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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARLOS ANTHONY DENNISON,

APPELLANT.

APPELLATE CASE NO. 2019-001161

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred where it refused to grant a mistrial despite twice erroneously instructing the jury that in determining whether Appellant had the intent to distribute, the inference weight for PWID heroin was two grams instead of two grains, where it was apparent the jury had fixed its "critical attention" on the issue, and where none of the court's instructions corrected the jury's misunderstanding that the inference was mandatory rather than permissive?

STATEMENT OF THE CASE

On March 27, 2019, a Georgetown County Grand Jury indicted Appellant for the offenses of possession with intent to distribute heroin and possession with intent to distribute cocaine. R. 297. However, the State ultimately tried Appellant for possession with intent to distribute (PWID) heroin, third offense, and the lesser offense of possession of cocaine, third offense. R. 49, ll. 3-8; R. 285, ll. 4-5.

On June 20, 2019, Appellant appeared before the Honorable Larry B. Hyman for a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975). R. 1. The judge engaged in a *Faretta* colloquy with Appellant and ruled that he could proceed pro se. R. 3, l. 21 – 9, l. 17.

Appellant was tried before the Honorable J. Mark Hayes and a jury, from July 8 – 10, 2019. R. 10. Appellant represented himself at trial. R. 19, ll. 3-7. Ron Hazzard acted as Appellant's standby counsel. R. 48, l. 12-13. The State was represented by Keith Powell. R. 10.

Appellant was convicted of PWID heroin and possession of cocaine, third offense. R. 278, ll. 9-12; R. 281, ll. 4-8. The court sentenced Appellant to serve concurrent terms of ten years' incarceration on each charge. R. 290, ll. 18-20; R. 301.

This appeal follows.

STANDARD OF REVIEW

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." *Id.* at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)).

ARGUMENT

The trial court erred where it refused to grant a mistrial despite twice erroneously instructing the jury that in determining whether Appellant had the intent to distribute, the inference weight for PWID heroin was two grams instead of two grains, where it was apparent the jury had fixed its "critical attention" on the issue, and where none of the court's instructions corrected the jury's misunderstanding that the inference was mandatory rather than permissive.

The trial court twice incorrectly charged the jury that the inference weight for PWID heroin was two grams rather than two grains. The second incorrect charge was in response to a question by the jury about the matter. The court should have granted Appellant's mistrial motion after the second time the jury was incorrectly instructed on the law as to the inference weight. The prejudice to Appellant must be considered in the context that even though the court instructed the jury three times on the inference weight for PWID heroin, it never once corrected the jury's misunderstanding that a permissive inference was in fact an "automatic" conclusion.

Relevant facts

Search incident to arrest on outstanding warrants for other drug charges, police found a lip balm container that had white powdery substances inside it in Appellant's pocket, and there were additional baggies and lottery slips in his tote bag. R. 97, l. 11 – 99, l. 8. Appellant was tried for possession with intent to distribute (PWID) heroin, third offense, and possession of cocaine, third offense. R. 49, ll. 3-8; R. 285, ll. 4-5. Appellant proceeded pro se, motivated apparently by a disagreement with his prior attorney's advice that he should become a confidential informant. R. 233, ll. 3-6. Standby counsel was appointed to assist Appellant during the trial. R. 48, l. 12-13.

At trial, Appellant argued that he was an addict—a user, not a seller. R. 233, l. 19 – 234, l. 11. Appellant argued, "I only possessed it because I'm an addict." R. 243, ll. 21. Although the

solicitor commented in his opening statement that "we're here today" because Appellant decided "to make easy money" by selling drugs instead of working a "normal job," the solicitor conceded in his closing argument that Appellant "probably is a heroin addict." R. 66, ll. 1-12; R. 229, ll. 19-22.

