

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Laurens County
Hon. Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2019-001584

RECEIVED

Jun 05 2020

S.C. SUPREME COURT

The State,

Respondent,

v.

Terrance Edward Stewart,

Petitioner.

Opinion No. 2019-UP-209 (S.C. Ct. App. filed June 5, 2019)

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court properly instructed the jury: “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence and to be given the weight you think it deserves.” When read as a whole, the jury charge covered the current and correct law of South Carolina. Further, it did not alter the State’s burden of proof.

- II. The trial court properly instructed the jury: “Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found.” When read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina. Further, it did not alter the State’s burden of proof.

STATEMENT OF THE CASE

Procedural History

Terrance Edward Stewart (Petitioner) was indicted at the June 2015 term of the grand jury for Laurens County for distribution of heroin (2015-GS-30-0957), trafficking in heroin (2015-GS-30-0958), and possession with intent to distribute (PWID) oxycodone (2015-GS-30-0959). He was initially represented by public defenders Claude H. “Chip” Howe, III, and Chelsea McNeill of the Eight Circuit Public Defender’s Office; however, he was later represented at trial by C. Rauch Wise, Esquire. Respondent (the State) was represented by Assistant Solicitors C. Dale Scott, Margaret Boykin, and Jim Todd, all of the Eighth Circuit Solicitor’s Office. On December 13-14, 2016, Petitioner proceeded to trial by jury pursuant to which he was found guilty of trafficking heroin, distribution of heroin, and the lesser included offense of possession of oxycodone. He was sentenced by the Honorable Frank R. Addy, Jr., to twenty-five (25) years’ imprisonment for trafficking in heroin, ten (10) years’ concurrent imprisonment for distribution of heroin, and five (5) years’ concurrent imprisonment for simple possession of oxycodone – third offense. (R.p.511-519; R.p.475-p.488). Petitioner timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his appeal.

The Court of Appeals affirmed the convictions and sentences. (App.1-10). Petitioner filed a timely Petition for Rehearing, which was denied by the Court of Appeals. (App.11-17). Petitioner timely served and filed a Petition for Writ of Certiorari and the State filed a Return. After consideration, this Court denied the Petition as to Questions I-IV and granted Petitioner’s Petition as to Questions V and VI. Petitioner served and filed a Brief of Petitioner on April 19, 2020, and this Brief of Respondent follows.

Factual Background

The charges against Petitioner stemmed from a police investigation into some tips about heroin usage in the upper part of Laurens County. Sergeant Matt Veal described the police procedures for making a controlled buy and the use of confidential informants (CI). Veal also explained the January, 2015, investigation into heroin sales in Fountain Inn and how that investigation led to Lawrence Cheatham, an individual who had overdosed on heroin and was willing to serve as a CI. Veal then provided a detailed description of the actual controlled buy where Cheatham purchased heroin from Petitioner from the residence in Laurens County. He explained how Cheatham was searched, wired for video and audio recording, and given documented funds to make the purchase, and how he returned from Petitioner's residence with five small bags containing a substance field tested to be heroin. (R.p.269-p.296).

Next, Officer Steven Sweat described the January 21, 2015 controlled buy, whereby the LCSO used Mr. Cheatham to purchase heroin from Petitioner at his address. Sweat identified Petitioner in the courtroom as the person he saw outside the residence just before the purchase. (R.p.296-p.307). The State then called Lawrence Cheatham to the stand. He admitted he was a heroin addict and described the incident where he almost died from taking some bad heroin and was found unconscious by the police. Cheatham explained he was charged with possession of drug paraphernalia and then agreed to work with the police as a CI. (R.p.307-p.312).

Cheatham described meeting with Sergeant Veal on January 21, 2015, and the procedure they followed to set up the controlled buy from his heroin supplier, Cheddar. He identified the video recording of the buy and it was admitted into evidence and played for the jury. Cheatham then identified Petitioner in the courtroom as the man he knew as Cheddar and as the man appearing in the video who sold him heroin. (R.p.312-p.316).

