STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2019-001902

THE STATE, ...RESPONDENT,

v.

KENNETH EARLE MCGILL, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3713

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29649
(864) 942-8800

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge properly found Appellant's indictment was not duplicitous where its language was based upon the charging statute and Appellant's actions constituted a continuous course of conduct.

II. The trial judge properly refused to give a jury instruction on entrapment where such a charge was not supported by the evidence presented at trial.

III. The trial judge did not abuse his discretion in denying Appellant's motion for a continuance because trial counsel failed to articulate a compelling reason for the continuance where the sought cell phone data would not contradict the prime evidence of Appellant's guilt. Further, subsequent review of the data failed to yield any evidence which would have supported the continuance.

STATEMENT OF THE CASE

Appellant was indicted by the Abbeville County Grand Jury for trafficking in methamphetamine, 100 grams or more but less than 200 grams, on December 3, 2018. On September 6, 2019, the grand jury issued an amended indictment. On September 12, 2019, Appellant moved to quash the indictment, but the motion was denied via written order filed September 19, 2019. On November 4–6, 2019, Appellant proceeded to a jury trial before the Honorable Donald B. Hocker. Deputy Solicitor Yates Brown, Esquire, and Assistant Solicitor Micah Black, Esquire, represented the State; W. Norman Epps, III, Esquire, represented Appellant. The jury found Appellant guilty as charged and the trial judge sentenced Appellant to twenty-five years' incarceration.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Pre-trial Hearing

During a pretrial hearing, trial counsel moved to quash the indictment against Appellant, claiming it was duplicitous; counsel claimed the indictment contained "multiple criminal counts," rendering it defective pursuant to United States v. Furlow, 928 F.3d 311 (4th Cir. 2019). Specifically, trial counsel claimed manufacturing, selling, delivering, or purchasing methamphetamine were all separate crimes grouped together in the indictment against Appellant. (H.Tr.p.17, line 12–H.Tr.p.23, line 13)

In response, the State explained the cases cited by trial counsel did not support his argument. For example, Furlow did not involve a trafficking statute, but sentencing guidelines involving the Armed Career Criminal Act: the indictment describing that defendant's prior trafficking offense used the broad language of the statute, and possession, unlike the other statutorily defined trafficking behaviors, could not enhance Furlow's sentence for arson. The hearing judge denied the motion to quash, noting Furlow, which pertained to sentencing guidelines, did not support Appellant's argument. (H.Tr.p.23, line 14–H.Tr.p.27, line 21; September 14, 2019 Order)

Motion for a Continuance

Immediately before trial, trial counsel moved for a motion for a continuance although the Court, in a prior order, ordered that no further continuances be granted in the case. The grounds for counsel's motion was that approximately ten days prior to trial, counsel requested the full contents of a data "dump" of Ferguson's phone, which ended up in the possession of the DEA office in Greenville following his arrest for the purpose of a federal case against person unrelated to Appellant's prosecution. The State had been unaware of this data collection until trial counsel informed it, and in turn tried to obtain the data. The DEA tried sending the info a few days after

the request, but experience issues with sending copies of the data due to their security software. Trial was able to review the phone for several hours the day trial was scheduled to begin, and desired a continuance so that he could do a full review of the data to try and find evidence that Ferguson had been a drug dealer longer than the amount of time he testified too. Further, trial counsel wanted to point out that Ferguson received a significant reduction of his charge and potential sentence for his apparent cooperation with the State. (Tr.p.52, line 9–Tr.p.57, line 4; Tr.p.57, line 14–Tr.p.58, line 7; Tr.p.58, lines 8–24; Tr.p.61, line 7–Tr.p.63, line 18)

The trial judge noted that trial counsel's argument was not persuasive: counsel was already able to argue Ferguson lacked credibility due to his history of dealing drugs and for receiving a reduced charge which related to his cooperation with law enforcement. The State argued the phone was not relevant to Appellant's case because the data sought by trial counsel was unrelated to the State's case against Appellant; the recordings of the two phone calls between Appellant and Ferguson on the date in question were already in the parties' possession and trial counsel's request was purely a fishing expedition. Ultimately, the trial judge denied the motion for a continuance, noting it was his duty to not allow fishing expeditions, and counsel's request bordered on such a request. He explained counsel did not articulate any specific information which he believed to be on the phone which would aid in Appellant's defense. However, the trial judge did note trial counsel would be allowed additional time to review the phone data. (Tr.p.57, lines 5–13; Tr.p.58, lines 8–12; Tr.p.58, line 25–Tr.p.61, line 6; Tr.p.63, line 19–Tr.p.65, line 15)

