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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge (On remand)
Alexander S. Macaulay, Circuit Court Judge (Trial)

Appellate Case No. 2023-001578

THE STATE, ...RESPONDENT

v.

JOHN ALEXANDER WEBB, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly denied Appellant's motion for a directed verdict where the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of violating the drug distribution law described in section 44-53-390(a)(4) of the South Carolina Code by omitting material information from records he was required to keep as a person registered to manufacture, distribute, or dispense controlled substances under Article 3, Chapter 53, Title 44 of the Code?

2. Whether the trial court properly denied Appellant's motion for a new trial where there was sufficient, competent evidence to sustain the jury's convictions of Appellant for violating the drug distribution law described in section 44-53-390(a)(4) of the South Carolina Code, including testimony that described the relevant record-keeping requirements set forth in Chapter 61-4 of the South Carolina Code of Regulations?

3. Whether Appellant's arguments that: (1) the trial court erred in failing to charge the jurors on the relevant laws and regulations that contain the requirements for record keeping, and (2) trial counsel was ineffective both for failing to request such jury instructions and for failing to object to the instructions that *were* given to the jury, are preserved for appellate review where they were neither raised to nor ruled upon by the trial court during trial? Even if preserved, in regard to the allegation of trial court error, whether the trial court properly charged the jury where the charge was substantially correct and adequately covered the law applicable to the case such that a reasonable juror would have understood the charge, and in regard to the allegations of ineffective assistance of counsel, whether such allegations are improperly raised in this direct appeal? Finally, whether any possible error in the jury charge was entirely harmless where there was overwhelming evidence of Appellant's guilt?

4. Whether Appellant's arguments that: (1) the trial court erred in failing to grant a new trial or directed verdict and instead granting a judgment in arrest of verdicts, and (2) trial counsel was ineffective for failing to object to the trial court's improper ruling, are preserved for appellate review where they were neither raised to nor ruled upon by the trial court during trial? Even if preserved, whether the trial court properly denied Appellant's motions for a directed verdict and for a new trial for the reasons addressed in Arguments I and II of this appeal and, therefore, his complaint is of no consequence? Furthermore, whether the allegations of ineffective assistance of counsel are not properly raised in this direct appeal?

5. Whether Appellant's arguments that: (1) the trial court erred in allowing the jury to hear testimony from a DHEC investigator that Appellant was *not* permitted to bootstrap compliance with the controlled substance record-keeping rules that provide he must keep required records and have them readily retrievable by "recreating" such records after-the-fact because this violated his due process rights, and (2) trial counsel was ineffective for failing to make a contemporaneous objection to the admission of this testimony, are preserved for appellate review where they were neither raised to nor ruled upon by the trial court during trial? Even if preserved, whether the testimony was properly allowed because it merely consisted of a description and interpretation of the existing statutory and regulatory mandates applicable to physicians registered to prescribe controlled substances in South Carolina? Furthermore, whether the allegation of ineffective assistance of counsel is improperly raised in this direct appeal? Finally, whether any possible error in admitting the testimony was entirely harmless where the trial court properly charged the jury on the statutory elements of the charged offense and there was overwhelming evidence of Appellant's guilt?

6. Whether Appellant's arguments that: (1) the trial court erred in failing to exclude testimony of his prior bad acts pursuant to Rules 403 and 404(b) of the SC Rules of Evidence, and (2) trial counsel was ineffective for failing to contemporaneously object to such testimony, are preserved for appellate review where they were neither raised to nor ruled upon by the trial court during trial? Even if preserved, whether the trial court properly allowed the testimony as part of the *res gestae* and because its probative value was not substantially outweighed by the danger of undue prejudice? Furthermore, whether the allegation of ineffective assistance of counsel is improperly raised in this direct appeal? Finally, whether any possible error in admitting the testimony was entirely harmless where it had no prejudicial effect and there was overwhelming evidence of Appellant's guilt?

STATEMENT OF THE CASE

John Alexander Webb (Appellant) was indicted at the June, 2017 term of the grand jury for Horry County for three counts of "violation of drug distribution law" (2017-GS-26-03144, -03145, & -03146). On April 22-23, 2019, Appellant proceeded to trial by jury. He was represented by Fran Humphries, Esquire, of the Horry County Bar. Respondent (the State) was represented by Assistant Solicitors George Henry Martin and Seth Oskin of the Fifteenth Circuit Solicitor's Office. (Tr.p.1). Appellant was found guilty as charged and was sentenced by the Honorable Alexander S. Macauley to three concurrent terms of one (1) year's imprisonment suspended upon the service of ninety (90) days' imprisonment and one (1) year of probation. (Indictments & Sentencing Sheets; Tr.p.237-p. 245).

