STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
The Honorable J. Mark Hayes, Circuit Court Judge

Appellate Case No. 2019-001161

THE STATE, Respondent,

v.

CARLOS ANTHONY DENNISON, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Whether the trial judge abused his discretion in refusing to grant Appellant's request for a mistrial when the trial judge corrected his previous error and properly instructed the jury on the correct inference weight of possession with intent to distribute heroin? And furthermore, whether Appellant could possibly suffer any prejudice from the trial judge reading the jury the correct law of this state?

STATEMENT OF THE CASE

In March 2019, the Georgetown County Grand Jury indicted Appellant for one count of possession with intent to distribute heroin and one count of possession with intent to distribute cocaine. On July 8-10, 2019, a jury trial was held in the Georgetown County Court of General Sessions with the Honorable J. Mark Hayes, presiding. Appellant represented himself at trial. The State was represented by Assistant Solicitor Keith Powell of the Fifteenth Circuit Solicitor's Office. The State proceeded to trial on the charges of possession with intent to distribute heroin and possession of cocaine. At the conclusion of trial, the jury convicted Appellant of both counts. Because Appellant had two prior drug convictions, Appellant was sentenced for a third offense on each charge. The trial judge sentenced Appellant to two concurrent terms of ten years' imprisonment. Appellant then timely served a notice of appeal and an initial brief.

STATEMENT OF FACTS

On June 20, 2018, Staff Sergeant John Gregory of the Georgetown City Police Department was responding to a service call on an unrelated incident in the Congdon Street area of Georgetown, when he noticed Appellant standing on a nearby porch. (R. 69). Knowing Appellant had outstanding arrest warrants, Gregory contacted Detective Noel Smith to effectuate an arrest of Appellant. (R. 70). Smith arrested Appellant and searched him pursuant to that arrest. (R. 97-98). Smith located a small lip balm container in Appellant's front pocket. Inside the container, Smith found plastic bags filled with suspected heroin and cocaine. (R. 98). Appellant was also carrying a tote bag on his back that contained additional plastic bags and lottery tickets. (R. 98). Officer Donald Tempalsky of the 15th Circuit Drug Enforcement Unit testified that lottery tickets are commonly used to package and sell drugs. (R. 145). Smith also testified that a typical dose for a heroin user would be "about a tenth of a gram." (R. 86, line 6).

The suspected drugs were tested by Forensic Scientist Lynn Black of SLED. Black determined the first suspected bag contained a combination of heroin and fentanyl weighing .1 grams or 1.54 grains. (R. 200, 293). A second bag contained a combination of heroin, fentanyl, and cocaine and weighed .041 grams or .632 grains. (R. 201, 293). A third bag contained a combination of heroin and cocaine weighing .056 grams or .864 grains. (R. 201, 294). A fourth bag contained cocaine weighing .35 grams or 5.40 grains. (R. 201, 294). The total weight of the suspected heroin was .197 grams or 3.036 grains.

Appellant did not testify on his own behalf, but he did present a closing argument. In his closing argument, Appellant admitted that he possessed and used drugs but he only did so because he was an addict. (R. 233, 243, 252).

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id.

ARGUMENT

The trial judge did not abuse his discretion in refusing to grant Appellant's request for a mistrial because the trial judge corrected his previous error and properly instructed the jury on the correct inference weight of possession with intent to distribute heroin. Furthermore, Appellant suffered no prejudice from the trial judge reading the jury the correct law of this state.

Appellant argues the trial judge erred by denying Appellant's motion for a mistrial and choosing to correct his previous incorrect instruction to the jury regarding the proper inference weight to be considered by them in determining whether Appellant possessed heroin with the intent to distribute it. Thus, Appellant argues the trial judge erred by instructing the jury on the correct law rather than declaring a mistrial. A trial judge's decision to instruct the jury on the correct law of South Carolina is not a reversible error in this state. Appellant's argument fails for two reasons. First, the trial judge corrected his previous error and instructed the jury on the correct law of this state. Secondly, Appellant suffered no prejudice from the trial judge's decision because a defendant cannot be prejudiced by a jury being instructed on the correct law. In short, a trial judge instructing a jury on the correct law of South Carolina does not warrant the extreme remedy of a mistrial.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." Thompson, 352 S.C. at 560, 575 S.E.2d at 82. "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). "A mistrial should not be granted unless absolutely necessary." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). "Instead, the trial judge should exhaust other methods to cure possible

prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." Id.

"Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." State v. Logan, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013). "A jury charge that is substantially correct and covers the law does not require reversal." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). "To warrant reversal based on a trial court's failure to give a requested jury instruction, the failure must be both erroneous and prejudicial." State v. Lee-Grigg, 374 S.C. 388, 415, 649 S.E.2d 41, 55 (Ct. App. 2007). "Prejudice to the appellant's case is a prerequisite to reversal of a verdict due to an erroneous jury charge." Id.

South Carolina Code section 44-53-370(a) states, in relevant part, that it shall be unlawful for a person

> (a) Except as authorized by this article it shall be unlawful for any person:
> (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue;

S.C. Code § 44-53-370(a)(1). South Carolina Code section 44-53-370(d)(4) provides that a person who is in "possession of more than:...two grains of heroin...is prima facie guilty of violation of subsection (a) of this section." S.C. Code § 44-53-370(d)(4).

