STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAROLD GENE WHITE III,

APPELLANT

APPELLATE CASE NO. 2022-000579

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On October 11, 2018, a York County Grand Jury indicted Harold Gene White, III, Appellant, for possession with intent to distribute oxycodone, possession with intent to distribute marijuana, and possession of cocaine. On January 20, 2022, Appellant was indicted for possession with intent to distribute hydrocodone. Appellant was tried before the Honorable Brian M. Gibbons, from April 20 – 21, 2022, in a bench trial. Christopher Wellborn represented Appellant. Erin Joyner and Daniel Porter prosecuted the case.[1]

The court broke to deliberate, and proceedings reconvened on April 28, 2022, when the court announced its verdicts. As to possession with intent to distribute hydrocodone, Appellant was convicted, and he was sentenced to 7 years' imprisonment for a second offense. As to possession with intent to distribute oxycodone, Appellant was convicted of the lesser offense of possession of oxycodone, and he was sentenced to serve 2 years' imprisonment for a second offense. As to possession of cocaine, Appellant was convicted, and he was sentenced to 3 years' imprisonment for a second offense. As to possession with intent to distribute marijuana, Appellant was convicted as indicted, and he was sentenced to 2 years' imprisonment for a first offense. All sentences were run concurrently.[2]

This appeal follows.

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[1] R. *(indictments); Tr. I, 1.

[2] Tr. II, 1; Tr. II, 2, l. 1 – 3, l. 17; Tr. II, 10, l. 23 – 13, l. 8; R. *(sentence sheets).

STATEMENT OF FACTS

Just before 6:00 pm on March 29, 2017, Appellant's nine-month-old daughter (Child) was found dead at the home of his mother, Yolanda Adams, on Simpson Street in Rock Hill. Earlier in the day, Child and her twin brother (Brother) were at Appellant's home on Amanda Lane. However, either Adams or her neighbor, Jasmine Rawlinson, picked the twins up from Appellant's home and took them to Adams' home at approximately 11:00 am or 12:00 pm. (Appellant said Adams picked the children up, but Adams claimed Rawlinson picked them up.) Adams fed both children and took a nap with them in her bed. Adams woke up and left Child sleeping. Adams' friend, Williette Beard, and another resident of the Simpson Street home, Amanda Pettrey, were there. Adams asked Beard and Pettrey to watch the twins. Adams left.[3]

At some point, Appellant came by his mother's house and saw Child sleeping in bed and Brother playing with Beard. (Agent Trista Baird would later testify there was no indication Appellant had physical contact with Child at that time.) Appellant left. Adams returned. The mother of the twins, Julisa White, and another resident of the Simpson Street home, Darrell Ross, as well as Rawlinson and Pettrey, were present in the home. Adams checked on Child and found her unresponsive. 911 was called but Child could not be resuscitated. An autopsy was done, and seventeen days later, on April 15, 2017, a toxicology report revealed Child had fentanyl and norfentanyl in her system.[4]

On April 17, 2017, Agent Baird sought a search warrant for Appellant's home. On April 25, 2017, she sought a search warrant for cellular telephone data for seven mobile telephones recovered during the search of Appellant's home, including a telephone recovered from

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[3] Tr. I, 26, l. 3 – 27, l. 18.

[4] Tr. I, 27, l. 18 – 28, l. 4; Tr. I, 37, ll. 2-11.

Appellant's person. The warrants were issued in error, however, since the affidavits did not contain sufficient information to give the magistrate a basis to find probable cause. The affidavit for the search of Appellant's Amanda Lane home stated the following:

