STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. 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

The State, Respondent,

v.

Terrance Edward Stewart, Petitioner.

PETITION FOR REHEARING

On May 19, 2021, this Court reversed the trial court's decision to charge the jury: "The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." In doing so, this Court reversed Petitioner's convictions for trafficking in heroin and possession of oxycodone. This Court misapprehended or overlooked long-standing, significant case law explaining the benefit and appropriateness of inference, including inferences similar to the one in question in this case. Further, the Court overlooked the relevant evidence in the Record which clearly demonstrates any possible error in giving the challenged instruction was entirely harmless. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing; find the trial court did not err in giving the charge previously approved by this Court; find any possible error was entirely harmless because the jury instruction could not reasonably have contributed to the jury's verdict, especially in light of the overwhelming evidence in the Record and the fact Petitioner received a

mere presence charge which would negate any possible confusion; and affirm Petitioner's convictions and sentences for trafficking in heroin and possession of oxycodone.

Propriety of the Instruction

Initially, this Court finds that a trial judge should not give the inference of knowledge and possession charge to the jury, even though the charge was approved by this Court in a unanimous decision in State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987).[1] This Court relies on the reasoning found in State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019), for the conclusion the charge was improper and that the inference is a valid one for the jury to draw but not for the trial court to instruct. This Court quotes language from Burdette, including: "some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" However, in doing so, this Court does not explain why the jury instruction is not an appropriate instruction for the jury, especially in light of the mere presence instruction which this Court has not addressed. The Court does not explain how the inference singles out any particular evidence, such as the use of a deadly weapon in the charge discussed in Burdette. The charge, which does nothing more than provide the jury with an alternate consideration to the one they receive with the mere presence charge, does not single out any particular evidence, requires the jury to still find the property was under

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[1] While this Court is certainly free to alter or abandon its prior decisions, it should not do so based solely on a fleeting change in the direction of the wind. It should not lightly refuse to adhere to the doctrine of *stare decisis*, especially when the prior decision was a unanimous decision of the sitting Justices, has been followed by numerous decisions in the last almost twenty-five years, and has resulted in an instruction given to countless juries since the decision in State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). As this Court long ago explained, the impact of *stare decisis* is most significant when looking at three factors: "*First*, the unanimity with which its judgment was pronounced; *second*, the fact that it has been followed; and, *third*, the duration of time during which it has been openly followed or tacitly assented to." State v. Williams, 13 S.C. 546, 554 (1880) (italics in original). In this case, Adams satisfies all three requirements for consideration of *stare decisis* and this Court should, at a minimum, provide an explanation for its decision to abandon its prior decision.

the dominion and control of the defendant and not someone else, and allows them to accept or reject the inference that the finding they made could also support a finding of knowledge and possession. Nothing in this charge is of the nature of the charge in Burdette other than both are set forth as inferences.

This Court also overlooks and ignores its long-standing precedent on inferences and a trial court's role in instructing the jury. This Court clearly overlooks the findings of this Court in Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896), which this Court has previously declared "a legal classic." Eaddy v. Jackson Beauty Supply Co., 244 S.C. 256, 258, 136 S.E.2d 297, 298 (1964). In Norris, the Court examined the difference between commenting on the facts in violation of the South Carolina Constitution, and declaring the law as is required. Specifically, this Court acknowledged:

> 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.**

Norris, 25 S.E. at 809-810. The Court in Norris explicitly upheld the type of instruction at issue in this case as a proper instruction by the court.

Additionally, this Court has recognized the necessity of these types of charges. "A jury ought to be instructed about what right springs out of a fact to be determined by them. The jury ought not to be left to cut a way through the woods with no compass to guide it." Collins-Plass

Thayer Co. v. Hewlett, 109 S.C. 245, 95 S.E. 510, 513 (1918). This is particularly true in a case in which the jury has already been instructed regarding one direction the evidence may lead. Certainly, it is appropriate—dare say necessary—to instruct them on the other direction the compass may point as a result of the evidence. In this case, the jury needed to be instructed on the inferences they could make if they found certain facts existed, in part because they were already instructed on the inference they could make based on another possible interpretation of those same facts.

As discussed, this Court also overlooks the fact the judge instructed the jury: "I instruct you that mere presence at the scene where the drugs were found is not enough to prove possession." (R.469). It is entirely inappropriate for the trial court to charge the jury on mere presence without also charging the jury on the inference of possession from his dominion and control of the property. 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. 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. To the extent this Court upholds its decision that a trial court instructing the jury on the permissive inference regarding knowledge and possession is improper, the Court must also find the mere presence charge improper and should no longer be given because they are both the same type of charge providing the jury with the same type of explanation and instruction.

The jury instruction in this case was legally proper, as this Court acknowledges in its opinion, a proper type of instruction to give as declared by this Court in Norris, and was

necessary to explain to the jury the proper determinations to be made from the evidence—either Petitioner was merely present or he had dominion and control of the property and as such had knowledge and possession of its contents. This Court should grant rehearing and find the trial court did not err in this case in giving the instruction because it was necessary for a complete and proper instruction to the jury.

Harmless Error

Even if this Court upholds its determination that the charge given was improper—and, likewise, indicates the mere presence instruction is improper—the giving of the charge in this case was entirely harmless. This Court failed to address the harmless nature of the error, especially in light of the overall charge which included the mere presence instruction and the overwhelming evidence in the Record. "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.' " State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)).