On April 26, 2019, Appellant filed a written, post-trial "Motion for New Trial and/or Judgment in Arrest of Verdict." (April 25, 2019, Motion). On June 18, 2019, the trial court held a hearing on the post-trial motion in the Georgetown County Courthouse. Appellant was again represented by Mr. Humphries and the State was represented by Assistant Solicitors Mary-Ellen Walter and George Henry Martin. (June 18, 2019 Tr.p.1-p.3). In an order dated October 18, 2019, and filed October 25, 2019, Judge Macaulay granted Appellant's motion in arrest of judgment, ordered that the guilty verdicts be set aside, and ordered that verdicts of not guilty be entered as to Appellant. (October 18, 2019 Order). On November 15, 2019, the State filed a motion to reconsider and in an order dated December 20, 2019, Judge Macauley denied that motion. (November 15, 2019 Motion to Reconsider and December 20, 2019, Order Denying Motion to Reconsider). The State timely filed a notice of intent to appeal the order and in an unpublished opinion this Court reversed and remanded for consideration of Appellant's motion

for a new trial pursuant to Rule 220(b), SCACR. *State v. Webb*, Op. No. 2023-UP-059 (Ct. App. filed February 15, 2023).

On August 10, 2023, following remand, a hearing on Appellant's motion for a new trial was convened at the Horry County courthouse before the Honorable Benjamin H. Culbertson.[1] Appellant was represented by Lacey Thompson, Esquire, and Laura Hiller, Esquire, of the Horry County Bar. Respondent (the State) was represented by Assistant Solicitor Walter of the Fifteenth Circuit Solicitor's Office. (August 10, 2023 Tr.p.1-p.6). At the conclusion of the hearing, Judge Culbertson denied the motion. (August 10, 2023 Tr.p.26). The same date, the lower court issued a form order denying the motion that found: "Requiring the defendant to produce records mandated by State law is not burden shifting." (August 10, 2023 Order). On August 18, 2023, Appellant filed a "Motion for Re-Consideration." (August 18, 2023 Motion).

On September 21, 2023, a hearing on Appellant's motion for re-consideration was convened at the Horry County Court courthouse before Judge Culbertson. Appellant was again represented by Ms. Thompson and Ms. Hiller, and the State was represented by Assistant Solicitor Walter. (September 21, 2023 Tr.p.1). In a form order dated September 27, 2023, Judge Culbertson denied the motion. (September 27, 2023 Order). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Following jury selection, the trial court addressed pretrial motions from both parties. (Tr.p.24). First, the court denied the State's motion in limine seeking to introduce evidence that

[1] Between the issuance of the December 20, 2019 order and this Court's February 15, 2023 opinion reversing the trial court and remanding for a hearing on Appellant's motion for a new trial, the Honorable Alexander S. Macauley retired from the circuit bench. The Honorable Benjamin H. Culbertson assumed jurisdiction, considered, and ruled upon Appellant's motion.

Appellant prescribed several Schedule IV drugs to "Kristy S" beyond the single drug named in the body of indictment number 2017-GS-26-03145, Phentermine. (Tr.p.24-p.33). Next, the court began a *Jackson v. Denno* hearing to determine the admissibility of a recorded interview Appellant had given to an investigator from the South Carolina Department of Health and Environmental Control (DHEC), Derek Strickland, on February 14, 2017. After taking brief testimony from Strickland and several on-the-record discussions, the parties ultimately entered into a stipulation, agreeing the statements in the interview had been freely and voluntarily given without coercion and that a redacted version would be introduced into evidence during the State's case in chief and played for the jury. (Tr.p.33-p.48; p.51-p.56; p.81-p.83 & p.132-p.134). Interspersed with those discussions, the trial court began reviewing the statutes at issue in the case, considering jury charges, and asking the parties to put together proposed jury charges that would be considered at a charge conference toward the end of trial. (Tr.p.48-p.51; p.56, lines 6-9; p.96-p.98).

The trial court then heard Appellant's motion in limine seeking to exclude certain evidence "under the general category of bad acts." Appellant asked the court to exclude three things: (1) evidence about a pending Medical Board[2] investigation related to his prescribing practices as opposed to the criminal case, which was about his record-keeping practices; (2) evidence about his divorce – specifically any graphic or salacious allegations regarding improper sexual activity; and (3) evidence about a prior criminal charge that was dismissed. The State: (1) agreed not to introduce evidence of the prior criminal charge; (2) agreed to limit references to the pending Medical Board case to simply explaining that it was the reason the DHEC investigator began investigating Appellant's record-keeping practices for this case; and (3) argued the State should be allowed to reference the divorce proceedings in response to any attempt by Appellant

[2] The Board of Medical Examiners at the South Carolina Department of Labor, Licensing, and Regulation.

to blame his lack of record keeping on his wife for losing any such records in the divorce. Appellant *agreed* it would be admissible for Investigator Strickland to say why he initiated the criminal investigation and he agreed to allow references to the divorce case, so long as there was no mention of the allegations of sexual impropriety. The court granted the motion pursuant to the terms agreed upon by the parties. (Tr.p.56-p.61).

Finally, the trial court heard Appellant's motion in limine to prohibit the State from eliciting any testimony that attempted to describe the professional standards or rules for record keeping by physicians licensed and registered to prescribe controlled substances in South Carolina. He argued that any such testimony would be equivalent to allowing expert testimony on the ultimate issue, which he believed would be inappropriate in this case. The State responded that testimony about Appellant's residency program and the requirements of that program was relevant and admissible to show Appellant's knowledge and intent, elements the State would be required to prove under the statute at issue. (Tr.p.61-p.80). After a recess, the parties continued to argue their respective positions, with Appellant continuing to argue that testimony about rules and standards would be inappropriate in lieu of direct evidence of DHEC regulations, and the State arguing that the statutory scheme itself is so intertwined with both the regulation of practitioners and the policy and purpose of those statutes that testimony about standards, rules of the residency program, and regulations should be allowed. (Tr.p.86-p.96). Ultimately, the trial court denied Appellant's motion to limit the State's evidence in any wholesale fashion, and instead ruled that it would allow the parties to argue whatever they wanted as to whether Appellant was required to follow certain rules or not. Judge Macauley said he would rule on any specific objections to particular testimony being offered in the context of which it was offered during the trial. (Tr.p.96, lines 13-20).

