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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
The Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2022-000579

The State,

Respondent,

v.

Harold Gene White, III,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Judge Gibbons properly determined there was sufficient information in the search warrant affidavit regarding the search of Appellant's residence to support the magistrate's finding there was probable cause to believe evidence of a crime may be located in the residence.

II. Judge Gibbons properly admitted limited text messages found on Appellant's cellphone because the substance of the messages was circumstantial evidence of Appellant's intent to distribute the illegal substances found in his residence, and clearly stated he would give the evidence the weight and credibility he determined was appropriate.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On March 29, 2017, in response to a 911 call, emergency personnel went to 644 Simpson Street, Rock Hill, SC (Appellant's mother's home) and found Appellant Harold White's nine-month-old daughter ("Infant") was unresponsive and not breathing. Infant had no pulse and had vomit coming from her mouth. Infant was transported to the hospital where she was pronounced dead. (Trial Transcript [TT], p. 26, Court's Exhibit 1; Record on Appeal [R.], pp. 26, 297-302).

Appellant advised investigators that on the day Infant died, Appellant's mother (Adams) picked up Infant and her twin brother from Appellant's home around 11:00 or 12:00 p.m. and took them to her residence. He further advised them that he went to Adams' house later that afternoon and found Infant sleeping in Adams' bed, while Infant's twin brother was playing with Adams' friend (Beard) in the living room. Appellant stated Adams was not there at the time and Appellant left the home before she returned. (TT, pp. 26-27, Court's Exhibits 1; R., pp. 26-27, 297-302).

Adams advised investigators her neighbor (Rawlinson) picked the twins up from Appellant's home and brought them to Adams' home around lunch time. Adams fed each twin a bottle of formula mixed with infant cereal, and then laid down with them and went to sleep. According to Adams, she and Infant's twin woke up, got out of bed, and left Infant sleeping in the bed. Adams' children had a doctor's appointment, so she asked Beard and another resident of the home (Pettrey) to watch the twins while Adams took her children to the doctor. When Adams returned home, she was told Infant was still asleep. When she checked on Infant, Adams found her unresponsive and not breathing. Adams gave Infant to Appellant's wife (White), who had come to the home prior to Adams' arrival, they brought Infant into the living room, and Pettrey began CPR. Rawlinson was also at the home and she called 911. Adams reported that another resident of the home (Ross) was asleep in one of the bedrooms most of the day. (TT, p. 27, Court's Exhibit 1; R., pp. 27, 297-302).

An autopsy was performed on March 30, 2017. On April 15, 2017, investigators received the toxicology report from the autopsy that revealed there was fentanyl and norfentanyl in Infant's blood at the time of her death. After receiving the toxicology report, the lead investigator, Special Agent Trista Baird (Baird) of the South Carolina Law Enforcement Division (SLED) sought and obtained search warrants for Appellant's home and Adams' home, the two locations where Infant was known to have been on the day of her death. (TT, p. 28; Court's Exhibit 1; R., p. 28, 297-302).

The affidavits for both warrants were virtually identical and recounted the information investigators had received from Appellant, Adams and the toxicology report, and stated that "information gained from this search is necessary to assist investigators in determining the cause and manner of death of [Infant], the individuals who were present at the time and leading up to her death, and the timeline of events surrounding her death." The property to be seized was described as "[a]ny and all evidence related to the death of [Infant]: to include Fentanyl (a DEA Schedule II synthetic morphine substitute anesthetic/analgesic), any substances suspected to be Fentanyl, and any paraphernalia or items associated with the use of Fentanyl; state issued identification car and/or driver's license of any and all individuals at the residence; any and all cellphones belonging to [Adams, Ross, Appellant, Rawlinson, Appellant's wife [White], Beard and Pettrey]." (TT, pp. 28-29, Court's Exhibit 1; R., pp. 28-29, 297-302).

The warrants were obtained and executed on April 17, 2017. During the search of Appellant's home, law enforcement seized plant material suspected to be marijuana, multiple pills of various shapes and colors, a brown envelope containing white powder, a hand tied plastic bag containing white powder, multiple guns, and multiple cellphones. (Court's Exhibit 1; R., pp. 297-

302). A search warrant issued on April 25, 2017, allowed extractions from all the cellphones seized during the search of Appellant's and Adams' homes. (Court's Exhibit 2; R. pp. 303-307).