> I, Special Agent Trista Baird, being duly sworn state the following:
>
> Special Agent (S/A) Trista Baird is employed with the South Carolina Law Enforcement Division (SLED) and is assigned to the Special Victim's Unit—Department of Child Fatalities. S/A Baird has worked in law enforcement since 2007. S/A Baird has been employed by SLED since May of 2013. Prior to working with SLED, S/A Baird was employed with the Rock Hill Police Department as a detective assigned to investigate child and vulnerable adult abuse.
>
> **On March 29, 2017, at approximately 5:56 pm, Piedmont Medical Center EMS and Rock Hill Police Department (RHPD) were dispatched to [redacted] Simpson Street in the city limits of Rock Hill, South Carolina, in reference to a 9-month-old female ([Child], dob [redacted]/2016; dod 3/29/2017) unconscious and not breathing.** EMS arrived on scene and found [Child] supine on the living room floor with a female performing chest compressions. She was unresponsive, not breathing, had no pulse, and had vomit coming from her mouth. She was transported to Piedmont Medical Center where she was pronounced deceased. York County Coroner's Office, RHPD, and SLED responded to the hospital.
>
> **According to [Child's] father (Harold Gene White III), his mother (Yolanda Harris Adams) picked up his twins ([Child] and [Brother]) from his residence ([redacted] Amanda Lane, Rock Hill, South Carolina) at approximately 11:00 am or 12:00 pm on March 29, 2017. Adams took the twins to her residence at [redacted] Simpson Street.** Later in the afternoon, he went to Adams' house and found [Child] asleep in Adams' bed. [Brother] was playing with Adam's [sic] friend (Williette Woodward Beard) in the living room. Adams was not home. He then left the residence.
>
> According to Adams, her neighbor (Jasmine Latasha Rawlinson) picked the twins up from Harold White and brought them to her house around lunchtime. Adams then fed the twins a bottle each with formula mixed with infant cereal. The, the three of them lay down on her bed and went to sleep. Adams and [Brother] both woke up, got out of bed, and left [Child] sleeping in the bed. Adams got her children ready for their doctor's appointment and asked Amanda Jo Pettrey (who resides at her residence) and Beard to watch [Child] and [Brother] while she took her children to the doctor. When she home [sic], Adams was told that [Child] was still asleep and went to check on her. She found her unresponsive and not breathing. Adams brought [Child] to Julisa White, who had arrived on scene at

> some point prior to Adams' arrival. Amanda Pettrey began CPR in the living room. Rawlinson, who was also on scene, called 911. Darrell Rodney Ross, who resides at the residence, was asleep in one of the bedrooms for most of the day.
>
> An autopsy was completed on March 30, 2017. **The toxicology report from NMS Labs revealed that [Child] had 17 ng/mL of Fentanyl and 5.2 ng/mL of Norfentanyl in her blood at the time of death.**
>
> It is the belief of this affiant that information gained from this search is necessary to assist investigators in determining the cause and manner of death of [Child], the individuals who were present at the time and leading up to her death, and the timeline of events surrounding her death.

The affidavit for cellular data extraction was identical, except that it contained the additional sentences, "These cellphones [sic] were obtained from a search warrant that was executed on April 18, 2017 at [redacted] Amanda Lane Rock Hill, South Carolina. Extractions of these cellphones [sic] are needed at this time."[5]

Pursuant to the search warrant of Appellant's home on April 17, 2017, authorities recovered a number of drugs: cocaine, ibuprofen, oxycodone, cyclobenzaprine, hydrocodone, alprazolam, and marijuana. Most of the drugs were found in the top drawer of a chest of drawers in the master bedroom. The same drawer contained Appellant's passport and credit cards. Authorities did not recover any fentanyl or norfentanyl. Pursuant to the search warrant executed on April 25, 2017, extraction of data from the cellular telephone seized from Appellant recovered text messages.[6]

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[5] *See* Court's Exhibit #1; Court's Exhibit #2. These exhibits are located at pp. * of the Record on Appeal; *see* State's Exhibit #37 (State's Exhibit #37 is a disc containing the cellular telephone extractions and is on file with this Court.)

[6] Tr. I, 89, l. 3 – 101, l. 18; Tr. I, 111, l. 9 – 124, l. 6.

As seen, Appellant was indicted and tried in a bench trial for possession with intent to distribute oxycodone, possession with intent to distribute hydrocodone, possession with intent to distribute marijuana, and possession of cocaine.[7]

Appellant objected to the admission of the fruits of the search warrants (i.e., the drugs and text messages) pursuant to the Fourth Amendment and South Carolina's parallel constitutional provision. However, the court deemed them admissible.[8]

Appellant separately objected to the admission of the text messages on multiple additional grounds. The messages spanned the time period of February 6, 2017 – April 15, 2017. Given the context of the case, it is important to remember that Appellant was not tried for possessing drugs on the date of his child's death. Instead, he was tried for drugs found in his home several weeks later, on April 17, 2017.