The jury was then sworn, and the trial court gave brief preliminary jury instructions. (Tr.p.99-p.105). The parties proceeded to make opening statements. (Tr.p.105-p.111). During his open, Appellant acknowledged the jury would hear "from a number of witnesses about how things should have been done, the way things are usually done," but urged them to remember that the only thing he was charged with was being unable to produce records upon request. (Tr.p.110, lines 19-22).

The State then began calling witnesses to testify about the case. First, Sheridan Spoon, the Board Administrator for the Medical Board at the South Carolina Department of Labor, Licensing, and Regulation (LLR) took the stand. He described the three primary functions of the Medical Board, which included licensing doctors and determining the eligibility and qualifications for the various categories of medical license that are created by law. Spoon explained the different categories of medical licenses, including the "limited license" which was issued to Appellant when he was a doctor in his residency program. He testified that when checking licensing requirements for a limited license, the application is not complete without a copy of the applicant's contract with a residency program. Spoon testified that a medical professional is required by the Board to keep records, opining that "[r]ecord keeping is paramount." He also described "moonlighting" and restrictions on the practice for doctors holding a limited license under a residency program. Spoon noted that all the rules and restrictions are in place to protect the public. (Tr.p.112-p.118).

Next, the State called Dr. Victor Collier, the Internal Medicine Program Director at Grand Strand Medical Center (GSMC). He explained he oversees the education of residents assigned to his facility and is familiar with the process by which physicians apply for a medical license. Dr. Collier then referred to a "Graduate Medical Education Training Agreement" which

was used in association with licensing. He explained it is an agreement between the hospital and the resident that goes over the policies and procedures of the residency program and would be signed by the resident and the CEO of the hospital. Dr. Collier testified he was familiar with the record-keeping requirements within the agreement, including a clause that says physicians are required to maintain medical records for all their patients. He said the agreement also prohibited moonlighting and testified that either in the agreement or a separate policy, residents are advised they are not permitted to prescribe to family members. (Tr.p.123-p.126).

The State then called Billy Davis, an employee for a subsidiary of Hospital Corporation of America (HCA). He explained HCA is a health care company that pilots operations in hospitals, outpatient care centers, urgent care centers, and graduate medical education programs nationwide, including at GSMC. Davis testified he served as the practice manager and ethics and compliance officer for Grand Strand Primary Care (GSPC), the graduate medical education resident clinic for GSMC, and that Appellant was a resident when Davis worked with GSMC. He noted he was responsible for electronic medical records and served as the electronic health records custodian. Davis explained these medical records essentially consisted of patient files and that each such file told the story of an individual patient including medical history, diagnoses, and medications. He said he was familiar with the restrictions placed on medical residents writing prescriptions, and that residents are only allowed to write them to patients that are seen in the clinic (GSPC) or those that are in the hospital (GSMC) under supervision. Davis testified he searched for the names of the three prescription recipients in this case and was not able to locate any corresponding medical records. (Tr.p.127-p.131).

Next, the stipulation regarding Appellant's audio recorded interview with DHEC investigator Strickland was read into the record and the redacted recording was admitted into

evidence and played for the jury. (Tr.p.132-p.134; State's Exhibit #1). In that interview, Strickland explained to Appellant that the investigation started when, during a review by the Medical Board, they discovered questionable names associated with certain prescriptions Appellant had written. Appellant acknowledged he only worked at GSMC during the time period at issue, and admitted he was not allowed to moonlight. Strickland then explained the purpose of the interview was to give Appellant the opportunity to produce documents or records of any prescriptions Appellant wrote outside of his practice with GSMC or GSPC. (State's Exhibit #1, 0:31-1:44).

Appellant claimed he established a patient relationship with every person he wrote a prescription for and always documented this with notes either in his notebook or iPhone; however, he claimed his notebook was not accessible due to his divorce and his iPhone was not available because it had been destroyed. He insisted *he created these records because that was how he was trained by the residency director.* (State's Exhibit #1, 1:45-3:20) (emphasis added). Strikland asked if Appellant could provide the required records. Appellant said he could not produce records the day of the interview but could try to find them. (State's Exhibit #1, 3:20-4:20). He swore he was being honest, saying he always kept documentation and it was all kept in his former house. Appellant agreed he had written prescriptions for people who were not patients at the clinic and did not have documentation of this with him, but claimed he had it elsewhere. (State's Exhibit #1, 4:21-5:49).