Analysis of the substances found at Appellant's home determined the plant material was marijuana (net weight 473 grams/16.69 ounces), the white powder in one of the bags seized was cocaine, some of the seized pills were oxycodone (15 white, round tablets), and 88 pills were hydrocodone/acetaminophen. Other seized pills were determined to be prescription ibuprofen. (TT, pp. 72-73, 90-91, 94-104, 113-124, 239-254, State's Exhibits 34 and 35; R., pp. 72-73, 90-91, 94-104, 113-124, 239-254, 492-493, 494-497).

Investigators sought and obtained a search warrant on April 25, 2017, to extract data from the cellphones received on April 17th. Analysis of Appellant's cellphone revealed text messages between Appellant and other individuals that contained language related to the purchase or sale of illegal narcotics, including marijuana, hydrocodone and oxycodone. Those references included "smoke" (marijuana), "pine" (marijuana), "whites" (hydrocodone), "perkies" (percocet/oxycodone), "blues" (oxycodone), and "yaps" (oxycodone).[1]

Appellant was indicted on one count of possession with intent to distribute oxycodone, one count of possession with intent to distribute marijuana, one count of possession of cocaine, and one count of possession with intent to distribute hydrocodone. After Appellant waived his right to a jury trial, the case was called for a bench trial before the Honorable Brian M. Gibbons on April 20, 2022.[2] Prior to hearing any motions or evidence, Judge Gibbons stated:

> [B]ut as both the fact finder and the judge of the law I'm going to give the parties leeway to make a full presentation of their case. Okay. And, as you know, a lot of

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[1]Appellant stipulated that the cellphone with the text messages belonged to him. (TT, pp. 234-235; R., pp. 234-235).

[2]A previous trial in March 2019 ended in a mistrial. The parties agreed the transcript from the prior proceeding would be entered as Court's Exhibit 3, and Judge Gibbons could consider it. (TT, pp. 5-6, Court's Exhibit 3; R., pp. 5-6, 308-491).

> things which would otherwise in front of a jury possibly be inadmissible pursuant to the evidentiary rules . . . I know what's credible and what's not. So even though it may not be technically admissible, I can give it the weight and credibility it deserves. . . . But admissibility is kind of different when you're dealing with a bench trial situation.

(TT, pp. 8-9; R., pp. 8-9).

Appellant objected to admission of any evidence seized pursuant to the search warrant issued on April 17th, arguing the supporting affidavit failed to set forth sufficient facts on which the issuing judge could find probable cause to believe evidence of a crime might be located in Appellant's home. He further argued the cellphone data seized pursuant to the April 25th search warrant was inadmissible as fruit of the poisonous tree.

Agent Baird testified she was assigned to investigate Infant's death on March 29, 2017. After receiving the toxicology report on or about April 15, 2017, indicating the presence of fentanyl and norfentanyl in Infant's blood, Agent Baird prepared affidavits in support of search warrants for Appellant's and Adams' homes, and presented them to the magistrate who issued the search warrants. She testified the affidavits included all the information gathered during the investigation up to April 17th, and the two locations to be searched were the only places Infant was known to have been on the day of her death. Investigators had differing accounts of how Infant got from Appellant's house to Adams' house and did not know who was being honest. She further testified that the totality of the information investigators had on April 17th indicated Infant had fentanyl and norfentanyl in her blood at the time of her death on March 29th, and they acted as quickly as possible to try to determine where and how Infant was exposed to the drugs by searching both known locations from March 29th. (TT, pp. 23-69; R., pp. 23-69).

After hearing Agent Baird's testimony and arguments of counsel, Judge Gibbons took the matter under advisement over the lunch break. When court reconvened, Judge Gibbons indicated

he had thoroughly reviewed the case law submitted by Appellant and the State. He found that based on the totality of the circumstances, the four corners of the search warrants, the testimony and arguments presented, the search warrants sufficiently established probable cause, and denied Appellant's motion to suppress the evidence obtained pursuant to the warrants. Appellant then argued the April 17th search warrant was invalid because it was stale given the time between Infant's death and the search warrant, and Judge Gibbons denied that motion as well. (TT, pp. 69-71; R., pp. 69-71).