Here, the trial judge gave the following incorrect instruction to the jury regarding the proper inference weight to be considered in determining whether Appellant possessed heroin with the intent to distribute it:

> The Court: Now, the State must also prove beyond a reasonable doubt that the defendant intended to distribute the heroin. Distribution means to deliver other than by administering of dispensing a drug. Intent may be shown by acts and conduct of the defendant and other circumstances for which you may reasonably infer intent. Determining whether the defendant had the intent to distribute the heroin. You may consider the circumstances surrounding the defendant's alleged possession. You may consider the amount of the substance alleged to have been possessed. The manner in which it was allegedly possessed, the place where it was allegedly possessed and other factors which you consider to be important. You must find that the defendant did not intend to have the heroin solely for his own use. Possession of more than *two grams* of heroin creates the inference that the defendant possessed the heroin with the intent to distribute. This inference does not relieve the State from proving beyond a reasonable doubt that the defendant had the intent to distribute. It is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight that you decide that it deserves.

(R. 262, lines 16-25-R. 263, lines 1-12)(emphasis added). Neither Appellant nor the State objected to the trial judge's jury instructions. (R. 265). Shortly after the jury began deliberations, they submitted the following two questions: "Is 2 grams or .2 grams the 'automatic' intent to distribute threshold?" and "Some jurors would like to know the legal definition of 'intent' in the charge 'intent to distribute.'" (R. 268, 296). After receiving the note, the trial judge again charged the jury with the same erroneous inference weight. (R. 272). Following the second erroneous instruction, the solicitor realized the trial judge's error and notified him of the error. (R. 273). Appellant objected to the trial judge reading the correct charge and moved for a mistrial in the event the trial judge read the correct charge. (R. 275). The trial judge denied Appellant's motion and re-instructed the jury using the correct inference weight of two grains. (R. 275-80).

On appeal, Appellant argues the trial judge erred by denying his motion for a mistrial and by choosing to read the correct statutory definition to the jury[1]. Appellant's argument is

[1] Appellant does not challenge his conviction for possession of cocaine, third offense, nor does he challenge the accompanying concurrent ten year sentence that is identical to the sentence he received for possession with intent to distribute heroin, third offense. (Initial Brief of Appellant 16). Therefore, Appellant's conviction for possession of cocaine, third offense is the law of the

meritless. First and foremost, the trial judge did not err because he correctly instructed the jury on law as it is written in S.C. Code § 44-53-370. Secondly, Appellant cannot be prejudiced by a trial judge reading the correct law to the jury. If Appellant's argument is taken to its' logical extreme, a trial judge could not correct an erroneous instruction after it has been read to the jury. In effect, a trial judge would not only be prohibited from correcting his or her mistake, but the judge would also be prohibited from reading the correct law to the jury. This would be an absurd result than cannot be the law of this state. See State v. Thompson, 68 S.C. 133, __, 46 S.E. 941, 943 (1904) (recognizing a trial judge "[c]learly" should "at once" correct an error that has been made if the trial judge becomes "conscious of [that] error" because "[c]ourts are organized to dispense justice").

Even if the trial judge had failed to correct his mistake, Appellant would have benefitted from the erroneous instruction. The initial erroneous instruction held the State to a higher burden of proof than the correct instruction because two grams is a higher threshold to establish than two grains. Understandably, Appellant opposed the trial judge correcting his mistake because the incorrect weight benefitted Appellant. However, just because reading the jury the correct inference weight did not benefit Appellant does not mean the trial judge committed reversible error by doing so.

Additionally, Appellant asserts there is no evidence in the record regarding the definition of the term "grain" (Initial Brief of Appellant 10-11). Appellant is correct that no witness defined the term "grain" for the jury; however, the SLED report prepared by Lynn Black converted the weights of each substance found in Appellant's possession from grams into grains. (R. 293-95).

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case. (Initial Brief of Appellant 1,4,15). See Shirley's Iron Works, Inc. v. City of Union, 403 S.C.560, 573, 743 S.E.2d 778, 785 (2013). ("An unappealed ruling is the law of the case and requires affirmance").

Therefore, there was evidence in the record that allowed the jury to determine whether Appellant possessed more than two grains of heroin. Notably, in his closing argument, the solicitor did not reference the inference weight and instead argued Appellant was guilty of possession with intent to distribute heroin because of the lottery slips and plastic bags that Appellant possessed. (R. 224-32).

To the extent Appellant argues the trial judge erred in giving an improper instruction on the nature of the inference to be considered by the jury, such an issue was not properly preserved for appeal. Appellant presumably objected to the trial judge correcting his previous mistake in regards to the inference weight after the State brought the error to the attention of the court. (R. 275). However, Appellant offered no other objection to the content of the jury charge at that time or when the jury was first charged. (R. 265, 275). In fact, Appellant consented to all of the language in the jury charge when he stated: "Your Honor, I ask that the charge stay the same, if not I move for a mistrial if it's a mistake made by the Court." (R. 275, lines 3-5). Therefore, any objection Appellant may have had to the inference language in the jury charge is not preserved for appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003)("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). See also State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000)(Holding an issue conceded at trial cannot be argued on appeal). Appellant's convictions and sentences should be affirmed.

CONCLUSION

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

Respectfully submitted,

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September 15, 2020

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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