Appellant continued to insist he wrote everything down. He acknowledged he had written prescriptions for his ex-wife, her mom, and possibly others outside of those who were patients at the clinic; however, he said he was taught this was fine if he established the patient relationship *and documented it.* (State's Exhibit #1, 5:50-9:15) (emphasis added). Appellant claimed he did a

medical history on each person, took blood pressure, and talked about side effects of medication. He said he did have documentation and could look for his notebooks, but that the notes he kept on his phone could not be recovered. (State's Exhibit #1, 9:16-13:34). Strickland then asked Appellant about specific people he had written prescriptions for outside of the clinic and Appellant admitted writing them for the three individuals named in this case. (State's Exhibit #1, 13:34-17-07). When Appellant again said he had records, Strickland offered to drive with him to his home in Hartsville to look. Strickland commented that if Appellant could not produce the records, it was as if they did not exist and *Appellant could not make them up.* Appellant said he had the records but may not be able to get them all. He said if they were not in his current house in Hartsville, they might be in the former marital home in Conway. Appellant claimed that if Strickland simply asked the patients in question, they could confirm he established the doctor-patient relationship and took notes. Strickland commented that the burden of producing the required records was on Appellant, but he would help Appellant look. Appellant said the records could be in notebooks, or looseleaf paper, or various locations in the office in his house. (State's Exhibit #1, 17:28-24:00).

Appellant then started asking questions about what would happen if his ex-wife threw away the records. Strickland said if the records could not be found, it would be on Appellant; however, he would not charge Appellant with anything without giving him a fair opportunity to produce the records. (State's Exhibit #1, 24:00-25:16). At the conclusion of the interview, Strickland noted he would be upset if they drove all the way to Hartsville and there were no records. Appellant said there was a single bag full of documents in his office in Hartsville, documents provided to him by his wife's attorney when he was not allowed to retrieve them himself from the former marital home. He again implored Strickland to talk to his ex-wife, her

coworker, and his stepdaughter about the prescriptions in question. (State's Exhibit #1, 25:17-end).

After the recorded interview was played, the State called Dr. Connie Williams, the Director of Pharmacy at GSMC, to the stand. She explained she was responsible for all medications at the hospital as well as all policies and procedures and making sure she had competent staff. Dr. Williams testified the hospital pharmacy is inpatient only and she described the electronic record -keeping process for physicians writing prescriptions. She testified the hospital keeps records of all prescriptions ordered, filled, and distributed within the hospital and that to the best of her knowledge there is no way to alter or delete those records. Dr. Williams said she searched the records and did not find any prescriptions for the three relevant names during the relevant time period. (Tr.p.138-p.143). Next, the State called the three pharmacists from local pharmacies who filled the three prescriptions at issue in this case. Leonard Cummings confirmed that while working at Walgreens he filled a prescription for Triazolam on October 28, 2016, which was called in on October 27, 2016, by Appellant. (Tr.p.144-p.147). Kate Birringer confirmed that while she was working at CVS, a prescription for Phentermine was filled on July 8, 2016, which was called in on July 7, 2016, by Appellant. (Tr.p.150-p.154). Karissa Proctor confirmed that while working at K-mart she filled a prescription for Phentermine on July 5, 2016, which was called in the same day by Appellant. (Tr.p.157-p.160).

Finally, the State called DHEC Investigator Derek Strickland to the stand. He explained he worked in the Bureau of Drug Control at DHEC, which is a law enforcement group that employs pharmacists to enforce and regulate the controlled substance laws in South Carolina. Strickland said he is a pharmacist himself, and that he was involved in the criminal investigation and arrest of Appellant in this case. He testified he began his investigation when he was notified

by an investigator with the Medical Board that they had noticed some questionable controlled substance prescribing for immediate family members. Strickland explained that controlled substances are classified by the US Drug Enforcement Agency (DEA) and DHEC as substances having a high potential for abuse or dependency. (Tr.p.162-p.163).

Strickland then proceeded to offer detailed testimony about DHEC rules and regulations concerning medical practitioners who prescribe controlled substances to patients, particularly about record-keeping regulations. While not citing regulations by number, he testified to some of their specific requirements. Strickland said the practitioner must have a valid SC medical license, a federal DEA number, and Bureau of Drug Control permit to order prescriptions. He testified that for a practitioner to prescribe a controlled substance, a valid patient/practitioner relationship was required, and the substance could only be issued for a legitimate purpose. Strickland emphasized that *documentation must take place*, including an examination of the patient, which must be documented, and that the physician must be available for follow-up care. He said that while DHEC does not have any specific guidelines for how records must be kept, *information about the prescription must be documented.* Strickland explained a physician could keep a simple memorandum as long as the records were readily available and, upon request, could be provided to an inspector. He clarified that *per DHEC regulations, documentation must be kept and maintained by the physician who writes the prescription and must be readily available.* He said it is the responsibility of the registrant to maintain the records. Strickland explained that both pharmacists and physicians are "registrants" and both are required to keep records under the regulations. Strickland went on to explain that when a registrant omits information from his documentation, or fails to document the prescription at all, it is against the

law. He said these records are required in the interest of patient safety. (Tr.p.163, line 24-p.166, line 20).

Strickland next offered testimony about Phentermine and Triazolam, the two controlled substances at issue in this case, explaining potential side effects as well as dangers of abuse and dependency. He said that during his investigation he found nineteen prescriptions where Appellant failed to document a valid patient/practitioner relationship but that only the three in this criminal case were charged. Strickland then provided details of the three prescriptions at issue, including the controlled substance, the recipient, the date, and the fact that they were prescribed by Appellant. Strickland tried to find documentation of a valid patient/practitioner relationship, but was unable to find any records with GSMC or GSPC. (Tr.p.166-p.173).