The charge could not reasonably have impacted the verdict reached by the jury because Petitioner received a mere presence charge which provided the counter inference to the one in the challenged instruction and the jury could not have been confused by the instructions. Additionally, the charge could not have reasonably contributed to the verdict in light of the overwhelming evidence of Petitioner's guilt of trafficking in heroin and possession of the oxycodone.

In the instant case, immediately preceding the challenged instruction was an instruction stating: "I instruct you that mere presence at the scene where the drugs were found is not enough

to prove possession." The jury could not have been confused, nor could only one fact be emphasized improperly as occurred in Burdette. The jury was properly charged with the alternative outcomes based on the factual findings it reached. Further, the charge given, never told the jury the weight to assign to any particular piece of evidence as occurred in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). The harm associated with the charges in Burdette and Cheeks is just not present in the current case, especially since the jury was also charged that Petitioner's mere presence was insufficient to constitute possession.

Most significantly, however, this Court overlooked the overwhelming evidence of Petitioner's guilt in the Record such that the jury instruction could not have contributed to the jury's verdict. The overwhelming evidence pointing to Petitioner is similar to what this Court addressed in Cheeks. The evidence indicated one person—Petitioner—was logically in possession of the heroin and oxycodone found at the residence, and as a result, even if the charge was improper, the only reasonable conclusion which could be reached by the jury was that Petitioner was guilty of both trafficking in heroin and possession of oxycodone.

A search warrant for Petitioner's residence was obtained based on the controlled purchases of heroin from Petitioner. During the execution of the search warrant, officers found four people in the residence who could be considered the ones in possession of the drugs located during the search. The four living in the home included Petitioner, Petitioner's girlfriend, and two children ages three and five.[2] (R.54; 98; 336; 359) As a result, only two people could have been in possession of the heroin and oxycodone—Petitioner and his girlfriend.[3]

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[2] Surely this Court, and the jury, eliminated the two children as possible suspects in the possession of the drugs.

[3] It is also very important to note that under the law, more than one person may jointly possess the drugs, and there is certainly nothing in the Record which would exclude Petitioner from, at a minimum, jointly possessing the drugs. See State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773,

This Court overlooked the remainder of the evidence presented at trial from which the jury could only conclude the drugs belonged to Petitioner. As this Court noted, Petitioner was involved in a controlled buy of heroin, in which a known individual purchased heroin from Petitioner shortly before law enforcement obtained the search warrant for Petitioner's residence. During the controlled buy, documented money was utilized. (R.298). When the search warrant was executed, Petitioner was located on the couch. He asked to put his pants on, and when the pants were searched for contraband or weapons, officers located money which included five of the documented twenty dollar bills used during the controlled buy. (R.333-334).

Additionally, officers originally arrested both Petitioner and his girlfriend. She called Petitioner indicating her concern regarding the charges. She noted that only two people lived in the house and the drugs were not hers. (R.379). Petitioner assured her that if necessary, he would admit the drugs belonged to him. (R.368). Further, during trial, Petitioner's girlfriend specifically disavowed ownership of the drugs found. (R.362; 368; 380). She testified she could not say how the drugs got there, "I can only attest that it's not mine." (R. 380).

The jury was faced with the fact Petitioner was distributing heroin as shown by video of the controlled buy conducted and the testimony of Mr. Cheatham. Petitioner is found with the money from the sale of heroin to the government informant in the pocket of the pants he acknowledges are his when the officers begin the execution of the search warrant. There are only two people in the house who could possibly possess the heroin on the fridge because no jury would believe the three and five year olds were complicit in the crime. The only other possible person in possession of the drugs disavowed ownership multiple times, the jury could freely

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775 (1981) ("possession may be shared"). The jury was specifically instructed "two or more persons may have joint possession of a drug." (R.469).

consider the girlfriend's credibility and determine whether her denial of ownership was credible, and her denial was never challenged at trial. Finally, Petitioner indicated he was willing to admit the drugs were his when his girlfriend indicated her concerns about the charges. Significantly, after his conviction, Petitioner did not disavow possession of the heroin; instead, he indicated he "shouldn't have went to trial" and instead should have accepted the **guilty** plea offered by the State—" I'm sorry I put my mother through this and having her see me go through this again. I should have just took what they offered." As a result, the only evidence in the Record indicates Petitioner possessed—at least jointly—the heroin located during the search, and the jury instruction could not have reasonably impacted the jury's determination. The only logical and reasonable finding the jury could make was Petitioner constructively possessed the drugs found on top of the refrigerator in the home he shared with his girlfriend.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing. The State asks the Court to find the trial court properly gave a valid jury instruction which was necessary in light of the fact the trial court gave a mere presence instruction, and affirm Petitioner's convictions and sentences. In the alternative, if this Court finds the instruction regarding the inference of possession improper, the State asks this Court to also find the mere presence instruction an invalid inference of the same nature. Finally, the State asks that if this Court finds the instructions given were improper jury instructions, then the Court should find the giving of the instructions in this case was entirely harmless particularly in light of the fact the only reasonable conclusion the jury could reach was that Petitioner possessed the heroin found at his residence and affirm Petitioner's convictions and sentences.

Respectfully submitted,

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