The State recalled Sergeant Veal to the stand. He testified he obtained a search warrant for Petitioner's residence based on the controlled buy, and then executed the search pursuant to that warrant on January 22, 2015, the morning after the buy. The police found Petitioner, Petitioner's girlfriend Tondalai Coleman, and her children inside the residence. Using a diagram, Veal described the layout of the residence and noted where various people and items were found during the search. Petitioner was on the couch. Petitioner asked if he could put on some clothes and indicated the pants on the floor were his. Veal picked up the pants and checked them for contraband before giving them to Petitioner. He found \$1,123 in the pockets of the pants, which included the five documented twenty-dollar bills that had been used in the controlled buy the day before. Veal placed Petitioner under arrest and continued the search. The police found a large bag of greyish powder which turned out to be heroin, a tinfoil ball full of pills which turned out to be oxycodone, a set of black digital scales with a powdery residue, a pistol wrapped in a green towel, and \$2,730 in cash. (R.p.328-p.346).

Tondalai Coleman explained she lived in the trailer with Petitioner and their two children. Coleman said she never heard anybody call Petitioner "Cheddar" and did not have any information or knowledge he was distributing drugs from their house. She then identified an audio recording of a phone conversation she had with Petitioner while he was in jail, and that recording was admitted into evidence and played for the jury. In the recording, Coleman expressed concern about being charged for the drugs and Petitioner responded that he would say they were his. (R.p.358-p.381). Finally, the State called SLED forensic drug analyst Shana Sorrells as an expert in forensic toxicology and drug analysis to give an opinion about the substances recovered in the controlled buy and the subsequent search. She said the substance in the large bag and the five small plastic bags was a mixture of heroin and fentanyl, and that the

pills were oxycodone. She explained the difference between heroin and fentanyl and their relative potency, and then gave the specific weights of the drugs that were found. (R.p.388-p.404). The following morning, the State rested and Petitioner advised the court he would not be putting up any evidence so that he would get the last closing argument. (R.p.406-p.410). After a charge conference in which Petitioner objected to the constructive possession charge and inferences, Petitioner rested.

The trial judge then charged the jury on the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, direct evidence, circumstantial evidence, credibility of witnesses, expert witnesses, the defendant's right not to testify, the elements of the crimes, criminal intent, actual possession, constructive possession, mere presence, and the necessity of a unanimous verdict. (R.p.458-p.474). In regard to the role of the jury, the trial judge charged:

Again, you are the sole and exclusive judges of the facts in this case. A trial judge cannot intimate, state, comment on, or make any statement to a jury about the facts. Since you, the jury, are the sole judges of the facts, you're not to infer from what I said during the progress of this trial in ruling upon the admissibility of evidence or otherwise or anything that I say to you now during the course of these instructions that I have any opinion about the facts of this case. Ladies and gentlemen, the law does not permit me to have any opinion about the facts. This is a matter solely for you to determine.

(R.p.462, lines 6-16). In regard to possession, the trial court charged the jury as follows:

Now, ladies and gentlemen, in terms of the possession -- or, sorry. In terms of the trafficking heroin charge and the possession with intent to distribute oxycodone and the possession of oxycodone charges, I'm going to define with you how the law defines possession. To prove possession, ladies and gentlemen, the State must prove beyond a reasonable doubt the Defendant had knowledge of, power over and the intent to control the disposition or use of the drugs involved. Possession may be either actual or constructive. Actual possession means that the drugs involved

were in the actual physical custody of the Defendant. Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found. Mere presence I instruct you -- I instruct you that mere presence at the scene where the drugs were found is not enough to prove possession. The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence and to be given the weight you think it deserves. I instruct you, ladies and gentlemen, that two or more persons may have joint possession of a drug. Additionally, mere presence at the scene where the drugs were found is not enough to prove possession. The Defendant's knowledge and possession again may be inferred when the substance is found on the property under the Defendant's control. Again, this is merely an evidentiary fact to be taken into consideration by you with the other evidence and give it the weight you think it should deserve.