Finally, Strickland testified about his actions following his recorded interview with Appellant. He testified he drove two hours to Hartsville where Appellant was unable to provide the requested records. Strickland noted they did find some documentation, which showed Appellant knew he should keep records; however, there were no records regarding the three prescriptions in this case. He testified that based on the interview with Appellant and his claim that documents may have been lost or destroyed by his ex-wife, Strickland checked police reports from Darlington County, Hartsville, Conway, and Horry County and did not discover any reports filed under Appellant's name alleging missing or stolen medical records. Strickland also checked Appellant's final divorce order and found no reference to missing or destroyed documents. Strickland concluded his testimony by explaining he gave Appellant approximately one month after the interview to provide the requested records and Appellant was never able to do so. (Tr.p.173-p.177; p.182-p.183). On cross-examination, Strickland again noted that records must be readily retrievable, which he said is defined as in one hour or less. (Tr.p.181-p.182).

After Strickland left the stand, the State rested and Appellant made a motion for a directed verdict. Appellant referenced language from section 44-53-390, the charging statute, and section 44-53-340, which he agreed was essentially incorporated into section 44-53-390, but claimed there was a fatal failure in the State's evidence that should result in a directed verdict of not guilty. (Tr.p.184-p.186). Specifically, Appellant argued:

> The record is also void of any reference, direct reference to any DHEC regulation that discusses what records are to be maintained or what record keeping mechanism must be used in relation to the prescribing of medications. There is no testimony in this record that specifically relates to a statute under article 3. There is no testimony in this record specifically relating to a DHEC regulation. I will tell the Court there is a DHEC regulation, it's 602. It exists. But there's been no testimony as to regulation 6002 [sic], none.

(Tr.p.185, lines 5-14). The State responded by arguing that Strickland's testimony about what a practitioner is required to do came directly from DHEC regulation 602, and that his testimony and that of the other witnesses provided sufficient evidence that Appellant failed to keep required records so that the case should go to the jury. (Tr.p.186-p.189) After hearing further from both parties, the trial court denied the motion for a directed verdict, finding: "there is sufficient evidence to go forward tending to prove the allegations of the indictment." (Tr.p.189).

Next, Appellant advised the trial court that he did not wish to testify and the trial court questioned Appellant about his decision. Following a brief discussion about jury charges, Appellant rested and renewed his motion for a directed verdict. The trial judge stated, "Very good," and recognized the State for its closing argument. (Tr.p.190-p.197). The parties then made closing arguments and the trial court began charging the jury on the law. (Tr.p.197-p.213).

The trial judge charged the jury on Appellant's right not to testify, the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, direct evidence, circumstantial evidence, credibility of witnesses, criminal intent, and the elements of

the crimes. As to the elements of the crimes, the trial court charged sections 44-53-390(a)(4) and 44-53-340 of the Code but did not charge any language from DHEC regulations. Neither party took exception to the jury charge or verdict form. (Tr.p.213-p.224). The jury deliberated for twenty-seven minutes before finding Appellant guilty of all three counts of violation of drug distribution law. Appellant renewed his motions, which the trial court noted for the record and then gave Appellant ten days to prepare in writing. (Tr.p.226-p.229). Judge Macauley sentenced Appellant to three concurrent terms of one (1) year's imprisonment suspended upon the service of ninety (90) days' imprisonment and one (1) year of probation. (Indictments & Sentencing Sheets; Tr.p.230-p. 245).

Appellant subsequently filed a written, post-trial "Motion for New Trial and/or Judgment in Arrest of Verdict" asking the trial court to set aside the verdicts of the jury and enter verdicts of not guilty, or in the alternative to grant him a new trial. (April 25, 2019 Motion). At a June 18, 2019, hearing on that motion, Appellant continued to advance his argument that the State had failed to offer sufficient evidence to convict under the relevant statutes. (June 18, 2019 Tr.p.4-p.5). The parties and the court then engaged in a lengthy discussion about the evidence presented, whether Strickland's comments about a practitioner having the burden of producing required records might constitute improper burden shifting, and why the State did not call the recipients of the three prescriptions to the stand. (June 18, 2019 Tr.p.5-p.47). At the conclusion of the hearing the trial court asked for proposed orders and in an order dated October 18, 2019, and filed October 25, 2019, Judge Macaulay granted Appellant's motion in arrest of judgment. (October 18, 2019 Order). The State appealed that order and in an unpublished opinion this Court reversed and remanded for consideration of Appellant's motion for a new trial. *State v. Webb*, Op. No. 2023-UP-059 (Ct. App. filed February 15, 2023).