The following day, the parties discussed the State's plan to introduce a series of text messages between Appellant and Ferguson which occurred on August 21, 2018 and the days prior. The parties found these text message while reviewing the data pulled from Ferguson's

phone. The State noted trial counsel spent hours looking at the phone the previous day, but trial counsel explained he was not able to look at all of the phone data during that time because it included a lot of data, including approximately 27,000 "pictures of meth and porn." The trial judge decided to allow the State to introduce the text message, provided Ferguson could authenticate them. Ferguson did such, and the text messages were admitted at trial. The text messages, which began on August 17, 2018, included messages discussing "washing" drugs in which Appellant noted they had a "bad taste" but "the high [was] good"; Ferguson asking Appellant about getting a "four" ounce bag of methamphetamine from him and Appellant accepting the request and telling him to go to his house at 3:30 p.m. on August 21; Ferguson informing Appellant that he planned to go to Atlanta on August 22; and text messages indicating Ferguson was at Appellant's house and picking up drugs immediately prior to going to Williams's home. (Tr.p.149, line 22–Tr.p.164, line 20)

Trial Evidence

Angelina Williams plead guilty to possession with intent to distribute methamphetamine several years prior to trial. On August 21, 2018, Williams was still on probation for that charge when her probation officer, accompanied by two deputies from the Abbeville Sheriff's Office, arrived for a home visit. Williams had methamphetamine and drug paraphernalia in her home and revealed it to the officers. Williams also discovered after the search that a warrant for her arrest on a trafficking methamphetamine charge had been issued prior to the search.[1] After a conversation with officers, Williams volunteered to arrange for her methamphetamine dealer to

[1] Williams pled guilty to two counts of trafficking—one count which served as the basis from the warrant and the second from the search of her home—in the afternoon before Appellant's trial began but had yet to be sentenced. (Tr.p.92, line 9–Tr.p.94, line 15)

come to the house with drugs. She called Stewart Ferguson, her methamphetamine dealer in the months leading up to these events, and asked him to "bring [her] as much meth as he could." Several hours later, Ferguson arrived and when Williams told him to enter the house, he was arrested by the officers waiting inside. (Tr.p.86, line 4–Tr.p.92, line 3; Tr.p.94, line 16–Tr.p.121, line 23)

Stewart Ferguson[2] testified that he started selling small amounts of methamphetamine in May 2018. In July 2018, Ferguson inherited the clients and contacts of his own trainer and methamphetamine dealer, Brian McClure, after the latter was arrested. On a weekly basis, Ferguson would drive to Atlanta and pick up six pounds of methamphetamine. Upon his return, he would deliver four pounds of the drugs to Appellant, who paid him for the drugs and the delivery. Ferguson kept the last two pounds and sold to his clients, including Williams. On August 21, 2018, Ferguson received a text from Williams requesting a delivery of methamphetamine. When Ferguson received the text, he was at Appellant's home picking up methamphetamine for another customer of his because he had run out of his own supply of the meth. Ferguson, believing Williams's request was perfectly ordinary, went to her home with drugs. After entering the home both he and the drugs were seized by officers. (Tr.p.124, line 18–Tr.p.144, line 7)

After handcuffing Ferguson and placing him in a chair, officers began questioning him about whether he had any drugs in his vehicle and/or home, as well as whether there was "anybody [he] could call . . . to help [him]self . . . out." Ferguson could only think of one person who he could invite to Williams's home, Appellant, so Ferguson called him asking for "four

[2] Stewart, like Williams, also pled guilty immediately before trial. He pled guilty to trafficking methamphetamine, 10 to 28 grams.