The State presented evidence regarding execution of the April 17th search warrant at Appellant's home, the items seized during the search and the analysis of the drugs found in Appellant's home. (TT, pp. 72-130, State's Exhibits 34 and 35; R., pp. 72-130, 492-493, 494-497). The State then called Investigator Dana Gatti of the York County Sheriff's Office Multi-Jurisdictional Drug Enforcement Unit, who was qualified as an expert in drug slang terminology. (TT, pp. 131-143; R., pp. 131-143). When the State started to ask Inv. Gatti about the terms used in certain text messages found on Appellant's cellphone, Appellant objected, arguing the messages were hearsay statements offered for the truth of the matter asserted. He contended the messages to Appellant's cellphone were from unidentified individuals who were not on trial, so they were not admissions by a party, and there was no evidence Appellant actually sent the messages from his cellphone.

The State responded that the messages were not offered for the truth of the matter asserted, i.e., that the declarants were actually trying to buy or sell the drugs referenced, but to show the meaning of terms used in the messages and give context to Appellant's responses, and there was ample evidence within the text messages and account records establishing the cellphone belonged to Appellant and he was in possession of it at the time of the messages. The State further argued

the messages from Appellant went to his intent to distribute hydrocodone and oxycodone, which did not have a statutory weight presumption. After hearing arguments, Judge Gibbons overruled the hearsay objection, stating: "I will give these statements the weight and credibility it (sic) deserves." (TT, pp. 143-151; R., pp. 143-151).

Appellant then argued the text messages were too remote from the date the drugs were seized from Appellant's home, and they constituted inadmissible propensity evidence under Rule 404(B), SCRE. Judge Gibbons again noted the matter was being tried non-jury, and as both the fact-finder and the judge of the law, he could hear everything, decide whether it was admissible, and if so, he would give it the weight and credibility it deserved, but his decision as to guilt or innocence would not be tainted by inadmissible evidence. (TT, pp. 152-156; R., pp. 152-156).

Inv. Gatti, who was not involved in the investigation regarding Appellant, testified about terms contained in text messages between Appellant and six individuals, and the meaning of those terms in the drug trade. These messages included references to "smoke," and "pine" (drug slang for marijuana), "blues" (drug slang for oxycodone, "whites" (drug slang for hydrocodone), "perkies" (drug slang for percocent/oxycodone), and "yaps" (drug slang for hydrocodone). One series of messages explicitly referenced hydrocodone by name. (TT, pp. 156-204, State's Exhibit 37; R., pp. 156-204).

After hearing extensive arguments, Judge Gibbons limited the admissible evidence to the text messages that related to the type of drugs found in Appellant's residence on April 17th, specifically marijuana, hydrocodone, and oxycodone. He further found the probative value of the admitted texts exceeded the prejudicial effect, and he would "give it the weight and credibility I believe it deserves." (TT, pp. 206-234. R., pp. 206-234).

After the State rested, Appellant moved for a directed verdict on all charges except the possession of cocaine charge, arguing there was no evidence Appellant possessed hydrocodone or oxycodone with intent to distribute it when the search warrant of his residence was executed on April 17th. Judge Gibbons denied the motion. After hearing closing arguments, Judge Gibbons took the matter under advisement, stating "at this point in time I just don't feel comfortable making an off-the-cuff decision since I'm not a jury," and "I have a lot of things to consider." (TT, pp. 258-281; R., pp. 258-281).

At a hearing on April 28, 2022, Judge Gibbons found Appellant guilty of possession with intent to distribute marijuana, possession with intent to distribute hydrocodone, and possession of cocaine. On the charge of possession with intent to distribute oxycodone, Judge Gibbons found Appellant guilty of the lesser included offense of possession of oxycodone. Judge Gibbons sentenced Appellant to two years' incarceration on the possession with intent to distribute marijuana conviction, seven years' incarceration on the possession with intent to distribute hydrocodone conviction, three years' incarceration on the possession of cocaine conviction, and two years' incarceration on the possession of oxycodone conviction. All the sentences were concurrent with credit for 393 days' time served. (April 28, 2022 Transcript, pp. 1-13, Sentencing Sheets; R., pp. 283-296, 506-513). This appeal followed.