The State posited some of the text messages contained slang terms which showed Appellant was a drug dealer. The State presented expert testimony from Officer Dana Gatti of the York County Sheriff's Office that texts from the telephone recovered from Appellant's person and texts from contacts in the telephone contained references to seeking and obtaining drugs. Regarding the admitted messages, Officer Gatti claimed that references to "smoke," "pine," and "strong" could mean marijuana, references to "pains" or "white ones" could be pain medication, references to "perky" could mean percocet, references to "blues" and "blue boys" could mean roxicodone. She opined that "28p" could refer to the price of marijuana.[9]

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[7] Tr. I, 5, ll. 3-15.

[8] Tr. I, 19, l. 10 – 22, l. 22; Tr. I, 50, l. 5 – 71, l. 11.

[9] Tr. I, 102, ll. 7-16; Tr. I, 78, l. 18 – 79, l. 10; Tr. I, 131, ll. 15-20; Tr. I, 141, l. 22 – 143, l. 1; Tr. I, 143, l. 20 – 144, l. 6; Tr. I, 156, l. 22 – 173, l. 17; *see* State's Exhibit #37.

The court would ultimately admit texts between Appellant's phone and contacts identified as "Kiesha," "Tatta," "Nadeen," "Geter," "Nuk," and "Malikkk." The messages admitted by the court were as follows.

- The messages between Appellant's phone and "Tatta" were from February 23 – 24, 2017. Messages reference "blue bois," "blues," and "white ones."
- The messages between Appellant's phone and "Kiesha" were from February 19, 2017. Messages reference hydrocodone.
- The messages between Appellant's phone and "Malikkk" from March 11 and 17, 2017. Messages reference "perkys" and "pine."
- The messages between Appellant's phone and "Nadeen" were from March 1 – March 14, 2017. Messages reference a "refill," "pain pills," and "pains."
- The messages between Appellant's phone and "Geter" were from March 1 and 7, 2017. Messages reference "smoke" and "pine."
- The messages between Appellant's phone and "Nuk" were from March 6, 2017. The messages reference "pine," "strong," and "28p." [10]

Appellant objected to the admission of the text messages on the bases of hearsay, foundation, Rule 404(b), SCRE, and Rule 403, SCRE. The court ruled the above-referenced messages were admissible.[11]

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[10] Tr. I, 219, l. 2 – 223, l. 10; Tr. I, 232, ll. 19.

[11] Tr. I, 144, l. 24 – 154, l. 6; Tr. I, 206, l. 22 – 234, l. 10.

ARGUMENT

I.

The court erred where it failed to suppress evidence seized pursuant to search warrants, where the affidavits were insufficient to support a finding that there was a fair probability contraband or evidence of a crime would be found, since the evidence should have been excluded pursuant to the Fourth Amendment of the United States Constitution and article I, section 10 of the South Carolina Constitution.

A magistrate issued warrants to search Appellant's Amanda Lane home and the cellular telephone in his possession several weeks after his child's death. However, the magistrate only knew that the child had fentanyl in her system and was found dead at Appellant's mother's Simpson Street home six or seven hours after being taken from Appellant's home. This was after another person had driven Child, fed Child, and napped with her, and after she was around six other adults. Under the totality of the circumstances, this information was insufficient to support a finding of probable cause to search Appellant's home and electronic devices.

A. Standard of review

"Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion is a question of law subject to de novo review." *State v. German*, Op. No. 2849 (S.C. Sup. Ct. filed Apr. 5, 2023) (Howard Adv. Sh. No. 13 at 67, 71) (quoting *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022)) (cleaned up).

B. The evidence was obtained in violation of federal and state constitutional provisions

"All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment." *Nathanson v. United States*, 290 U.S. 41, 46 (1933). "At the very core of the Fourth Amendment is a person's right to retreat into his own home and there be free from unreasonable government intrusions." *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (quoting *Kyllo v. United States*, 533 U.S. 27, 31 (2001)) (cleaned up). "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Nathanson*, 290 U.S. at 47.