more" ounces of methamphetamine and cash for the next trip to Atlanta. Appellant agreed to meeting up at Williams's for the exchange, and a second phone call occurred in which Appellant asked Ferguson for directions to the home. Both calls were recorded. Ferguson was in a room of the home when Appellant arrived and was arrested. Additionally, Ferguson identified a series of text messages occurring between the men in the days, hours, and minutes leading up to Appellant's arrival at the home in which they discussed their methamphetamine supplies, such as the purity of the batch of drugs they were using and Ferguson's need to pick up another four ounces of methamphetamine from Appellant for one of his other customers. (Tr.p.144, line 8–Tr.p.166, line 17; State's Exhibit 16)

Following his arrest, Ferguson met with the DEA and provided agents with information about other individuals he encountered during his time selling drugs, primarily McClure. (Tr.p.166, line 18–Tr.p.168, line 8)

Lieutenant Jeffrey Hines of the Abbeville County Sheriff's Office was one of the officers at Williams's home that day. Lieutenant Hines explained the officers went to the house due to multiple reports that Williams was selling methamphetamine. After arriving, Williams showed officers where her drugs were hidden and agreed to participate in a "buy-bust" operation, in which individuals—often suspects—agree to contact a person with whom they themselves engage in the drug trade. Notably, officers do not ask the suspect to contact a specific person; a suspect decides on his or her own who to invite to a location. Williams decided to contact Ferguson. Officers decided to use Williams's house because it was a safe, controlled location which had its own surveillance system. After Ferguson arrived with drugs he himself offered to participate in the buy-bust operation and contact one of his drug connections and contacted Appellant. (Tr.p.256, line 6–Tr.p.270, line 7)

After Appellant arrived and officers announced their presence, he dropped a black bag from his right hand to the ground and allowed officers to handcuff him. Officers then read Appellant his Miranda rights and explained that Appellant had been caught in a buy-bust operation. Appellant admitted to officers that the black bag contained methamphetamine, and field testing confirmed his admission to be true. Appellant consented to a search of his vehicle, during which officers found a large amount of money wrapped in electrical tape, a trait common for currency transported in the narcotics trade. The officers counted the money and discovered $13,749 in various denominations of bills, including sixty-six $100 bills. The money was also damp, leading the officers to believe it had been buried and recently dug up. (Tr.p.270, line 25–Tr.p.290, line 11)

Investigator Joshua Monts was also present at the Williams residence during the buy-bust operations and echoed Lieutenant Hines's testimony. Further, Investigator Monts recorded the phone conversations between Appellant and Ferguson in which the latter asked Ferguson to bring money and methamphetamines to their location. He also observed Appellant drop the black bag in the home and witnessed him admit to the contents of the bag. (Tr.p.325, line 20–Tr.p.340, line 14)

SLED agent Larry Zivkovich, a forensic scientist, analyzed the drugs recovered by officers from the buy-bust operations. He confirmed that the drugs recovered by the officers were methamphetamine, with the methamphetamine recovered from Appellant weighing 111.67 grams. (Tr.p.390, line 9–Tr.p.399, line 10)

Jury Instructions

Trial counsel request a jury charge on entrapment with the following language:

The defendant in this case has pled to the defense of entrapment.

Entrapment is defined as the conception and planning of an offense by an officer or other person working with law enforcement agents under some sort of arrangement and his procurement of its commission by one who would not have perpetrated it except for the trickery persuasion, or fraud of the officer. Entrapment occurs where one is instigated, induced or lured by law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement for the purpose of prosecution into the commission of a crime which he had otherwise no intention of committing.

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.

The entrapment defense consists of two elements:

(1) government inducement of the crime; and
(2) lack of predisposition on the part of the defendant to engage in the criminal conduct.

Predisposition, the principal element in the defense of entrapment, focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime. The defense of entrapment is not available to a defendant with a predisposition, independent of government inducement and influence, to commit the crime with which the defendant is presently charged.

The defense of entrapment has as its basis the fact that the law does not tolerate any person, particularly a law enforcement officer, generating int eh mind of a person who is innocent of any criminal purpose the original intent to commit a crime, thus, entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement. Where a crime is person so entrapped, as his acts do not constitute a crime.