STANDARD OF REVIEW

Validity of Search Warrant

Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis: the appellate court reviews the trial court's critical factual findings for any evidentiary support; but the ultimate legal conclusion is reviewed *de novo* as a question of law. State v. Frasier, 437 S.C. 625, 879 S.E.2d 762, 766 (2022). When reviewing a magistrate's decision to issue a search warrant, the appellate courts must consider the totality of the circumstances. State v. Jones, 342 S.C. 121, 536 S.E.2d 675, 678 (2000); *see also* State v. Dupree, 354 S.C. 676, 583 S.E.2d 437, 441 (Ct. App. 2003) ("An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed.").

Admission of Evidence

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87, 93 (2002); *see also* State v. Phillips, 430 S.C. 319, 844 S.E.2d 651, 662 (2020) (trial court's decision to admit or exclude evidence is reviewed by appellate court under a deferential standard for an abuse of discretion); Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) (same). Appellate courts review Rule 403 rulings pursuant to an abuse of discretion standard and give great deference to the trial court. Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197, 199 (2007). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should only be reversed in exceptional circumstances. Johnson v. Horry County. Solid Waste Auth., 389 S.C. 528, 698 S.E.2d 835, 838 (Ct. App. 2010).

ARGUMENT

I. Judge Gibbons properly determined there was sufficient information in the search warrant affidavit regarding the basis for searching Appellant's residence to support the magistrate's finding there was a fair probability that evidence of a crime may be located in the residence.

Appellant contends the trial court erred in denying Appellant's motion to suppress the evidence seized pursuant to the April 17th search warrant for Appellant's residence because the affidavit submitted to obtain the warrant did not set forth sufficient information for the magistrate to determine there was probable cause to believe evidence of a crime would be located at the residence.[3] Appellant's argument fails when the totality of the circumstances presented in the affidavit are considered.

The task of a magistrate when determining whether to issue a warrant is to make a practical, common sense decision as to whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. State v. Kinloch, 410 S.C. 612, 767 S.E.2d 153, 155 (2014); State v. Ostrowski, 435 S.C. 364, 867 SE.2d 269, 279 (Ct. App. 2021) (same) (citing State v. Dupree, 354 S.C. 676, 583 S.E.2d 437, 442 (Ct. App. 2003)); State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994) (same). The

[3]In support of this contention, Appellant argues the search warrant was insufficient under the South Carolina Constitution's enhanced right to privacy. While trial counsel did mention the state constitution "enhanced" right to privacy issue, almost in passing, he did not present any case law on the issue or argue how the "enhanced" right applied in this case separate from the Fourth Amendment protections. Judge Gibbons did not rule on the state constitution issue, and Appellant did not seek a ruling on that issue during trial, or file a post-trial motion to get a ruling on the issue. (TT, pp. 51, 63; R., pp. 51, 63). Therefore, the issue is not preserved for appellate review. *See* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

supporting affidavit must contain sufficient underlying facts and information for the magistrate to make a probable cause determination. State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990); State v. Philpot, 317 S.C. 458, 454 S.E.2d 905, 907 (Ct. App. 1995) (same).

The term "probable cause" does not mean absolute certainty, and in determining whether to issue a search warrant, "magistrates are concerned with probabilities and not certainties." State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572, 587–89 (Ct. App. 2005), *rev'd on other grounds*, 379 S.C. 17, 664 S.E.2d 480 (2008). Search warrant affidavits "are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion." *Id.*

The April 17th search warrant in this case described the property sought as "any and all evidence related to the death of [Infant] to include Fentanyl (a DEA Schedule II synthetic morphine substitute anesthetic/analgesic), any substances suspected to be Fentanyl, and any paraphernalia or items associated with the use of Fentanyl; state issued identification car and/or driver's license of any and all individuals at the residence; any and all cellphones belonging to (listed individuals identified by name and date of birth)." The affidavit stated, "information gained from this search is necessary to assist investigators in determining the cause and manner of death of [Infant], the individuals who were present at the time and leading up to her death, and the timeline of events surrounding her death."