(R.p.468, line 16-p.469, line 21). Petitioner renewed his objections to the constructive possession charge. (R.p.474).

After deliberating for approximately thirty minutes, the jury found Petitioner guilty of trafficking in heroin, distribution of heroin, and the lesser included offense of simple possession of oxycodone. The trial judge then sentenced Petitioner to twenty-five (25) years' imprisonment for trafficking in heroin, ten (10) years' concurrent imprisonment for distribution of heroin, and five (5) years' concurrent imprisonment for possession of oxycodone – third offense, for an aggregate sentence of twenty-five (25) years' imprisonment. (R.p. 511-519; R.p.475-p.488).

STANDARD OF REVIEW

“An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). “In general, the trial court is required to charge only the current and correct law of South Carolina.” Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). “A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.” State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

“Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. art. V, § 21. “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). “The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). “In reviewing jury charges for error, [the Court] must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial.” Brandt, 393 S.C. at 549, 713 S.E.2d at 603 (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). “Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict.” State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (citing State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). “Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous.” Id.

ARGUMENT

- I. **The trial court properly instructed the jury: “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence and to be given the weight you think it deserves.” When read as a whole, the jury charge covered the current and correct law of South Carolina. Further, it did not alter the State’s burden of proof.**

The trial court correctly charged the jury with regard to a permissive inference that knowledge and possession may be inferred when the substance is found on property under the defendant’s control. The court properly explained the inference was merely an evidentiary fact and it was up to the jury to determine whether to accept the inference and the weight to give to the inference. The charge did not alter the State’s burden of proof, nor was it an improper comment on the facts.

In the instant case, the trial court charged the jury:

To prove possession, ladies and gentlemen, the State must prove beyond a reasonable doubt the Defendant had knowledge of, power over and the intent to control the disposition or use of the drugs involved. Possession may be either actual or constructive. . . . Mere presence I instruct you -- I instruct you that mere presence at the scene where the drugs were found is not enough to prove possession. The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence and to be given the weight you think it deserves.

(R.469). The trial court repeated both the mere presence and the permissive inference for the jury. The trial court repeatedly reminded the jury that the State had the burden of proof and that Petitioner had a presumption of innocence. (R.459-461; 463; 465-466; 470). The court also

explained that the jury had the duty to determine the effect, value, weight and truth of the evidence presented. (R.462; 464).

Petitioner first argues the challenged jury charge is factually incorrect and is not supported by the law of South Carolina. He claims the historical basis for so instructing the jury is simply not supported by a logical reading of the prior case law in South Carolina, taking particular issue with State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). Petitioner acknowledges the oft quoted language from Adams that: “The proper charge on constructive possession is to instruct the jury that the defendant’s knowledge and possession may be inferred if the substance was found on premises under his control.” However he complains this statement is only supported by a citation to State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981), where Hudson itself does not support such a charge. He argues Hudson merely held that if a defendant is exercising dominion and control over the premises, then the case should be submitted to the jury, not that the inference should be charged to the jury when submitted. (Brief of Petitioner, p.14-p.15). Petitioner has misconstrued the relevant cases.

Although Petitioner correctly notes Hudson was a directed verdict case and was not specifically about the jury charge, Adams was about the jury charge, and it referenced Hudson’s recognition of the permissive inference. In State v. Hudson, this Court explained: “Where 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.” State v. Hudson, 277 S.C. 200, 203, 284 S.E.2d 773, 775 (1981). Hudson cites to State v. Ellis, in which the Court stated: “Where such materials are found on the premises under the control of an 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 on a charge of unlawful

possession.” State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974). In Adams, this Court put an end to the practice of trial courts using a modification of the Ellis directed verdict inference language to charge the jury that items “must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary.” Adams, 291 S.C. at 135, 352 S.E.2d at 486. The Court held this instruction impermissibly shifted the burden of proof to the appellant to disprove possession, but then corrected this problem by directing trial courts to charge both the inference and that it is merely permissive. Id. at 135-36, 352 S.E.2d at 486. Again, this is precisely what the trial court did in Petitioner’s case. (R.p.469).