"Under both the United States and South Carolina constitutions, search warrants may not be issued except 'upon probable cause, supported by Oath or affirmation.' U.S. Const. amend. IV; S.C. Const. art. I, § 10. Following these constitutional requirements, § 17-13-140 requires a sworn affidavit for a search warrant be issued." *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).

"A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) (citing *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221; *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause." *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (citing *State v. Viard*, 276 S.C. 147, 276 S.E.2d 531 (1981)). "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are

insufficient. His action cannot be a mere ratification of the bare conclusions of others." *Id.* (citing *Illinois v. Gates*, 462 U.S. at 239 (cleaned up)).

"The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. *Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). "If no supplemental oral testimony is taken, an issuing judge's probable cause determination is limited to the four corners of the search warrant affidavit." *State v. Thompson*, 419 S.C. 250, 257, 797 S.E.2d 716, 719 (2017). "In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." *State v. Thompson*, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

"[T]he Fourth Amendment does protect digital information stored on a cell phone." *State v. Warner*, 436 S.C. 395, 401, 872 S.E.2d 638, 640 (2022) (citing *Riley v. California*, 573 U.S. 373 (2014); *State v. Brown*, 423 S.C. 519, 523-24, 815 S.E.2d 761. 763-64 (2018)).

In this case, there was no substantial basis upon which to find probable cause. "In reviewing a magistrate's probable cause determination, circuit judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *Kinloch*, 410 S.C. at 617, 767 S.E.2d at 155. The April 17 and April 25, 2017, affidavits stated that on March 29, 2017, Child was found dead at Appellant's mother's house from toxic drug exposure, after being at Appellant's house six or seven hours earlier, and that Appellant checked on the child while she was sleeping at his mother's house. It set forth no facts as to why police believed Appellant was the person who exposed the child to toxic drugs or why they believed exposure happened at Appellant's home.

The affidavits listed six other individuals who could have had a hand in the child's death, and listed other places and circumstances where the child could have been exposed to drugs. The affidavits stated that another person, not Appellant, had fed the child and the other was the last person known to have contact with the child before she was found unresponsive. The affidavits did not have a sufficient basis upon which to find probable cause. *See State v. Smith*, 301 S.C. at 373, 392 S.E.2d at 183 (affidavit defective on its face where it set forth no facts as to why police believed Smith robbed the Master Host Inn); *State v. Baccus*, 367 S.C. at 52, 625 S.E.2d at 222 (trial court erred in admitting evidence seized pursuant to search warrant where affidavit fails to set forth any facts as to why police believed defendant committed the crime; the "language in the affidavit lacks specificity and contains conclusory statements.").

The information in the affidavit was also stale. "The appellate courts of this state have routinely held that the information contained in an affidavit providing a timely and direct nexus between the contraband sought and the location to be searched . . . is sufficient to support a search warrant." *Thompson*, 419 S.C. at 257, 797 S.E.2d at 719. "[A]n affidavit in support of a search warrant 'must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.'" *State v. Simmons*, 430 S.C. 1, 13, 841 S.E.2d 845, 851 (2020) (quoting *State v. Winborne*, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979)). "Moreover, 'the reason for this rule is that probable cause, with time, dissipates.'" *Id.*

The search warrants were issued 19 and 27 days after the child's death. The affidavits provided no timely and direct nexus between the contraband sought and Appellant's home and his cellular telephone. The affidavit for cellular data extraction stated that the telephones were obtained during the execution of the April 17, 2017, search warrant, but it did not state how the telephones were relevant to the case. Notably, the affidavit for cellular data did not state that

there were drugs found during the execution of the prior warrant, and the signatures on the warrants show that a different judge signed each warrant. *See* Court's Exhibit #1; Court's Exhibit #2. R. *.

"In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." *State v. Counts*, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015) (citing *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10). "[T]he South Carolina Constitution provides citizens an express right to privacy. *Counts*, 413 S.C. at 167, 776 S.E.2d at 67. "[T]he South Carolina Constitution affords a higher level of privacy protection than the Fourth Amendment." *Counts*, 413 S.C. at 170, 776 S.E.2d at 68 (citing *State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007)). *See State v. German*, Op. No. 2849 (S.C. Sup. Ct. filed Apr. 5, 2023) (Howard Adv. Sh. No. 13 at 67, 82) (the "drafters of our constitutional provision were concerned with the emergence of new technology enabling more invasive searches"); *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 330, 882 S.E.2d 770, 846 (2023) (James, J., dissenting) (the "privacy provision in article I, section 10 provides citizens with heightened Fourth Amendment protections, especially protection from unreasonable law enforcement use of electronic devices to search and seize information and communications.").