When the search warrant was requested on April 17th, the investigators only knew that 1) Infant had high levels of fentanyl in her system at the time of her death, which they did not learn until April 15th; 2) Infant was in two known locations on the day of her death, one of which was Appellant's residence; and 3) there were multiple people with Infant over the course of the day she died. All that information came directly from Appellant and/or his mother. More exact

characteristics of evidence that might provide answers regarding where and how the nine-month-old Infant was exposed to the large amount of fentanyl found in her system were unknown to investigators at that time, and requiring a more detailed description would unreasonably thwart the investigation into Infant's death. *See* Fletcher, 609 S.E.2d at 589 (requiring a more detailed description of the exact characteristics of evidence of abusive behavior toward children in the home would unreasonably thwart the investigation into a child's death).

Since a nine-month-old baby could not obtain or ingest fentanyl on her own, there was ample reason to believe Infant was exposed to fentanyl at one of the two known locations by one of the people who interacted with her that day.[4] The search warrant was intended to obtain any evidence from the only two known locations that could help further the investigation into where and how Infant was exposed to fentanyl on the day she died. It did not seek evidence of any other crimes and was properly limited in scope.[5]

Based on the totality of the circumstances presented in the affidavit, there was a substantial basis for finding probable cause to search Appellant's residence, and subsequently search the cellphones seized pursuant to the April 17th search warrant. Judge Gibbons' findings and conclusions regarding the probable cause for the residence and cellphone search warrants were amply supported by the evidence and should be affirmed.

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[4]By all accounts, including his own statement, Appellant was the last person to see Infant at his mother's house before Appellant's mother found Infant unresponsive and not breathing at some point after Appellant left the house.

[5]Nothing in the search warrant implied Appellant was a drug dealer, but properly prescribed fentanyl could be present in his residence. Having that information would assist in the investigation of Infant's death.

II. Judge Gibbons properly admitted limited text messages found on Appellant's cellphone because the substance of the messages was circumstantial evidence of Appellant's intent to distribute the illegal substances found in his residence, and clearly stated he would give the evidence the weight and credibility he determined was appropriate.

Appellant asserts Judge Gibbons erred in admitting text messages found on Appellant's cellphone that referenced buying and selling of narcotics because the text messages "were inadmissible propensity evidence, were not proven by clear and convincing evidence, lacked any logical relevance, and any probative value was substantially outweighed by the danger of unfair prejudice," and were inadmissible hearsay. Appellant's laundry list of assertions ignores or misconstrues several essential facts as well as applicable case law.

Evidence of prior bad acts is not admissible to prove the crimes charged unless it tends to establish motive, intent, absence of mistake or accident, a common scheme or plan, or identity. State v. Gore, 299 S.C. 368, 384 S.E.2d 750, 751 (1989); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (same); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (same). Admission of prior bad acts regarding drugs requires "a logical relevance between the acts in questions and the purpose for introduction," and "[t]estimony relating to past drug distribution activities is admissible to establish the element of intent." State v. King, 349 S.C. 142, 561 S.E.2d 640, 645 (Ct. App. 2002) (internal citations omitted); *see also* State v. Wilson, 345 S.C.1, 545 S.E.2d 827, 830 (2001) (evidence of prior drug transaction is relevant on issue of intent when defendant is charged with possession of a controlled substance with intent to distribute) (*citing* Gore, 384 S.E.2d at 751 (evidence that defendant sold cocaine from his trailer twice one month earlier "tends to establish his intent regarding the cocaine in his possession at the time in question")).

Appellant accurately cites multiple cases involving the admissibility of prior bad act evidence, then makes the conclusory assertion the text messages at issue in this case were

inadmissible propensity evidence and lacked any logical relevance to the crimes for which Appellant was charged. This assertion ignores Judge Gibbons' express rulings regarding what portion of the text messages would be admitted and why.