On August 10, 2023, following remand, the Honorable Benjamin Culbertson held a hearing on Appellant's motion for a new trial. At that hearing, Appellant raised two grounds in support of his request for a new trial. First, he argued his rights to a fair trial were violated by the "burden shifting" that was allowed at trial when Strickland opined that a practitioner has the burden of producing required records under the law and DHEC regulations. He acknowledged no objections were raised at trial to those comments but argued this failure to object constitutes ineffective assistance of counsel, which further shows he did not get a fair trial. Second, Appellant rehashed the argument presented at trial in support of his request for a directed verdict, claiming the State's failure to put copies of DHEC regulations into evidence left the record void of evidence to support his convictions. (August 10, 2023 Tr.p.6-p.18). At the conclusion of the hearing, Judge Culbertson denied the motion. (Tr.p.26). The same date, the lower court issued a form order denying the motion that found: "Requiring the defendant to produce records mandated by State law is not burden shifting." (August 10, 2023, Order). On August 18, 2023, Appellant filed a "Motion for Re-Consideration" and on September 21, 2023, Judge Culbertson held a hearing on that motion. (September 21, 2023 Tr.p.1). At that hearing, Appellant claimed for the first time that he now had possession of the medical records that are required by law, because he had "recreated" those missing records under HIPPA guidelines. He then reiterated his arguments about burden shifting and what he believed were violations of his right to a fair trial. Appellant also argued the State failed to present sufficient evidence by not introducing the DHEC regulations and the trial court erred in failing to charge the jury with those specific DHEC regulations even if not introduced by the State. (September 21, 2023 Tr.p.2-p.19). In a form order dated September 27, 2023, Judge Culbertson denied the motion.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); *State v. Holcomb*, 426 S.C. 557, 562, 827 S.E.2d 367, 370 (Ct. App. 2019). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Brown*, 402 S.C. 119, 124, 740 S.E.2d 493, 495 (2013); *State v. Baccus*, 367 S.C. 41,48, 625 S.E.2d. 216, 220 (2006). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. *Wilson,* 345 S.C. at 6, 545 S.E.2d at 829. 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. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

ARGUMENT

I.

The trial court properly denied Appellant's motion for a directed verdict because the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of violating the drug distribution law described in section 44-53-390(a)(4) of the South Carolina Code by omitting material information from records he was required to keep as a person registered to manufacture, distribute, or dispense controlled substances under Article 3, Chapter 53, Title 44 of the Code.

Appellant argues the trial court erred in failing to grant a directed verdict on all three indictments because the State failed to directly reference any statute contained within Article 3, any rule issued by DHEC, or any federal law setting forth record-keeping requirements. He contends "it would have been impossible for the jurors to determine that [he] violated the record-keeping requirements" in the statutes "when the State at no point instructed the jurors as to what

record keeping requirements were mandated by the relevant laws and regulations." (Brief of Appellant, p.6). Appellant argues that when viewed in the light most favorable to the State, there was no substantial evidence introduced that reasonably tends to prove his guilt or from which his guilt may be fairly and logically deduced, and therefore, he was entitled to a directed verdict. (Brief of Appellant, p. 11). In support of this argument Appellant contends that because the State failed to introduce evidence of record-keeping requirements and instead introduced "irrelevant information about the terms of [his] residency contract," the jury improperly convicted him of violating the terms of his residency contract rather than the law. (Brief of Appellant, p.12-p.16). As further support Appellant contends the trial court's post-trial "Order Granting Motion in Arrest of Verdicts," which was subsequently reversed by this Court, was a recognition by the trial court itself that it was error not to initially grant a directed verdict and was an attempt to do so post-trial.

The State submits each of these arguments is either without merit or not preserved for appellate review. The trial court properly denied Appellant's motion for a directed verdict because the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of each element of violating the drug distribution law described in section 44-53-390(a)(4) of the Code. The evidence, viewed in a light most favorable to the State, showed that Appellant: (1) knowingly or intentionally, (2) omitted material information; (3) from records he, as a person registered to manufacture, distribute, or dispense controlled substances under Article 3, Chapter 53, Title 44 of the Code, was required to keep in conformance with rules issued by DHEC. Taken together, the evidence presented at trial supports the jury's conclusion that Appellant was guilty of committing three counts of violating the drug distribution laws of South Carolina. Thus, Appellant's convictions should be affirmed.

Standard of Review

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. *State v. Phillips*, 416 S.C. 184, 192, 785 S.E.2d 448, 452 (2016); *State v. Condrey*, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). When the evidence presented merely raises a suspicion of the accused's guilt, the trial court should not refuse to grant the directed verdict motion. *Phillips*, 416 S.C. at 192, 785 S.E.2d at 452; *State v. Cherry,* 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). However, the trial court must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *Phillips*, 416 S.C. at 192-93, 785 S.E.2d at 452 (*quoting State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Thus, when reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. *Brown* at 124, 740 S.E.2d at 395; *Holcomb* at 562, 827 S.E.2d at 370. The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *Brown* at 124, 740 S.E.2d at 395. However, if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *Id.* The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016); *see also State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

Analysis

In South Carolina:

> (a) *It is unlawful for a person knowingly or intentionally to*:
>
> . . . .
>
> (4) furnish false or fraudulent material information in, or *omit any material information from*, any application, report, or other document required to be kept or filed under this article, or *any record required to be kept by this article*.