The State presented the testimony by a SLED chemist and a drug analysis report to establish the types and amounts of the substances that were taken from Appellant's pocket and his tote bag. R. 203, ll. 1-12; R. 293; R. 200, l. 2 – 202, l. 4. As to the PWID heroin charge, the drug analysis report showed: one baggie contained heroin and fentanyl; a second baggie contained heroin, fentanyl, and cocaine; and a third baggie contained heroin and cocaine. A straw and paper wrappers likely contained these same substances but no confirmatory tests were done. As to the possession of cocaine charge, the report showed a fourth baggie contained cocaine. R. 293.

The drug analysis report alleged that the weight of the white powdery substances in the three baggies containing at least some heroin, when added up, totaled 0.197 grams, plus or minus 0.012 grams. The report also appeared to show that the weight in grains was 3.036 grains, plus or minus 0.48 grains. The report showed the weight of the cocaine as 0.35 grams of cocaine. R. 293.

Lynn Black, a SLED chemist, was qualified as an expert in chemistry and drug analysis. R. 191, l. 19 – 194, l. 13. Consistent with her report, Black testified that when she analyzed the substances, she found: one item that contained heroin and fentanyl with a weight of 0.1 grams; a second item that contained heroin, fentanyl, and cocaine with a weight of 0.041 grams; and a third item that contained heroin and cocaine with a weight of 0.056 grams. The fourth item was a substance that contained 0.35 grams of cocaine, according to Black. R. 200, l. 23 – 201, l. 16. Black said she performed indicative testing on the straw and wrappers, which indicated the

presence of drugs but she did not perform "full testing" per SLED policy. R. 201, l. 17 – 202, l. 4. Black testified to the drug weights in terms of grams. R. 200, l. 25 – 202, l. 4.

Noel Smith, a narcotics detective, testified that a single dose of heroin is about one tenth of a gram, which he said was a "very small amount." R. 86, ll. 4-13. According to Smith, a heroin user might be expected to buy one or two grams at a time for personal use. R. 87, ll. 1-5. Smith said he charged Appellant with PWID heroin because there were multiple baggies and lottery slips, which could be used for packaging drugs. R. 103, l. 6 – 104, l. 2.

On cross-examination, Appellant asked Smith, "What's the quantity amount for the statute of PWID? What's the amount that a person has on them that they can be charged with PWID?" R. 107, ll. 12-14. Smith answered, "It's not grams, grains." R. 107, l. 15. Appellant asked, "I thought the statutory amount was like a gram?" and Smith answered, "I don't know what you're talking about, sir." R. 107, ll. 18-19. The term "grains" was not described or defined by any witness.

A charge conference was held after the defense rested, and the court went over the charges it intended to give the jury. The court did not mention that it intended to give a charge regarding inference weight. R. 218, l. 16 – 221, l. 2. Nevertheless, as to the element of intent to distribute for PWID heroin, the judge charged the jury as follows.

> 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 or dispensing a drug. Intent may be shown by acts and conduct of the defendant and other circumstances for which you may naturally 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 it deserves.

R. 262, l. 16 – 263, l. 12 (emphasis added). No objections or exceptions were made to the charge. R. 265, ll. 18-22.

After deliberations began, the jury had a question. The jury question was: "**Is 2 grams or .2 grams the 'automatic' intent to distribute threshold? Some jurors would like to know the legal definition of 'intent' in the charge**." R. 296; R. 268, ll. 20-23 (emphasis added). The judge then re-instructed the jury on PWID heroin, including a repetition of its instruction that, "Possession of more than 2 grams of heroin creates an inference that the defendant possessed the heroin with the intent to distribute it." R. 270, l. 15 – 272, l. 23; R. 272, ll. 13-15.

However, after the jury retired to the jury room, the solicitor said he "had a light bulb sort of go off" and he now believed the law on inference weight was two grains, not two grams. R. 273, ll. 4-9. The solicitor then recited S.C. Code Ann. § 44-53-370(d)(4) and requested that the jury be recharged that the statute read "2 grains, not 2 grams." R. 273, l. 4 – 274, l. 18. Appellant responded, "Your Honor, I ask that the charge stay the same, if not **I move for a mistrial if that's a mistake made by the Court**." R. 275, ll. 3-5.