The search warrants in this case violated the South Carolina Constitution, which provides heightened privacy protection in the context of search and seizure. While article I, section 10 protects Appellant's privacy in his home, it is also of particular import here, where the authorities used Cellebrite[12] to extract data from personal communication devices. *Counts*, 413

[12] Cellebrite is a third-party Israeli digital intelligence company that develops digital intelligence platforms. Law enforcement agencies use the company's Universal Forensic Extraction Device tool to download data from cellular telephones and to organize that data so it can be reviewed.

S.C. at 170, 776 S.E.2d at 68. *See Riley v. California*, 573 U.S. at 395 ("more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.").

C. The evidence should have been excluded

Generally, evidence derived from an illegal search or seizure is deemed fruit of the poisonous tree and is inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). "Evidence seized in violation of the Fourth Amendment must be excluded from trial." *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). *See State v. Forrester*, 343 S.C. at 648, 541 S.E.2d at 843 (applying exclusionary rule to evidence taken in violation of state constitutional right to privacy provision).

However, given the good faith exception to the exclusionary rule, "suppression is only appropriate in a few situations, including when an affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *State v. Weston*, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (citing *United States v. Leon*, 468 U.S. 897, 923 (1984); *State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990) (cleaned up)). As discussed above, the affidavits did not state why police thought Appellant exposed Child to drugs or why they believed drugs would be found at Appellant's home given the amount of time that had passed since the child's death. In this case, the affidavits so lacked indicia of probable cause that the exclusionary rule would apply. *Weston, supra.*[13]

Cellebrite is ordinarily used as a software program, which can be installed onto a law enforcement computer, but Cellebrite also has devices that can be utilized without a computer. *United States v. Smith*, No. 21-CR-30003-DWD, 2022 WL 17741100, at *2 (S.D. Ill. Dec. 16, 2022).

[13] It is unclear whether a *Leon* exception applies to article I, section 10 violations, given that the provision provides heightened protections in the search and seizure context. *See State v.*

Finally, the error was not harmless. "When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result." *Baccus*, 367 S.C. at 55, 625 S.E.2d at 223 (citing *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984)). All of the evidence in the case was seized pursuant to the search warrants. Without it, Appellant could not have been convicted. He would not have even been indicted, and if he had been, he would have been entitled to a directed verdict of acquittal.

McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987) ("The *Leon* rule applies only when a search warrant is defective on Fourth Amendment grounds."); *but see State v. German*, Op. No. 2849 (S.C. Sup. Ct. filed Apr. 5, 2023) (Howard Adv. Sh. No. 13 at 67, 85) (applying good faith exception where police violated defendant's rights under both the Fourth Amendment and South Carolina's Constitution, without discussing whether *Leon* applies in the context of state constitution). Regardless, however, the affidavits in this case were so lacking in indicia of probable cause that the evidence should have been suppressed.

II.

The court erred where it admitted text messages generated between Appellant's phone and the phones of others, which the State contended showed Appellant was involved in the illegal drug trade.

A. Where the text messages were inadmissible propensity evidence under Rule 404(b), SCRE, since the bad acts were not proven by clear and convincing evidence, lacked logical relevancy, and any probative value was substantially outweighed by the danger of unfair prejudice.

i. Standard of review[14]

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Whitner*, 399 S.C. at 557, 732 S.E.2d at 866.

ii. The evidence was inadmissible under Rules 404(b) and 403

The messages regarded prior bad acts and their admissibility was subject to the limitations of Rule 404(b), SCRE. "Our courts view a defendant's previous distribution of drugs as a past bad act." *State v. King*, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002).