S.C. Code Ann. § 44-53-390 (2016) (emphasis added). Article 3, Chapter 53, Title 44, which is titled "Narcotics and Controlled Substances," provides in part that: "Persons registered to manufacture, distribute, or dispense controlled substances under this article *shall keep records* and maintain inventories *in conformance with* the record-keeping and inventory requirements of Federal law and with *any additional rules the Department issues*." S.C. Code Ann. § 44-53-110(11) (2016) (emphasis added). "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, *including the prescribing*, administering, packaging, labeling, or compounding necessary to prepare the substance for the delivery; "Department" means the State Department of Health and Environmental Control. S.C. Code Ann. § 44-53-110(11) & -110(15) (2016) (emphasis added).

DHEC has promulgated extensive regulations concerning narcotics and controlled substances in South Carolina. *Controlled Substances*, S.C. Code Ann. Regs. 61-4. (2011 & Supp. 2016). When describing the purpose and scope, DHEC explains the regulation "implements the provisions of Section 44-53-10, et seq., of the S.C. Code of Laws, 1976, as amended" and "establishes the requirements necessary to ensure the appropriate security, authority and accountability with regard to the possession, manufacture, dispensing, administering, use and distribution of controlled substances in South Carolina." S.C. Code Ann. Regs. 61-4.101(Supp.

2016). The regulation is divided into "Parts" covering topics such as "Definitions" [Part 100], "Records and Reports of Registrants" (Part 600), "Continuing Records" (Part 800), "Prescriptions" (Part 1000), "Controlled Substances Listed in Schedules III, IV and V" (Part 1200), and Handling and Administering Controlled Substances in Hospitals" (Part 1900).

Pursuant to the parts of the regulation, a "Prescription" is "[a]n order for medication which is dispensed to or for an ultimate user . . . ." S.C. Code Ann. Regs. 61-4.102(y) (Supp. 2016). A "Registrant" is "[a]ny person who is registered pursuant to the Act"; an "Individual Practitioner" is "[a] physician . . . or other individual licensed, registered, or otherwise permitted by the United States or the State of South Carolina . . . to dispense a controlled substance in the regular course of professional practice"; and a "Dispenser" is: "[a]n individual practitioner . . . who dispenses a controlled substance." S.C. Code Ann. Regs. 61-4.102(cc); -4.102(q); & -4.102(l) (Supp. 2016). "Readily Retrievable" means: "a registrant is able to produce controlled substances records in a timely manner (usually within one hour) and that such records are segregated, sorted, or filed in such a manner that the controlled substances information may be derived from the material within a reasonable time (usually within a few hours) by an inspector." S.C. Code Ann. Regs. 61-4.102(aa) (Supp. 2016).

The regulation provides that every person who prescribes any controlled substance is required to register, S.C. Code Ann. Regs. 61-4.106 (Supp. 2016), and that each registrant "shall maintain the records . . . required by this Part, except as exempted by this Section." S.C. Code Ann. Regs. 61-4.602(a) (Supp. 2016). Part 600 then provides that: "A registered individual practitioner is required to maintain a readily retrievable record, separate from patient charts, or all controlled substances acquired, dispensed . . . distributed, or otherwise disposed of by the practitioner . . . ." S.C. Code Ann. Regs. 61-4.602(c) (Supp. 2016). It further provides that:

"Every inventory and other record required to be kept under this Part shall be kept by the registrant and be available, for at least two years from the date of such inventory or record, for inspecting and copying by authorized employees of the Bureau of Drug Control." S.C. Code Ann. Regs. 61-4.603 (Supp. 2016). In regard to "Continuing Records," Part 800 provides that: "On and after June 17, 1971 every registrant required to keep records pursuant to Section 602 shall maintain on a current basis a complete and accurate record of each such substance manufactured, imported, received, sold, delivered, exported, or otherwise disposed of by him or her . . . ." S.C. Code Ann. Regs. 61-4.801(a) (Supp. 2016). Finally, Part 1200 provides: "Prior to the issuance of a prescription for controlled substances listed in Schedule III, IV, or V the prescribing practitioner shall have a valid practitioner-patient relationship established with the recipient of the prescription . . . ." S.C. Code Ann. Regs. 61-4.1204 (Supp. 2016). It also explains that: "A practitioner cannot usually acquire a valid patient-practitioner relationship with himself or herself, now [sic] with a member of his or her immediate family, due to the likelihood of the loss or vitiation of the objectivity required in making the necessary medical decisions in order to properly prescribe or dispense controlled substances." S.C. Code Ann. Regs. 61-4.1204 (Supp. 2016).

Therefore, to withstand Appellant's directed verdict motion in the trial of this case, the State was required to produce evidence that Appellant:

> (1) knowingly or intentionally;
>
> (2) omitted material information;
>
> (3) from records he was required to keep *pursuant to Article 3*, Chapter 53, Title 44 of the South Carolina Code.

S.C. Code Ann. § 44-53-390(a)(4) (emphasis added). Article 3 required that Appellant keep records in conformance with Federal law and *any additional rules* issued by DHEC. S.C. Code

Ann. § 44-53-340 (2016) (emphasis added). As set forth above, those additional rules provided that, as a registered individual practitioner:

> (a) Appellant was required to maintain a *readily retrievable* record, separate from patient charts, of all controlled substances he prescribed;
>
> (b) Appellant was required to keep those records for at least two years from the date of the prescription; and
>
> (c) Appellant was required to maintain, on a current basis, a complete and accurate record of each substance he prescribed.

S.C. Code Ann. Regs. 61-4.602(c), -4.603, & -4.801(a) (Supp. 2016).