Pending a resolution of this matter, the court instructed the jury foreman that the jury was to cease deliberating on the offense of PWID heroin, but stated the jury was allowed to deliberate on the offense of possession of cocaine. R. 276, l6, l. 16 – 277, l. 6. However, the foreman replied that the jury had already reached a verdict on the possession of cocaine charge, and the verdict of guilty was published as to that charge. R. 277, l. 1 – 278, l. 12.

The court did not grant Appellant's mistrial motion and it instead reinstructed the jury on PWID heroin for a third time. R. 278, l. 14 – 280, l. 11. The charge was the same, except that the judge instructed, "Possession of more than 2 **grains** of heroin creates an[ ] inference that the defendant possessed the heroin with the intent to distribute it." R. 280, ll. 1-4 (emphasis added).

The jury deliberated for over three hours total. R. 267, l. 23; R. 280, ll. 22-25. The State alleged both offenses were third offenses based on Appellant's conviction in 2009 for possession of cocaine, second offense. R. 285, ll. 4-7. The court sentenced Appellant to serve concurrent terms of imprisonment for ten years for each offense. R. 290, ll. 18-20; R. 301.

Discussion

The court twice charged the jury the incorrect law on the inference weight for PWID heroin. The second incorrect charge was in response to a jury question about that specific subject. While the third charge was correct about the inference weight, none of the charges rectified the jury's apparent misunderstanding that if it found the inference weight was met, Appellant automatically possessed the intent to distribute. It was error to deny Appellant's motion for a mistrial based upon two erroneous jury charges on inference weight, where it was apparent from the jury's question it had focused its critical attention on that subject.

The judge's first two charges were wrong—the inference weight for PWID heroin was not two grams. The correct inference weight for PWID heroin was two grains. S.C. Code Ann. § 44-53-370(d)(4) states in relevant part that "possession of more than: one gram of cocaine, one hundred milligrams of alpha- or beta-eucaine, four grains of opium, four grains of morphine, **two grains of heroin** . . . is prima facie guilty of violation of subsection (a) of this section." (emphasis added).

The Honorable Ralph King Anderson, Jr. suggests that in a PWID heroin case, the jury may be properly charged on this matter that

> Section 44-53-370(d)(4) of the South Carolina Code of Laws creates a **permissive inference that possession of more two grains of heroin constitutes possession of heroin with intent to distribute**. Thus, section 44-53-370(d)(4) provides that possession of more than two grains of heroin gives rise to a **permissive inference** that the defendant possessed the heroin with intent to distribute it. The inference of a violation of the law by possession of more than two grains of heroin may be drawn from proof of the quantity of the drug.
>
> The resulting implication only **permits rather than requires** the jury to infer a violation of the law. This is another piece of evidence for you to consider and evaluate. This **permissive inference** does not relieve the State from actually proving beyond a reasonable doubt the element of intent to distribute. This **permissive inference** is of an evidentiary nature and the **permissive inference does <u>NOT</u> require the jury to infer a violation of law**. In other words, the **permissive inference** of a violation of the law from possession of this quantity of heroin is simply an evidentiary fact to be taken into consideration by the jury, along with other evidence in the case, and is to be given such weight as the jury determines it should receive. **You are free to accept or reject the permissive inference** depending on your view of the evidence.

Anderson, Jr., Ralph King, *Possession of Heroin with Intent to Distribute*, S.C. Requests to Charge - Criminal, § 4-14(d) (emphasis in original) (emphasis added).

It is notable that unlike the three charges given by the trial judge on intent to distribute, Judge Anderson's suggested charge repeatedly emphasizes the permissive nature of the inference. Although the charge here stated that the inference did not relieve the State of its burden and was "merely an evidentiary fact," nowhere did the trial judge state the inference was merely permissive, rather than mandatory or "automatic." This shortcoming is relevant to an analysis of prejudice, which will be discussed infra.

"A trial court is required to charge the current and correct law in South Carolina." *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017); *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). "It is error to give instructions which are calculated to confuse or mislead the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) (internal quotations omitted). "Only law applicable to the case should be charged to the jury." *Id*. Here, the judge twice charged incorrect law when it twice charged the inference weight was two grams rather than two grains. This was error.