If the intent to commit the crime did not originate with the defendant and he was not carrying out his criminal purpose, but the crime was suggested by law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement acting with the purpose of entrapping and cause the arrest of the defendant, then the defendant is not criminally liable for the acts so committed. However, the fact that a government official merely affords opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials, that is, when the criminal design originates with the officials of the government, and they implant in the

> mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.
>
> Where the doing of a particular act is a crime regardless of the consent of anyone, if the criminal intent originates in the mind of the defendant and the criminal offense is completed, the fact that an opportunity is furnished or that the defendant is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefore constitutes no defense. The purpose of the law enforcement officer is not to solicit the commission of the offense, but to ascertain if the defendant is engaged in an unlawful business. It is no defense that law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement, a law enforcement, acting as a decoy, furnished the opportunity for the commission of the offense to be committed, the theory being that the offender acts of his own volition and is simple caught in his own devices.
>
> In considering the defense of entrapment, you must ascertain whether the acts charged as constituting the offense were the result of the intent of law enforcement, a law enforcement entity or a person acting at the request or behest of law enforcement to place the defendant in a position where he might be charged with the offense and the defendant had no previous intention of committing such offense, in which event, the defendant may not be convicted. If you find the defendant was acting in pursuance of his own intent when he committed the act and law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement was merely affording him the opportunity of doing so, in that event, the defense of entrapment would not relieve the defendant from criminal responsibility.
>
> The defense of entrapment is an affirmative defense. This means the defendant must prove by the preponderance of the evidence that he was entrapped by actions of law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement. The defendant has the burden of showing that he was induced, tricked, or incited to commit a crime, which he would not otherwise have committed.

(Court's Exhibit 1)

Trial counsel argued the charge was appropriate because Appellant was induced by law enforcement to go to Williams's house with the drugs: Appellant had never been to the home or sold drugs to Williams herself on any previous occasion. However, the trial judge denied the

requested charge, explaining there was not a scintilla of evidence presented which supported charging the affirmative defense. (Tr.p.496, line 4–Tr.p.497, line 23)

Additionally, the trial judge gave the following explanation of Appellant's charged crime:

> Now let me explain to you this charge. The defendant is charged with trafficking in methamphetamine, 100 grams or more but less than 200 grams. The State must prove beyond – prove beyond a reasonable doubt the defendant knowingly sold, manufactured, delivered, purchased, brought into the State, provided financial assistance or otherwise aided, abetted, attempted, or conspired to sell, manufacture, deliver, purchase, or bring into this state, or was knowingly in actual or constructive possession, or knowingly attempted to become in actual or constructive possession of methamphetamine. The State must also prove beyond a reasonable doubt that the amount of methamphetamine was 100 grams or – 100 grams or more but less than 200 grams.

(Tr.p.547, line 12–Tr.p.548, line 2)

Post-Verdict Discussion

After the jury returned a verdict of guilt, the parties discussed Appellant's criminal history. Notably, Appellant's extensive criminal history included convictions for several drug offenses: (1) possession with intent to distribute methamphetamine in 2008; (2) distribution of a cocaine base of methamphetamine in 2009; (3) manufacturing methamphetamine or cocaine base in 2010; and (4) possession of methamphetamine or cocaine base in 2010. (Tr.p.559, line 8–Tr.p.560, line 3)

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

I.

The trial judge properly found Appellant's indictment was not duplicitous where its language was based upon the charging statute and Appellant's actions constituted a continuous course of conduct.

Appellant argues the trial judge in failing to find his indictment duplicitous or, in the alternative, failing to give a special jury instruction. The State disagrees with these allegations of error. Appellant's indictment was not duplicitous and did not require a special jury instruction because Appellant was charged, pursuant to S.C. Code Ann. Section 44-53-375(C) and Appellant's charged crime constituted a continuous course of conduct which could not be separated into individual charges. If the State had done so, such indictments would have violated the Fifth Amendment of the United States Constitution.

"A duplicitous count of an indictment or information joins two or more distinct and separate offenses in the same count." 41 Am. Jur. 2d Indictments and Informations § 198 (2020). However, "charges are not duplicitous if each count alleges a single incident or offense, or if the acts charged constitute a continuous crime, or a continuous course of conduct, or continuous acts." Id.; see also 1A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 143 (5th ed. 2020) (defining duplicity as "the joining of two or more separate offenses in a single count." (emphasis added))

"When a statute may be violated by various means and the statute provides the same punishment for each manner of violating the statute, the indictment may allege any or all of the acts conjunctively and in one count as one offense, or, preferably, in the conjunctive/disjunctive." 41 Am. Jur. 2d Indictments and Informations § 201 (2020)· "An indictment count that alleges in the conjunctive a number of means of committing a crime can

support a conviction if any of the alleged means are proved." Id. When the statute sets forth various modes of committing the offense in the disjunctive, the indictment may list them conjunctively; proof of any one of the violations charged conjunctively in the indictment will generally sustain a conviction. Id.