Petitioner next contends the challenged jury charge is similar to the federal statutory presumption of knowledge of illegal importation from the mere fact that the defendant possessed a small amount of marijuana, a presumption rejected by the United States Supreme Court (USSC) in Leary v. United States, 385 U.S. 6 (1969). He argues the inference charge should similarly be rejected by this Court because such information is not within the specialized judicial competence or completely commonplace. However, the rationale of Leary does not apply in the instant case.

In Leary, the USSC considered whether a person in possession of marijuana could be inferred to know its origin and whether it was imported or domestically grown. The Court, after considering numerous sources, found: “In short, it would be no more than speculation were we to say that even as much as a majority of possessors ‘knew’ the source of their marihuana.” As a result, the Court found an inference that being in possession of marijuana supported a conclusion the marijuana was known to be imported was improper.

Leary is clearly distinguishable from the current case. In this case, the jury is not asked to make a huge inferential leap that someone in possession of a substance knows whether it was imported or created domestically. Instead, the inference in the instant case merely asks the jury to rely on common sense to determine that a person in control of the property on which the substance is found can be inferred to know of the existence of that substance and possess that substance.

The inference in the instant case is much more similar to the inference upheld by the USSC in Hawes v. State of Georgia, 258 U.S. 1 (1922). In Hawes, the Court upheld the validity of a statute providing that the existence of a liquor still upon ‘real estate’ constitutes prima facie evidence that those ‘in actual possession’ of the land knew of the location of the still and may, on the strength of that presumption, be held guilty of the crime of permitting a still to be operated upon their property. While the presumptive nature of the inference would constitute a due process violation, as opposed to the entirely permissive inference in the instant case, the rationale for upholding the presumption remains valid. The USSC explained that it may be presumed that one who occupies land “will know what there is upon it.” Id. at 5. The Court concluded: “We agree, therefore, with the Supreme Court of the state that the existence upon land of distilling apparatus, consisting of the still itself, boxes, and barrels, **has a natural relation to the fact that the occupant of the land had knowledge of the existence of such objects and their situation.**” Id.; see also, People v. Terra, 102 N.E.2d 576, 578-79 (N.Y. 1951) (“Persons who occupy a room, who either reside in it or use it in the conduct and operation of a business or other venture . . . **normally know what is in it**; and, . . . it is neither unreasonable nor unfair to presume that the room’s occupants are aware of its presence.” (emphasis added)). This is

essentially the exact inference the trial court's instruction permitted in this case and should, likewise, be upheld.

Petitioner takes issue with the inference, seemingly because it is beneficial to the State. As the Court of Appeals of New York explained: "Presumptions are no innovation in the field of criminal law. . . . Although such provisions undoubtedly facilitate proof of guilt and the task of the prosecution, they are not, for that reason, to be condemned." Terra, 102 N.E.2d at 578. Additionally, the USSC has explained: "Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts." Cty. Court of Ulster Cty., N. Y. v. Allen, 442 U.S. 140, 156 (1979).

In this particular case, Petitioner also received an inference immediately before the one he complains the State improperly received. The jury was specifically charged: "I instruct you that mere presence at the scene where the drugs were found is not enough to prove possession." (R.469). The two charges given together form a balance and instruct the jury on its rule in considering the evidence. Neither charge is appropriate without the other. The charge at issue in the current case does not improperly comment on the facts, weigh the evidence, or isolate one type of evidence above others. Instead, it merely provides instruction to the jury on how to use the doctrine of constructive possession. This charge no more comments on a fact or isolates a particular set of facts than does the mere presence charge which immediately preceded it in the judge's instructions. Both the mere presence and the inference charge are instructions for the jury on how to use evidence, similar to reasonable doubt instructions, the instructions regarding direct versus circumstantial evidence, and instructions explaining the jury's role in weighing the

evidence and determining credibility of the witnesses.¹ These are present to enlighten the jury and aid it in arriving at a correct verdict; they do not improperly comment on the facts, weigh the evidence, or provide a confusing or improper charge on the law.