During execution of the search warrant on Appellant's residence, investigators found oxycodone, hydrocodone, marijuana, and cocaine. Investigators also seized multiple cellphones, including one identified as belonging to Appellant, and extracted data from that cellphone pursuant to a subsequent search warrant.[6] Appellant was charged with possession with intent to distribute oxycodone, possession with intent to distribute hydrocodone, possession with intent to distribute marijuana and possession of cocaine.[7]

The text messages contained references to "smoke," "blues," "whites," "perkies," "yaps," "snow," and "pine." The State presented expert testimony regarding the meaning of those terms in drug lingo: "smoke" and "pine" are terms for marijuana; "blues" and "perkies" are terms for oxycodone (aka roxycodone); and "whites" and "yaps" are terms for hydrocodone. The expert testified the drug trade involves long term relationships for the buying and selling of drugs.[8] (TT, pp. 131-144, 156-173; R., pp. 131-144, 156-173). The State presented only the text messages

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[6]As counsel attempted during the trial, Appellant tries to subtly divorce himself from the text messages by saying they were coming from or going to "Appellant's cellphone," or "the person responding from Appellant's cellphone." Appellant ultimately stipulated at trial that the cellphone with the text messages at issue belonged to him. (TT, pp. 234-235; R. pp. 234-235). He does not contend on appeal that the cellphone did not belong to him, but just states there was no evidence he was actually holding it at the time the text messages were sent or received. With ownership of the cellphone not an issue, Appellant cites no cases to support his suggestion that evidence is required to show a defendant was actually holding the cellphone when incriminating messages were sent or received.

[7]Appellant's conviction for possession of cocaine was essentially conceded at trial during the directed verdict discussion and is not at issue in this appeal. (TT, p. 259; R., p. 259).

[8]Appellant asserts Inv. Gatti's testimony was "extensive." In reality, the State's direct and re-direct examination of Inv. Gatti was relatively short. (TT, pp. 156-173, 203-204; R., pp. 156-173, 203-204). By comparison, Inv. Gatti's cross-examination by Appellant's counsel was "extensive." (TT, pp. 174-203; R., pp. 174-203).

specifically referencing the type of drugs found in Appellant's residence on April 17th (hydrocodone, oxycodone and marijuana) as circumstantial evidence of Appellant's long involvement in buying and selling those types of drugs, which went to the issue of his intent to distribute the drugs found in his residence. (TT, pp. 150-151, 203-205, 217-223, 231-232; R., pp. 150-151, 203-205, 217-223, 231-232).

After hearing extensive arguments from Appellant and the State on Appellant's objections to the text message evidence, Judge Gibbons overruled the objections as to the limited portions of the messages that specifically referenced the type of drugs found in Appellant's residence, expressly finding there was a logical connection between the limited February and March 2017 text messages referencing marijuana, hydrocodone and oxycodone and the drugs found in Appellant's residence on April 17th.[9] As he had stated earlier, Judge Gibbons reiterated that he would give the evidence the credibility he believed it deserved and look at it when he weighed all the evidence. (TT, pp. 206-233; R., pp. 206-233).

Appellant's contention the text messages were irrelevant and unduly prejudicial because they occurred weeks before April 17th is unavailing. The February and March text messages were logically relevant to the pending charges because they showed a long standing drug transaction history related to buying and selling the type of drugs found in Appellant's residence on April 17th, and go directly to the issue of intent as to those drugs. The courts have consistently differentiated between inadmissible "propensity" evidence and evidence of intent in drug cases. *See* King, 561 S.E.2d at 645; Wilson, 545 S.E.2d at 830; Gore, 384 S.E.2d at 751. The evidence in this case was

[9]The CD entered as State's Exhibit 36 contains more of the text messages, but the State only submitted as evidence, and Judge Gibbons only allowed, the portions of the text messages presented during Inv. Gatti's testimony. (TT, pp. 156-173, 217-223, 231-232; R., pp. 156-173, 217-223, 231-232).

especially relevant because there is no statutory presumptive weight for intent to distribute hydrocodone or oxycodone, so the State had to establish intent as an element of the indicted offenses.

Appellant's reliance on Ostrowski is misplaced because it is distinguishable from the instant case.[10] In Ostrowski, methamphetamine was found in the pocket of a pair of men's pants located on a shelf in a room of the defendant's home, and the defendant was charged with trafficking more than 28 grams of methamphetamine. At trial, the State introduced text messages found on the defendant's cellphone that talked about the sale of "clear" as evidence identifying the defendant as the owner of the drugs found in his home, and as an alternate way to prove trafficking in addition to the statutory presumption based on weight. A law enforcement officer, who was not qualified as an expert on drug terminology, testified that "clear" was drug jargon for methamphetamine. 867 S.E.2d at 275-277.

