32; R.148). Appellant's counsel then attempts to craft an argument utilizing the incorrect testimony from Officer Louis:

> A hundred dollars gram a hand. He knew what he was buying. It was pretty close. Whatever he got was a little bit short.
>
> By the time it gets to SLED it's a whole lot shorter. Where are those .6 grams?
>
> . . . .
>
> Now, I don't know what happened. I don't know what happened between the time they claim that whatever was delivered

[3] As demonstrated above, this was either a misstatement or a mischaracterization of the evidence presented.

> to Mr. Cooper did not be from Mr. Lewis. By the time it got to SLED it's a tenth of what it was.
>
> . . . .
>
> Initially weighed .7, came back less than a tenth of a gram. How do you explain that?

(11/7T.32-33; R.148-149). Near the end of his argument, Appellant's counsel added:

> He's saying it's .7, well it's a tenth of that. It's .1. Sorry, that don't add up. Something's not adding up. You can't convict him on that. That's, that's too much of a discrepancy between what they claim they got and what they sent to SLED.
>
> You don't lose almost all but a tenth for it to be tested. That's reasonable doubt.

(11/7T.35; R.151).

Counsel's incorrect statement regarding Officer Louis' testimony of the weight of the drugs, and subsequent argument that the alleged discrepancy between Officer Louis' and Agent McCormack's testimony created reasonable doubt, clearly led to confusion by the jury. After the jury began its deliberations, it sent out several questions for the court. Relevant to this appeal are two questions:

> Did the state say .07 or .7 in their argument yesterday?
>
> If the size discrepancy is indeed that large, does that create reasonable doubt?

(11/7T.39-40; R.155-156). In response to the questions, the court reminded the jury that argument of counsel is not evidence and that they should rely on their own recollection of the evidence and not that presented by counsel. The court further recharged the jury on reasonable doubt and the State's burden of proof. (11/7T.43; R.159).

Thereafter, the State realized the jury may have been confused on what they were asking about because during the State's opening statement the day before there was no mention of

weight and the only mention came during testimony from Officer Louis and the SLED drug analyst. (11/7T.46; R.162). The judge indicated he assumed they meant opening statement in their question and that was why he recharged the jury that counsel arguments are not evidence. The court then opined that the jury may, reasonably, have taken his recharge as an instruction that he cannot answer the question and they could not rehear the testimony since he told them to rely on their own recollections. (11/7T. 50; R.166).

After Appellant's counsel indicated his hesitancy to interfere with the ongoing deliberations and noted that the jury could have asked for further instruction or to specifically hear the testimony, the court offered a possible solution. The court proposed: "How about instead of making any reference to their questions in particular, I will just tell them that the attorneys, plural, have requested that I remind them that if they have any questions about testimony that they can have it played back for them?" Both counsel indicated their assent, with Appellant's counsel specifically indicating: "Yes, sir, I agree with that." (11/7T.51; R.167). After giving the proposed instruction to the jury, the court asked Appellant's counsel if he had any objection to that instruction. He responded: "No objection." (11/7T.52; R.168).

To the extent Appellant's arguments on appeal relate to the trial court's reminder to the jury that they have the right to rehear testimony, this issue is not preserved for review. Appellant's counsel specifically consented to the instruction proposed by the court. When asked after the jury was charged with the proposed reminder whether he had any objection, Appellant's counsel simply stated: "No objection." State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007) (explaining an issue conceded at trial cannot be argued on appeal); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding appellant waived an issue for appellate review because he acquiesced to the trial court's ruling); State v. Rios, 388 S.C. 335, 342, 696

S.E.2d 608, 612 (Ct. App. 2010) ("[A] party cannot acquiesce to an issue at trial and then complain on appeal.").

The jury requested to hear the testimony of Officer Louis. Specifically, they requested to hear the testimony "regarding the weight he confiscated." (11/7T.55; Court's Exhibit 3; R.171). Appellant's counsel objected arguing that the jury may place more weight on his testimony. The trial court noted the objection, but indicated he would play the entirety of Officer Louis' testimony so not one part was unduly emphasized. The trial court clearly acted within his discretion in allowing the jury to rehear testimony, even just the testimony of Officer Louis.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations. The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). In Plyler, the trial court played the direct testimony requested by the jury, who then indicated they did not need to hear more. The defendant asked that the cross-examination be played and the trial court refused. The South Carolina Supreme Court indicated it was not an abuse of discretion to refuse to play the entirety of the witness's testimony. Id.

Other cases have also considered the discretion of the trial court in replaying testimony for a jury during deliberations. In State v. Winkler, the Supreme Court considered the propriety of the jury reading a transcript of the 911 call while listening to the recording. The Court found the judge "exercised proper discretion and committed no error in allowing the jury to read the transcript while listening to the 911 tape." State v. Winkler, 388 S.C. 574, 585, 698 S.E.2d 596, 602 (2010).

In State v. Summers, 276 S.C. 11, 274 S.E.2d 427 (1981), *overruled on other grounds by* State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000), the jury requested to hear both the direct and cross-examinations of the victim and a doctor. Apparently both were played for the jury, who then requested to hear only a portion of the direct testimony of the victim. The defendant objected indicating the trial court should have allowed the jury to hear the testimony on cross-examination related to the same testimony replayed from direct examination. The South Carolina Supreme Court explained: "We recently pointed out in State v. Plyler, S.C., 270 S.E.2d 126, the **broad discretion vested in the trial judge** in dealing with requests of the jury to review evidence during their deliberations." State v. Summers, 276 S.C. 11, 16, 274 S.E.2d 427, 430 (1981) (emphasis added). The Court continued: "Since the rulings of the trial judge were discretionary, prejudice must be shown to constitute reversible error." Id. The South Carolina Supreme Court then concluded:

> While the record fails to show what testimony was reproduced for the jury, it is reasonably inferable that the jury was satisfied with the court's response to their requests and indicated no further need for a review of the testimony.
>
> In view of the failure of the record to clearly show a failure of the court to comply with the request of the jury and the inference that the jury apparently felt their request had been met, we find no abuse of discretion.

Id. The Court indicated that a "failure of the court to comply with the request of the jury" was required to demonstrate an abuse of discretion.

In this case, the trial court played what the jury requested, and ensured no prejudice occurred by playing more than just the specific requested testimony. See e.g., Plyler, 275 S.C. at 298, 270 S.E.2d at 129 ("The court is not required to submit evidence to the jury for review beyond that specifically requested but may, in its discretion, have the jury review other evidence

relating to the same factual issue so as not to give undue prominence to the evidence requested."); see also, State v. Carlson, 363 S.C. 586, 602, 611 S.E.2d 283, 291 (Ct. App. 2005) (This Court no error in only playing a portion of the testimony when the jury broke for dinner midway in rehearing testimony and never indicated a need to rehear more of the witnesses testimony. The Court held: "The law imposes no duty on the judge to require the jury to hear additional testimony.").

The trial court in this case clearly complied with the request of the jury to rehear the testimony of Officer Louis. The court then utilized its broad discretion to play the entirety of Officer Louis testimony instead of solely playing the specific portion requested by the jury. Any possible undue emphasis that could have been caused by playing on the portion regarding the weight was eliminated when the entirety of Officer Louis' testimony was played for the jury. Accordingly, the trial court did not abuse its broad discretion in replaying the testimony for the jury and Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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December 19, 2019

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed December 19, 2019, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 19th day of December, 2019.

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