"If a statute sets forth alternative means or theories by which a crime may be committed, the indictment or information may charge one or all of the alternatives, provided the alternatives are not inconsistent with each other." 41 Am. Jur. 2d Indictments and Informations § 202 (2020). Further:

> Where a statute allows an element of the offense to be proven by alternative methods, more than one of which is alleged in the charging instrument, evidence of that element will be sufficient to support a conviction if the state proves one of the statutory alternatives alleged in the charging instrument beyond a reasonable doubt.

Id.

Analysis

Appellant's argument centers on an analysis of the Fourth Circuit Court of Appeals' opinion in United States v. Furlow, 928 F.3d 311 (4th Cir. 2019). However, the opinion did not involve a question of whether an indictment containing the text of S.C. Code Ann. Section 44-53-375(B) is a duplicitous indictment; the Fourth Circuit's was only concerned with the divisibility of the potential offenses contained within the statute for the purpose of determining whether the defendant's prior conviction merited an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Id. at 317–322. By way of footnote, the Fourth Circuit explicitly passed on ruling whether the divisibility of the potential offenses contained within 44-53-375(B) "render[ed] duplicitous countless [S]tate court drug offense indictments"

and indicating the answer to such a question was best explored by State prosecutors and South Carolina courts. Id. at 322 n.15.

Because the Fourth Circuit did not analyze the duplicity of the prior drug conviction's indictment in Furlow, it was likely unaware that the question of what constitutes a duplicitous indictment has already been answered under South Carolina law. In State v. Samuels, 403 S.C. 551, 743 S.E.2d 773 (2013), the defendant was charged with assaulting with an intent of killing "Patricia Speaks and/or Carla Daniels." Id. at 554, 743 S.E.2d at 775. Citing to State v. Jones, 344 S.C. 48, 54, 543 S.E.2d 541, 543 (2001), the Supreme Court of South Carolina found this indictment duplicitous. Samuels, 403 S.C. at 557–58, 743 S.E.2d at 777. Notably, Jones involved a defendant who argued the three counts of armed robbery for which he was indicted should have been combined into a "single count" against him based upon the "single larceny rule" stated in State v. Waller, 280 S.C. 300, 312 S.E.2d 552 (1984). Jones, 344 S.C. at 52–53, 543 S.E.2d at 543. The Jones Court explained the reasoning behind the single larceny rule is that "the act of taking is one continuous act or transaction, and [because] the **gist of the offense is the felonious taking of property**, the legal quality of the act is not affected by the fact that the property stolen belonged to different persons" and that larceny, as codified,[3] contemplates the

[3] S.C. Code Ann. Section 16-13-30 (2010) defines petit and grand larceny as:

> (A) Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personalty of which by law larceny may be committed, or of any fixture, part, or product of the soil severed from the soil by an unlawful act, or has a value of two thousand dollars or less, is petit larceny, a misdemeanor, triable in the magistrates court or municipal court, notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, and 14-25-65. Upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days.

combined value of stolen goods. Id. at 53, 543 S.E.2d at 543. Further, the Jones court found armed, robbery—a crime of violence—is an offense primarily against the person, and thus one which "may" allow separate indictments for each individual victim. Id. at 53–55, 543 S.E.2d at 543–44. Thus, the Jones court upheld the single larceny rule and affirmed the State's decision to charge Jones for three separate counts of armed robbery. Id. at 55, 543 S.E.2d at 544.

Relying on Jones, the Samuels court distinguished the facts of that case from Waller, explaining that "[f]or offenses **against the person,** a separate offense exists for each person subjected to the criminal conduct." Samuels, 403 S.C. at 557, 743 S.E.2d at 777 (emphasis added). Still, the court found the error in using the duplicitous indictment was harmless because: the trial court instructed the jury that a guilty verdict required the jury unanimously agree that Samuels assaulted Speaks, or they unanimously agree that Samuels assaulted Daniels; the court utilized a special verdict form requiring separate findings of fact for Samuels and Daniels; and Samuels was sentenced for only one offense despite being found guilty of both offenses. Id. at 557–58, 743 S.E.2d at 777.