He also maintains the permissive inference in this case altered the burden of proof and allowed the State to convict Petitioner without proving beyond a reasonable doubt all elements of the crime in violation of In re Winship, 397 U.S. 358 (1970). “The most common evidentiary device is the entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant.” Allen, 442 U.S. at 157. This is precisely the type of inference at issue in this case. The USSC continued explaining:

Because this permissive presumption leaves the trier of fact free to credit or reject the inference and **does not shift the burden of proof**, it affects the application of the “beyond a reasonable doubt” standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

Id. (emphasis added). As discussed above, the connection between Petitioner’s knowledge and possession of the drugs being located on property under his dominion and control is perfectly reasonable so there is certainly a rational way a trier of fact could make the connection. As a result, the permissive inference—the trial court expressly stated twice that “this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence and to be given the weight you think it deserves”—in this case did not alter the burden of proof nor did it allow the State to not prove an essential element. Instead, it merely allowed the jury to

¹ To the extent this Court found the permissive inference regarding knowledge and possession to be improper, the Court would have to find the mere presence charge improper because they are both the same type of charge providing the jury with the same type of explanation and instruction.

infer an elemental fact—knowledge and possession of the drugs—from one or more evidentiary facts—dominion and control over the property on which the drugs were located.

Petitioner relies on several cases to challenge the validity and propriety of the inference given in this case. In regard to State v. Brunson, 905 P.2d 346 (Wash. 1995), the State submits it actually supports the validity of the inference charge given in Petitioner’s case. In Brunson, the Supreme Court of Washington, in an *en banc* opinion, found the pattern inference of intent instruction, “In prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein,” to be a constitutionally sound permissive inference rather than an unconstitutional mandatory inference. Brunson, 905 P.2d at 349-50. In doing so, the Washington Court noted: (1) it allowed the trier of fact to either infer the elemental fact from proof by the prosecutor, or reject the inference; (2) the language in the instruction was clearly discretionary; and (3) no proof existed that the jury considered the inference to the exclusion of all other evidence. Id. Here, the knowledge and possession inference is clearly permissive, and similar to Brunson, our inference is constitutional because knowledge and possession more likely than not flow from a substance being found on property under the defendant’s control.

Petitioner relies on two early twentieth century civil cases in support of his contention that any jury instruction that tells the jurors some fact can be “inferred” is impermissible. In Yarborough v. Southern Ry., 78 S.C. 103, 58 S.E. 936 (1907), the trial court charged the jury on “the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the fact that an agent has notice of its being placed there and makes no objection.” The charge is not given, but appears to be in the nature of a mandatory presumption and not a permissive inference. Further, the charge only presents one side of the

equation. There was evidence of a conspicuously posted sign forbidding all persons to place cotton on the premises of the company until tendered and accepted for shipment. Because it was for the jury to say whether the paper was so posted as to give notice to all shippers, and therefore determine whether the agent had a duty to object, this Court found the charged inference which would have allowed the jurors to disregard making this determination became an unconstitutional comment on the facts. The instant case is clearly distinguishable because the jury was presented both the permissive inference that knowledge could be inferred from drugs being on property under the defendant's control, but were also charged the other side of the equation which is that mere presence is insufficient. The court in this case did not isolate one set of facts and provide an inference which would have entirely eliminated the jury's ability to consider an entire set of facts and argument set forth by the railroad.