The court of appeals reversed, finding the text messages were offered to identify the defendant as the owner of the drugs found in the pants pocket, which was "a definitional example of propensity evidence," and they were not necessary on the element of intent because that element was established by the statutory presumption based on weight. *Id.* at 283-286. The court further found the prejudice from the text messages outweighed their probative value because the statutory amount alone exposed the defendant to the trafficking charge, and the State failed to connect most of the messages to the drugs at issue in the indictments. *Id.* at 286-287.

Unlike Ostrowski, identity/ownership of the drugs found in Appellant's residence was not at issue, and there was no statutory presumption of intent based on the weight of the hydrocodone

[10]Judge Gibbons was particularly familiar with the facts and holding in Ostrowski because he was the trial judge who was reversed in that case, and he specifically found this case was distinguishable. (TT, pp. 141-144; R., pp. 141-144).

and oxycodone found in Appellant's residence. In the absence of a statutory presumption based on weight, the State had to show intent through other evidence, and the text messages admitted at trial went specifically to Appellant's long history of buying and selling hydrocodone and oxycodone. Thus, the evidence was directly and logically relevant to the crimes charged in the indictments and the prejudice to Appellant did not substantially outweigh the evidence's probative value.[11] *See* Rule 403, SCRE (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice).

Significantly, Appellant's assertion that the text message evidence should have been excluded because the prejudice to Appellant outweighed the evidence's probative value also ignores the important fact that this matter was a bench trial rather than a jury trial. Assessment of prejudice in the context of a bench trial presents "a near insurmountable burden for a defendant to prove prejudice" because a trial judge "is presumed" to separate admissible and inadmissible evidence during the mental process of adjudication even though the judge has heard both. State v. Inman, 395 S.C. 539, 720 S.E.2d 31, 45 (2011). "A trial judge's role in a bench trial is to admit all evidence and evaluate it in a non-jury setting." Brown v. Allstate Ins. Co., 344 S.C. 21, 542 S.E.2d 723, 726 (2001).

At every phase of the trial, Judge Gibbons indicated he would give any evidence presented the credibility and weight he believed it deserved. Both before the trial started and before hearing the text messages evidence, Judge Gibbons specifically stated he was both the fact finder and the judge of the law, his decision on guilt or innocence would not be tainted by inadmissible evidence,

[11]The weight of marijuana found in Appellant's residence was sufficient for the statutory presumption of possession with intent to distribute marijuana. The text messages referencing marijuana were minimal, and it is unlikely Judge Gibbons' finding of guilt as to the possession with intent to distribute marijuana charge was premised on those few references.

and if he determined the evidence was admissible, he would give it the weight and credibility it deserved in light of the legal arguments presented. (TT, pp. 8-10, 151-156, 232-234; R., pp. 8-10, 151-156, 232-234).

Judge Gibbons did exactly what he said he would do in considering the evidence as demonstrated by his verdict on the possession with intent to distribute oxycodone charge. He found Appellant guilty of the lesser included offense of possession of oxycodone, indicating he found the text messages referencing oxycodone either not credible or gave them little weight in his determination of guilt or innocence on the indicted charge. As the fact-finder and the judge of the law, Judge Gibbons is presumed to have properly considered the evidence presented in the course of adjudicating Appellant's case, even if some of the evidence would have been excluded in a jury trial.

The text messages admitted at trial were directly relevant to the issue of Appellant's intent to distribute the drugs found in his residence. Judge Gibbons properly considered the credibility and weight of the text messages in the course of determining Appellant's guilt or innocence of the indicted charges, and his rulings as to the evidence and Appellant's convictions should be affirmed.

CONCLUSION

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

Respectfully submitted,

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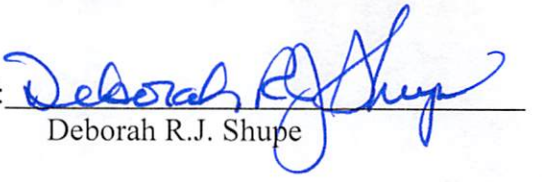
BY: 
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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
The Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2022-000579

The State, Respondent,

v.

Harold Gene White, III,

Appellant.

CERTIFICATE OF COUNSEL

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

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