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "as a threshold matter, determine whether the proffered evidence is relevant . . ." *State v. Clasby*, 385 S.C. at 154, 682 S.E.2d at 895 (cleaned up). "If the trial judge finds the evidence to be relevant,

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[14] The same standard of review governs both Issue II(a) and Issue II(b).

the judge must then determine whether the bad act evidence fits within an exception of Rule 404(b)," to show, *inter alia*, intent. *Id.* "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." *Id.* (quoting *State v. Gaines,* 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)).

"The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *State v. Perry*, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020) (quoting *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923)). "The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden 'should be subjected by the courts to rigid scrutiny,' considering the individual facts of and circumstances of each case." *Id.*

"[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *State v. Lyle*, 125 S.C. at 406, 118 S.E. at 807. "[E]vidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing *State v. Gore*, 299 S.C. 368, 384 S.E.2d 750 (1989)).

Appellant was not on trial for the drug transactions referenced in his text messages. The bad acts referred to in the messages lacked logical relevancy. Facts such as Appellant's phone responding that he did not have the drugs requested or the drug-seeking messages which elicited

no response from Appellant's phone undercut a claim of logical relevance. The bad acts were also too remote in time to establish intent, they merely went to propensity. *See State v. Wilson*, 345 S.C. at 7, 545 S.E.2d at 830 (prior drug sale only "a couple of days" earlier was relevant on issue of intent).

As seen, Appellant was on trial for drugs found in his home on April 17, 2017. The messages from "Tatta" were from February 23 – 24, 2017, and the messages from "Kiesha" were from February 19, 2017, roughly two months before the drugs in this case were found. The messages between Appellant's phone and "Nuk" were from March 6, 2017—over a month before the drugs in this case were seized. The messages between Appellant's phone and "Geter" were from March 1 and 7, 2017, five to six weeks before the drugs in this case were found. These messages were too remote in time to meet an exception to Rule 404(b).

The messages between Appellant's phone and "Malikkk" from March 11, 2017, where "Malikkk" asks, "You still got them perkys," and Appellant's phone's response, "Nah," were too remote in time, and were not logically relevant to the charges, due to the "Nah" response. The March 17, 2017 message from "Malikkk" asking, "Where the pine," and Appellant's response were also too remote in time for logical relevancy—that was a month before the charges in this case.

Finally, the "Nadeen" messages were too remote in time. The "Nadeen" messages about a "refill" were from March 1, 2017, over six weeks before the drugs that Appellant was on trial for were found. The messages asking for "pain pills" were also too remote—from March 8, 2017, and, in them, the person responding from Appellant's phone replied that they did not have any. A third message from "Nadeen" seeking "pains" was also too remote—March 14, 2017—

and it elicited no response from Appellant's phone. The negative responses and lack of responses undercuts logical relevancy.

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895 (quoting *Gaines,* 380 S.C. at 29, 667 S.E.2d at 731). "*Lyle* concerns bad acts and other crimes of a defendant, not statements of intent to commit crimes." *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000). The State did not show the drug transactions referenced in the text messages actually occurred—in fact, under the State's view of the evidence, some of the messages facially stated that Appellant did not have the drugs that others were seeking. It was unclear whether other transactions were ever completed. Because these bad acts were not subject to a conviction, the acts had to be proven by clear and convincing evidence, and the State did not meet its burden here. *King,* 349 S.C. At 153, 561 S.E.2d at 645.

Next, the messages should have been excluded based on their relative probative value and unfair prejudice potential. Where evidence is logically relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403. Where the evidence's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); Rule 403, SCRE (evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). To the extent bad act evidence serves a legitimate purpose that is not prohibited by Rule 404(b), the trial court "must determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper purpose." *Perry*, 430 S.C. at 31, 842 S.E.2d at 657-58.