In Finch v. Atlanta & C. Air Line Ry., 87 S.C. 190, 69 S.E. 208 (1910), the trial court began its instructions by discussing the facts of the case and then instructed the jury:

You cannot infer negligence on the part of the railroad company merely from the happening of the accident—from the happening of an injury—but after the happening of an injury to any one, if the railroad company **who is present through its agents and servants, and knows how it happened, or have an opportunity to know, and they do not come forward and explain**, then from their refusal to explain the jury may infer negligence.

Id. at 209 (emphasis added). The jury instruction begins by presenting facts to the jury and then continues by telling the jury that the railroad had employees present, and they knew or should have known how the injury to the plaintiff occurred. This is directly commenting on the facts and eliminating from the jury some of the determinations it is required to make. The charge presupposes the railroad employees knew and could explain and then used that fact and their failure to explain to allow only one conclusion, that negligence exists. In the current case, the

judge did not set forth a holding the jury must follow. He presented the jury with instructions on how to use the evidence they find existed. If Petitioner were merely present, the instruction told them that was insufficient to establish guilt. If however, they found the drugs were on Petitioner's property under his control, then they could infer from that his knowledge and possession of the drugs.

This Court should look to cases immediately after the amendment to the South Carolina Constitution to determine how to construe Section 21 of Article V. In Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896), this Court directly confronted the newly amended Constitution and what it meant when it indicated: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." First, the Court considered what was meant by the long-standing portion of the provision that "Judges shall not charge juries in respect to matters of fact." The Court, referred to prior cases including Moore v. Columbia & G.R. Co., 38 S.C. 1, 16 S.E. 781 (1892), which explained:

What is meant by the judge charging upon the facts? It seems to us it may be said to occur when, in the progress of a trial, the circuit judge conveys, by word, his opinion upon the sufficiency or insufficiency of certain testimony, in determining by the jury of some fact at issue between the parties litigant. It must be by charge; that is, oral or written statements of the judge to the jury. It must be an opinion on some matter of fact. It must be such an expression of opinion on a matter of fact that thereby the jury are made to know what his estimate is of the truth or falsity of some matter in testimony. And, lastly, such expression by the judge must relate to some matter of fact at issue between the parties.

Moore v. Columbia & G.R. Co., 38 S.C. 1, 16 S.E. 781, 791 (1892). This is similar to the determination made by this Court in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), that indicating one fact is "strong evidence" of another improperly weighs the evidence and is an expression of the trial court's opinion on the matter. This Court in Norris went on to state: "A

judge violates this provision [“Judges shall not charge juries in respect to matters of fact”] when he expresses in his charge his **own opinion** upon the force and effect of the testimony, or of any part of it, or intimates **his views** of the sufficiency or insufficiency of the evidence in whole or in part.” Norris, 47 S.C. at ___, 25 S.E. at 806 (emphasis added). In the instant case, the instructions did not provide the trial court’s opinion or views. Instead, they merely explained to the jury how to use evidence if it found that evidence existed.

Significantly, Norris speaks directly to the type of charge in this case. This Court stated:

We therefore conclude and hold that as it would be impossible to declare the legal principles involved without some state of facts, actual or hypothetical, it was the intention of the framers of the new constitution, in amending section 26, art. 4, that the trial judge, in charging the law of the case, should lay before the jury that law as applicable to a supposed state of facts, but that in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony either in whole or in part. We are clearly of the opinion that under section 26, as it now reads, a judge may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that, **if they believe so and so from the evidence they have heard, then such and such will be the legal result.**

Id. at 809-810. This allowed instruction is exactly the type of inference presented in this case. It does not comment on the actual facts, but instead tells the jury if they believe certain facts to be the case, then they can infer other facts from them and use those for whatever evidentiary purpose they desire.