In the instant case, the trial judge properly found Appellant indictment was not duplicitous. The charged offense, trafficking in methamphetamine between 100 and 200 grams, states:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts,

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> (B) Larceny of goods, chattels, instruments, or other personalty valued in excess of two thousand dollars is grand larceny. Upon conviction, the person is guilty of a felony and must be fined in the discretion of the court or imprisoned not more than:
>
> > (1) five years if the value of the personalty is more than two thousand dollars but less than ten thousand dollars;
> >
> > (2) ten years if the value of the personalty is ten thousand dollars or more.

> or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined . . . is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" . . . .

S.C. Code Ann. Section 44-53-375(C). Pursuant to South Carolina law, the indictment against Appellant properly included this language. S.C. Code Ann. Section 17-19-20 provides:

> Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20 (2005); see also, State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981) (indictment phrased substantially in language of statute which creates and defines offense is ordinarily sufficient).

Appellant claims in his brief, without citation to authority, the various actions listed in the indictment are "distinct offenses with different elements." (Br. of Appellant, p.15). This is incorrect. Appellant's indictment lists only a single crime and merely included more than one method of violation; such an indictment is not duplicitous. See State v. Pee Dee News Co., Inc., 286 S.C. 562, 565, 336 S.E.2d 8, 9 (1985) (indictment for obscenity, which included multiple methods of violation of the statute found not duplicitous); State v. Sheppard, 248 S.C. 464, 466-467, 150 S.E.2d 916, 917 (1966) (finding indictment for DUI not duplicitous because the "indictment charges only one offense which may be established by proof that the defendant operated a motor vehicle while under the influence of intoxicating liquor or of narcotic drugs, either or both."). These offenses are not distinct and different; Appellant was charged with his

actions stemming from a single course of conduct. If Appellant was indicted for his actions with separate indictments, such indictments would have run afoul of the Fifth Amendment.

Samuels, cited by Appellant, involved offenses against multiple victims which should have been indicted as separate offenses. Id., 403 S.C. at 557, 743 S.E.2d at 777. Jones, the case which the Samuels court itself used to analyze the question of duplicity, noted non-violent crimes involving a continuous course of action, such as larceny should be indicted as a single offense. Jones at 53, 543 S.E.2d at 543. Larceny is not a situation in which a defendant is indicted for each individual item stolen; citing to Waller, the Jones court reiterated the sum total of theft, even when multiple victims are involved, is used provided the property was stolen in a single event. Jones at 52–53, 543 S.E.2d at 543.

The facts of Appellant's case only support a finding that Appellant's actions consisted of a continuous course of conduct. The State provided evidence that, at a minimum, Appellant: (1) actually and knowingly possessed the drugs in question; (2) while in possession of those drugs, Appellant delivered the recovered drugs to Ferguson at Williams's home; and (3) Appellant attempted delivered the drugs pursuant to his belief he was engaging in a purchase/sell transaction with Ferguson. Pursuant to Appellant's argument, each of these actions was a separate and distinct crime. If, as Appellant argues, this was the case, the State could charge each action as a separate offense. Not only is this disadvantageous to Appellant, but violates Appellant's right against double jeopardy.

The United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. *See* U.S. Const. amend. V ("No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put

in jeopardy of life or liberty . . . ."). This guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense after an improvidently granted mistrial. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Kirby, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977).

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Ex Parte Lange, 85 U.S. (18 Wall.) 163, 168 (1873).

In the instant case, any and all of these "separate" offenses alleged by Appellant arise out of the same fact pattern; his agreement to bring drugs over Ferguson at Williams's house. Any attempt to prosecute Appellant under the "separate" offenses listed by him would be in violation of the Fifth Amendment's protections against double jeopardy.

Jury Instructions

For these same reasons, the trial judge did not err in refusing to give a special jury instruction. As noted above, the State properly charged Appellant with a single offense which, pursuant to the evidence presented at trial, Appellant violated in multiple ways. It is proper for the State to include all relevant language from the charging statute in the indictment. 41 Am. Jur. 2d Indictments and Informations § 202; Hamling v. U.S., 418 U.S. 87, 117 (1974) ("It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or

ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" (quoting United States v. Carll, 105 U.S. 611 (1882)). A special verdict form was not required because the offense, as charged, was appropriate and not duplicitous.