The probative value of the messages was minimal—they went largely to propensity. Their remoteness in time and lack of logical relevancy cuts against probative value on the issue of intent. *See State v. Ostrowski*, 435 S.C. 364, 397, 867 S.E.2d 269, 286 (Ct. App. 2021) (erroneous admission of text messages from up to six weeks prior to defendant's arrest where many of messages were "completely extraneous to the events that were the subject of the trial, and the State made no real effort to link the text messages to the specific drugs at issue in this case."). Like this case, the appellant in *Ostrowski* "was not on trial for any of the drug transactions recorded in his text messages." *Id.*, 435 S.C. at 403, 867 S.E.2d at 289. Moreover, the State alleged Appellant possessed over sixteen ounces of marijuana—well past the inference weight of one ounce, so text messages about marijuana had a particularly low probative value. However, the evidence carried a high danger of prejudice. "When the prior bad acts are 'strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.'" *State v. Campbell*, 317 S.C. 449, 451, 454 S.E.2d 899 (Ct. App. 1994) (quoting *State v. Gore*, 283 S.C. 118, 121, 3222 S.E.2d 12, 13 (1984)).

The error was not harmless. The State's case rested on two pillars—the physical drugs found in Appellant's home and the drug-related text messages on his telephone. The text messages were central to the State's case. The testimony by Officer Gatti about the messages was extensive. *See Ostrowski*, 435 S.C. at 401, 867 S.E.2d at 288 (error in admission of text messages was not harmless "because of the degree to which the phone evidence became a central aspect of the State's case"); *State v. Tuffour*, 364 S.C. 497, 507, 613 S.E.2d 814, 820 (Ct. App. 2005), vacated, 371 S.C. 511, 641 S.E.2d 24 (2007) (finding prejudice from admission of alleged prior drug sales is "manifest.").

II.

The court erred where it admitted text messages generated between Appellant's phone and the phones of others, which the State contended showed Appellant was involved in the illegal drug trade,

B. Where the text messages were inadmissible hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Evidence is not hearsay unless it is offered to show the truth of the matter asserted." *State v. Sims*, 304 S.C. 409, 420, 405 S.E.2d 377, 383 (1991). A Statement is not hearsay if it is offered against a party and is the party's own statement. Rule 801(d)(2), SCRE.

The incoming messages from unknown declarants ("Tatta," "Kiesha," "Nuk," "Geter," "Malikkk," "Nadeen") were hearsay. These declarants were never identified and did not testify at trial. The State argued the messages were not offered for their truth but to show an effect on the listener, Appellant. However, the messages did not explain why Appellant took any subsequent actions. As discussed above, it is unclear whether drug transactions referenced in the messages ever took place. Some messages explicitly stated there were no drugs to sell.

The messages were offered to show Appellant was selling drugs. "THE COURT: They're offering it to prove that he's a drug dealer." The State used the testimony of Officer Dana Gatti about drug slang terms to show that the messages were about drug transactions. The State used the messages for the truth of the matter asserted.[15]

The outgoing messages the State alleged were sent by Appellant were also hearsay. The State did not show Appellant sent or received the text messages. It did not show the phone was in

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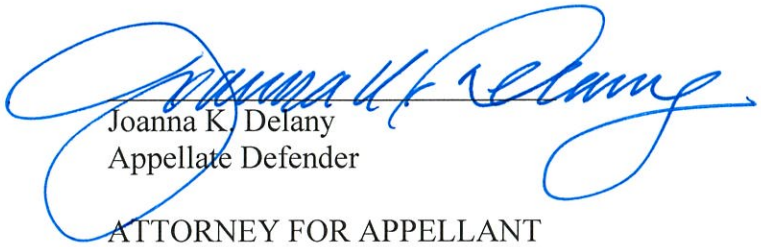
[15] Tr. I, 211, ll. 2-3; Tr. I, 156, l. 22 – 173, l. 16.

his possession during the times the messages were sent or received. Therefore, the State did not show that the messages qualified as non-hearsay under 801(d)(2), the exception for a party's own statement.

The error in admitting the messages was not harmless. The messages were central to the State's case and the testimony by Officer Gatti about the messages was extensive. *See Ostrowski*, 435 S.C. at 401, 867 S.E.2d at 288 (error in admission of text messages was not harmless "because of the degree to which the phone evidence became a central aspect of the State's case"); *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006) (improper admission of hearsay is reversible error only when the admission causes prejudice); *State v. Tuffour*, 364 S.C. 497, 507, 613 S.E.2d 814, 820 (Ct. App. 2005), vacated, 371 S.C. 511, 641 S.E.2d 24 (2007) (finding prejudice from admission of alleged prior drug sales is "manifest.").

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of May, 2023.