The trial court in this case did not abuse its discretion in giving the inference charge in this case, especially in light of a reading of the charge as a whole. The charge in the instant case was entirely correct and reasonable as a statement of law. It is entirely consistent with Hudson and Adams, and it is a constitutionally correct version of the charge approved in Ellis. The charge was not a comment on the facts and was exactly the type of charge contemplated by this

Court very shortly after the South Carolina Constitutional provision was amended. The charge did not shift the burden of proof because it allows the trier of fact to make the ultimate determinations as required by the USSC in Allen. Finally, the charge did not prejudice Petitioner particularly in light of his receipt of the mere presence charge immediately preceding the charge in question. This Court should affirm the trial court's decision giving the inference in this case and affirm Petitioner's convictions and sentences.

II. The trial court properly instructed the jury: “Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found.” When read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina. Further, it did not alter the State’s burden of proof.

The trial court correctly instructed the jury on the definition of constructive possession when the charge is read as a whole. The charge is consistent with South Carolina law, as well as statements of the law from other states. Finally, nothing in the charge altered the State’s burden of proof or the elements of the crime the State was required to prove beyond a reasonable doubt.

In this case, the trial court charged the jury:

To prove possession, ladies and gentlemen, the State must prove beyond a reasonable doubt the Defendant had **knowledge of, power over and the intent to control the disposition or use of the drugs involved**. Possession may be either actual or constructive. Actual possession means that the drugs involved were in the actual physical custody of the Defendant. Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found.

(R.468-469).

When read as a whole, the charge given by the trial court was a full and correct statement of law. It specifically instructed “the State must prove beyond a reasonable doubt the Defendant had knowledge of, power over and the intent to control the disposition or use of the drugs involved.” It then defined constructive possession in the way this Court and other courts have done for many years. Nothing in the charge altered the elements the State was required to prove in order to convict Petitioner of any crime related to possession of the drugs.

This Court has made the same statement made by the trial court: “[C]onstructive possession occurs when the person charged with possession has dominion and control over either

the drugs or the premises upon which the drugs were found.” State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974) (citing State v. Perry, 516 P.2d 1104 (Wash. App. 1973), *overruled on other grounds by* State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987)). This Court has made the statement previously in defining constructive possession. See State v. Burgess, 408 S.C. 421, 440, 759 S.E.2d 407, 417 (2014) (“constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found.”); State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996) (“Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found.”).

Other courts from around the country have similarly defined constructive possession. See State v. Withrow, 8 S.W.3d 75, 80 (Mo. 1999) (“Constructive possession requires, at a minimum, evidence that the defendant had access to and control over the premises where the materials were found.”); People v. Warren, 55 N.E.3d 117, 132 (Ill. App. 2016)(“Actual possession requires actual physical dominion over the contraband, while constructive possession is established where a defendant has exclusive control of the premises in which the contraband is found.”); Williams v. State, 154 So. 3d 426, 428 (Fla. Dist. Ct. App. 2014)(internal citations omitted) (“Actual possession exists where a defendant has physical possession of contraband. Constructive possession exists where a defendant does not have actual physical possession of contraband but knows of its presence on or about his premises and has the ability to exercise dominion and control over it.”); State v. Dues, 24 N.E.3d 751, 756 (Ct. App. Ohio 2014) (“Constructive possession is also sufficient to prove possession. Possession may not be inferred

from mere access to the thing; however, a person constructively possesses a thing or substance when he knowingly exercises or is able to exercise dominion and control over the thing or substance or over the premises on which the thing or substance is found or concealed, even though the thing or substance is not in his physical possession.”); State v. Carter, 157 P.3d 420, 423–24 (Wash. App. 2007) (“Possession may be actual or constructive”; constructive possession means the person has “dominion or control over [the firearm] or over the premises where the firearm [is] found.”).

The charge given, when viewed as a whole, properly instructed the jury that the State has to prove possession, including Petitioner’s knowledge of the drugs, and that one means of establishing possession is through constructive possession. The trial court properly defined constructive possession for the jury to distinguish it from actual possession, and it did so in a manner entirely consistent with many years of case law from this Court. Accordingly, the trial court did not err in the charge given and this Court should affirm Petitioner’s convictions and sentences.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

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