Harmless Error

Regardless, any error alleged by Appellant is harmless has not prejudiced Appellant. As stated in Samuels: "proceeding to trial on a duplicitous indictment does not alone create reversible error. For example, federal courts employ a prejudice analysis and will reverse a conviction for duplicity only where two or more distinct crimes are combined into one count and the defendant is prejudiced thereby." Samuels, 403 S.C. at 556, 743 S.E.2d at 776. Appellant was in no way prejudiced; In fact, if, as Appellant alleged, his various actions constituted separate and distinct crimes, Appellant **benefitted** from the consolidation of his offenses into a single indictment. As explained above, Appellant's actions surrounding his delivery of the drugs to Williams's home constituted at least three distinct crimes but Appellant was only sentenced based on the single count of trafficking with which he was charged. Additionally, there was overwhelming evidence of these various criminal offenses, including recorded phone calls between Appellant and Ferguson, text messages, over $13,000 in cash recovered from his vehicle, and the substantial amount of drugs possessed by Appellant. Accordingly, Appellant could not have been prejudiced by any of the alleged error.

II.

The trial judge properly refused to give a jury instruction on entrapment where such a charge was not supported by the evidence presented at trial.

Appellant argues the trial judge erred in refusing to give a jury instruction on entrapment. The State disagrees with this argument because no evidence was presented at trial which supported such a charge.

"The affirmative defense of entrapment is available where there is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer." State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct.App.2004) (citation omitted). "The defense of entrapment is not available to a defendant who is predisposed to commit a crime independent of governmental inducement and influence." State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). "Thus, the entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition." Id. A government official merely providing opportunities or facilities for committing the offense does not, by itself, constitute entrapment. State v. Johnson, 295S.C. 215, 367 S.E.2d 700 (1988) (citing Sherman v. United States, 356 U.S. 369 (1958)). As explained by the United States Supreme Court, the rationale underlying the defense of entrapment is:

> When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

Sorrells v. United States, 287 U.S. 435, 445 (1932).

"One pleading entrapment has the burden of showing that he was induced, tricked or incited to commit a crime, which he would not otherwise have committed." Johnson, 295 S.C. at

217, 367 S.E.2d at 701; Babb v. State, 240 S.C. 235, 237, 125 S.E.2d 467, 467 (1962), *cert. denied,* 375 U.S. 979 (1964) ("Entrapment is an affirmative defense to the crime charged and imposes upon the accused the burden of showing that he was induced to commit the act for which he is being prosecuted."). "[T]he defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." United States v. Sligh, 142 F.3d 761, 762 (4th Cir.1998) (citations omitted). "A defendant is not entitled to an entrapment instruction unless he can meet this initial burden of producing some evidence of government inducement." Id. at 762-63. Thus, "[t]he court may find as a matter of law that no entrapment existed, when there is no evidence in the record that, if believed by the jury, would show that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready and willing to commit it." United States v. Osborne, 935 F.2d 32, 38 (4th Cir.1991).

In the instant case, an entrapment charge was inappropriate given there was not a scintilla of evidence Appellant was induced into committing a crime he would not otherwise have committed. Appellant focuses his argument on this issue on Williams's and Ferguson's criminal histories. However, it is undisputed that both witnesses had criminal records and both were charged with crimes for their actions that day. Notably, Appellant's brief fails to argue the actual elements of entrapment: inducement to commit a crime which a charged defendant would not, but for government inducement, have otherwise committed. See Johnson, 295 S.C. at 217, 367 S.E.2d at 701.

The text messages and recorded phone conversations demonstrated Appellant was, without question, willingly participating in a long-term scheme to traffic methamphetamine.

Further, when Appellant arrived at Williams's home, he was in possession of over 100 grams of methamphetamine and $13,000, the latter of which was wrapped in black electric tape as is standard with narcotics trafficking. Appellant failed to present any evidence contradicting or providing valid justifications for the State's evidence. Moreover, as noted in the record, this was not Appellant's first drug offense: Appellant was previously convicted of four separate drug offenses relating to methamphetamine and cocaine. Without any evidence in the record supporting an entrapment charge, the trial judge did not err in refusing to provide it to the jury. See Johnson, 295 S.C. at 217, 367 S.E.2d at 701.