Adding to the confusion, all of the testimony about drug weights was given in grams, not grains. The only witness who gave any testimony regarding grains was Officer Smith. As seen, on cross-examination, Appellant asked Smith, "What's the quantity amount for the statute of PWID? What's the amount that a person has on them that they can be charged with PWID?" R. 107, ll. 12-14. Smith answered, "It's not grams, grains." R. 107, l. 15. Appellant asked, "I thought the statutory amount was like a gram?" and Smith answered, "I don't know what you're talking about, sir." R. 107, ll. 18-19. Although the drug analysis report used the term grains in addition to grams, nowhere was that term defined.

Laypeople are unlikely to be familiar with the term "grains" as it was used in this context. The term "grain" refers to a non-metric unit of mass that might be used by doctors or apothecaries. Three weight measurement systems used in field of medicine are Metric, U.S. Avoirdupois, and U.S. Apothecary. Grains are a unit of measurement in the U.S. Avoirdupois and U.S. Apothecary weight measurement systems, but not the Metric system. *See* Tennenhouse, Dan J., *Weight measurement systems*, 1 Attorneys Medical Deskbook 4th § 14:8, October 2019 Update. Grains are often expressed as fractions, and, according to Tennenhouse, approximate milligram

equivalents are 1/4 grain = 15 milligrams, 1/2 grain = 30 milligrams, and 3/4 grain = 45 milligrams. *Id*.

According to Stedmans Medical Dictionary, "apothecaries' weights" is defined as

> a system of weights based on the **weight of a grain of wheat**. Has been used for centuries in weighing medicines and precious metals (Troy measure). Some drugs that have been available for long periods are still often designated as grains (e.g., 5 grains of aspirin, 1/2 grain of codeine, 1/100 grain nitroglycerin). **This weight system has been largely superseded by the metric system (based on grams)**. One grain is the equivalent of 64.8 milligrams. One scruple contains 20 grains; one dram contains 60 grains; one apothecary ounce contains 8 drams (480 grains); one apothecary pound contains 12 ounces (5760 grains).

Stedmans Medical Dictionary, *Apothecaries' weights*, STEDMANS 997890 (emphasis added).

Because laypeople are likely unfamiliar with this obscure weight system, the third charge, which employed the term "grains," while technically correct as to the inference amount, was confusing, particularly coming on the heels of two erroneous charges on the same subject. *See State v. Blurton*, 352 S.C. at 208, 573 S.E.2d at 804. Moreover, the two prior erroneous instructions on the matter did not inure to Appellant's benefit since no one ever explained what the term grains meant, and since the jury charge, when read as a whole, failed to correct the jury's misapprehension about the permissive nature of the inference.

The court had twice instructed the jury erroneously about the inference weight for PWID heroin when Appellant made his mistrial motion. "A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." *State v. Wilson*, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." *State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (internal quotations omitted). "The determination of prejudice must be based on the

entire record and the result will generally turn on the facts of each case." *State v. Wilson*, 389 S.C. at 586, 698 S.E.2d at 865-66.

"An erroneous instruction alone is insufficient to warrant this Court's reversal." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). "When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Id*. (internal quotations omitted). "When considering whether an incorrect jury instruction constitutes harmless error, we are required to review the trial court's charge to the jury in its entirety." *Id*. At 490, 832 S.E.2d at 580. "In making a harmless error analysis, our inquiry is not what would the verdict have been had the jury been given the correct charge, but rather did the erroneous charge contribute to the verdict rendered." *State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994).

Here, since there was a jury question about the subject of the erroneous instructions, *State v. Blassingame*, 271 S.C. 44, 244 S.E.2d 528 (1978), is instructive on whether the error was harmless. In *Blassingame*, the judge mistakenly gave an incorrect definition of manslaughter but his instructions also contained a correct definition of manslaughter. *Id*. at 46-47, 244 S.E.2d at 530. The State argued that when the charge was considered in its entirety, it was not misleading or prejudicial, but the South Carolina Supreme Court disagreed and explained that since the jury had requested to be given additional instructions on the definition of murder and manslaughter, the error was not harmless. *Id*.