III.

The trial judge did not abuse his discretion in denying Appellant's motion for a continuance because trial counsel failed to articulate a compelling reason for the continuance where the sought cell phone data would not contradict the prime evidence of Appellant's guilt. Further, subsequent review of the data failed to yield any evidence which would have supported the continuance.

Appellant argues the trial judge abused his discretion in failing to grant him a continuance to further review the contents of Ferguson's phone, which had been in the possession of federal agents, until shortly before trial. The State disagrees with this allegation of error because trial counsel failed to State, with any particularity, what date he hoped to find on the phone which would benefit the defense. Further, trial counsel was allowed to review the phone during trial and was unable to locate any evidence which would contradict anything presented in the State's case against Appellant.

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." McMillian, 349 S.C. at 21, 561 S.E.2d at 604 (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

Pursuant to Rule 7(a), SCRCrimP, the presiding judge may grant a motion for continuance "only upon a showing of good and sufficient legal cause." The South Carolina Supreme Court has "repeatedly upheld denials of motions for continuances where there is no showing that any other evidence on behalf of the defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial."

State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002) (citing State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996)).; see also, State v. Motley, 251 S.C. 568, 571, 164 S.E.2d 569, 570 (1968) ("When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal.").

In the instant case, Appellant never demonstrated a "good and sufficient" legal cause for the continuance. Trial counsel claimed that the purpose for the requested continuance was to find evidence that Ferguson had dealt drugs for a longer period than he had testified. Appellant also sought information with which he could illustrate Ferguson received a reduction of his own charge and potential sentence as a result of his apparent cooperation with the State. As noted by the trial judge, trial counsel's efforts were actually a fishing expedition: trial counsel could not state any specific reason why he believed Ferguson had dealt drugs for a longer period of time than Ferguson had claimed. More importantly, trial counsel failed to argue how such information would improve the defense's strategy: trial counsel was already aware of Ferguson's history as a drug dealer, reduced charges, and his decision to testify against Appellant. All of which trial counsel brought up on cross-examination and used in his closing to impugn Ferguson's credibility. Yet, none of this information contradicted the key evidence of Appellant's guilt, his possession of over 100 grams of methamphetamine, the significant sum of money in his car, and his own recorded statements to Ferguson.

Further, trial counsel was given the opportunity to review the phone data during the trial. Despite spending several hours reviewing the data, trial counsel was unable to find any new information. Even now—in this appeal—Appellant is unable to identify any data from the phone

relevant to his defense or which would have justified a continuance. Accordingly, the trial judge did not err in refusing to grant Appellant an additional continuance.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY:

William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ATTORNEYS FOR RESPONDENT

January 4, 2021

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2019-001902

THE STATE, ...RESPONDENT,

v.

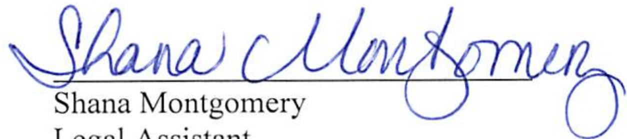
KENNETH EARLE MCGILL, ...APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address listed in AIS and with a copy of the same to follow in the United States mail, postage prepaid, addressed to:

William Norman Epps III
Epps and Epps, LLC
Post Office Box 2167
Anderson, South Carolina 29622

I further certify that all parties required by Rule to be served have been served this 4th day of January, 2021.



Shana Montgomery
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

Shana Montgomery

From:	Shana Montgomery
Sent:	Monday, January 4, 2021 11:32 AM
To:	norman_epps@hotmail.com
Cc:	Shana Montgomery; Bill Schumacher
Subject:	State V. Kenneth E. McGill ; Appellate Case No. 2019-001902
Attachments:	02458133.PDF

Good Morning,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter along with the proof of service for State v. Kenneth E. McGill (2019-001902). Please confirm receipt. This Initial Brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. In addition to the email, a hard copy will be placed in today's mail.

Thank You.

Shana Montgomery
Legal Assistant
Office Of The Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-7239

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