The Supreme Court explained, "It is reasonable to assume that the jury had, at this point, focused critical attention on the meaning of these two offenses and was in the process of deciding its verdict based upon one or the other, but wanted to be readvised of the definitions of each." *Id*. at 47, 44 S.E.2d at 530. "The additional words which the trial judge would relay to the jury would

be given special consideration by the jury since they were in response to its own inquiry. Under these circumstances the charge of the trial judge constituted prejudicial error requiring a new trial." *Id*.

Similarly, in *Rutland v. State*, 415 S.C. 570, 578, 785 S.E.2d 350, 354 (2016), the South Carolina Supreme Court found it proper to look at questions posed by the jury in deliberation when analyzing the prejudice prong in a post-conviction relief case. The defense in *Rutland* was one of self-defense, and the jury's question regarding whose fingerprints were on the gun alleged to have been pulled by the decedent showed the jury was "focusing critical attention" on that issue. *Id*. at 579, 785 S.E.2d at 354. *See also Martin v. State*, 427 S.C. 450, 457, 832 S.E.2d 277, 280 (2019) (jury question showed the jury was focusing its "critical attention" on the specific question asked and supported a finding of prejudice).

Here, the court incorrectly charged the jury on intent to distribute as it may be inferred based on weight, and the jury began deliberations. Then the jury asked, "Is 2 grams or .2 grams the 'automatic' intent to distribute threshold? Some jurors would like to know the legal definition of 'intent' in the charge." R. 296; R. 268, ll. 20-23. The jury question showed that the jury here was focusing its "critical attention" on inference weight in deciding the issue of whether Appellant had the intent to distribute heroin. However, in response to the jury's question, the judge then erroneously charged the jury on the inference weight for the second time.

At that point, the solicitor asked the judge to charge the jury the inference weight was two grains, not two grams. Appellant responded that since there was a "mistake made by the court" in its instructions, the defense moved for a mistrial. As explained by the Supreme Court in *Blassingame*, under these circumstances, the court's error was prejudicial error. Nevertheless, the

judge charged the jury a third time on inference weight, only at this point getting the law right on the weight.

The court's first charge on intent to distribute and inference weight contained no mention that the inference was of a permissive nature rather than a mandatory one. This is the opposite of the approach taken by Judge Anderson in his requests to charge—that model PWID heroin charge emphasizes the permissive nature of the inference. The jury asked whether two grams or point two grams was the "automatic" weight for the intent to distribute element of PWID heroin. Therefore, the jury had not understood from the court's first instruction that the inference was permissive. Yet, the judge instructed the jury in the exact same form twice more. The court's failure to correct this fundamentally flawed understanding of how the inference was supposed to operate in its subsequent two charges on the matter weighs in favor of a finding that Appellant was prejudiced, when the court's charge is reviewed in its entirety. *See State v. Burdette*, 427 S.C. at 490, 496, 832 S.E.2d at 580; *State v. Wilson*, 389 S.C. at 585-86, 698 S.E.2d at 865-66.

The court should have granted Appellant's mistrial motion. The court's instructions were error and Appellant was prejudiced. *See State v. Adams*, 354 S.C. at, 377, 580 S.E.2d at 793. The court twice charged the jury incorrect law. Appellant was prejudiced because the erroneous charges were given about a matter upon which the jury had fixed its critical attention. *State v. Blassingame*, 271 S.C. at 47, 244 S.E.2d at 530. The prejudice is further apparent when the errors are considered in the context of the entire charge—that none of the three charges corrected the jury's misunderstanding that the inference was automatic rather than permissible. *State v. Burdette*, 427 S.C. at 496, 832 S.E.2d at 580.

This Court should reverse.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests that, as to the offense of PWID heroin, this Court reverse his conviction and sentence and remand for a new trial.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of October, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 1, 2020.

s/Joanna K. Delany

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