As to the **third *statutory* element**—the one Appellant directly challenges on appeal by claiming the State failed to introduce *any* evidence of record-keeping requirements—there is abundant evidence that Appellant's omission was indeed "from records he was required to keep" pursuant to Article 3, as a person registered to prescribe controlled substances in South Carolina. Sheridan Spoon, the Administrator for the Medical Board, testified Appellant's application for a limited medical license from the Medical Board would *not* have been considered complete without a copy of his contract with a residency program—a contract that includes rules and restrictions that the jury later learned mirror the DHEC regulations described by Investigator Strickland. He noted that medical professionals are *required to keep records*, said "[r]ecord keeping is paramount," and said the restrictions on issuing prescriptions are intended to protect the public. (Tr.p.112-p.118).

Dr. Collier, the Internal Medicine Program Director at GSMC testified he was familiar with the process by which physicians apply for a medical license and referred to a "Graduate Medical Education Training Agreement" used in association with licensing, which is an agreement (contract) between the hospital and the resident that goes over the policies and procedures of the residency program. Dr. Collier testified he was familiar with the *record-*

keeping requirements within the agreement, including a clause that says *physicians are required to maintain medical records for all their patients*. He noted that either in the agreement or a separate policy, residents are advised they are not permitted to prescribe to family members. (Tr.p.123-p.126). Billy Davis, an employee with Hospital Corporation of America and GSMC, testified he was familiar with the restrictions placed on medical residents who write prescriptions, and that residents are only allowed to write them to patients that are seen in the clinic or those that are in the hospital under supervision. Davis testified he searched for the names of the three prescription recipients in this case and was not able to locate any corresponding medical records at GSMC or GSPC. (Tr.p.127-p.131).

The jury then heard Appellant's audio recorded interview, which started with DHEC investigator Strickland explaining the purpose of the interview was to give Appellant the opportunity to produce documents or records of any prescriptions Appellant wrote outside of his practice with GSMC or GSPC. During that interview, Appellant *never disputed* the fact that he had an obligation to keep and maintain prescription records. Instead, he proceeded to offer various explanations for why he may be unable to meet that obligation. (Tr.p.132-p.134; State's Exhibit #1). Appellant claimed he established a doctor-patient relationship with every person he wrote a prescription for and always documented this with notes either in his notebook or iPhone; however, he claimed his notebook was not accessible due to his divorce and his iPhone was not available because it had been destroyed. He insisted he created these records *because that was how he was trained by the residency director*—thereby offering direct evidence both that the prescriptions records were records he was required to create, keep, and maintain, and that he knew these were record-keeping requirements applicable to him. (State's Exhibit #1, 1:45-3:20). Appellant also claimed he was taught it was fine to write prescriptions for individuals outside of

those who were patients at the clinic as long as he established the patient relationship *and documented it*—again providing direct evidence Appellant knew prescription records were records he was required to keep. (State's Exhibit #1, 5:50-9:15). Appellant specifically admitted authorizing the prescriptions for the three individuals named in this case; however, even after searching at his house in Hartsville and being given a month to continue looking, he was unable to locate or produce any such purported records related to those prescriptions. (State's Exhibit #1, 13:34-end).

After the jury listened to Appellant's recorded interview, Dr. Williams testified she searched the GSMC records and did not find any prescriptions for the three relevant names during the relevant time period. (Tr.p.138-p.143). DHEC Investigator Strickland then offered *detailed testimony about DHEC rules and regulations* concerning medical practitioners who prescribe controlled substances to patients, *particularly record-keeping regulations*. While not citing regulations by number, he testified to many specific requirements. Strickland said the practitioner must have a *valid SC medical license*, a federal DEA number, and a Bureau of Drug Control permit to order prescriptions. He testified that for a practitioner to prescribe a controlled substance, a *valid patient/practitioner relationship was required*, and the substance could only be *issued for a legitimate purpose*. Strickland emphasized that *documentation must take place*, including an examination of the patient, which must be documented, and that the physician must be available for follow-up care. He said that while DHEC does not have any specific guidelines for *how* records must be kept, *information about the prescription must be documented.* Strickland explained a physician could keep a simple memorandum as long as the records were readily available and, upon request, could be provided to an inspector. He testified that *per DHEC regulations*, documentation must be kept and maintained by the physician who writes the

prescription and must be *readily available/retrievable*. He said it is *the responsibility of the registrant to maintain the records*. Strickland explained that both pharmacists and physicians are "registrants," and both are *required to keep records under the regulations*. Strickland went on to explain that *when a registrant omits information from his documentation*, or *fails to document the prescription at all*, it is against the law. He said these records are required in the *interest of patient safety*. (Tr.p.163, line 24-p.166, line 20; p.181, line 18-p.182, line 2). Strickland testified that when he went with Appellant to Hartsville, they did find some documentation, which *showed Appellant knew he should keep records*; however, there were no records regarding the three prescriptions in this case. Strickland concluded his testimony by explaining he gave Appellant approximately one month after the interview to provide the requested records and Appellant was never able to do so. (Tr.p.173-p.177; p.182-p.183).

The State submits the testimony offered at trial combined with Appellant's recorded interview provided more than sufficient evidence to submit to the jury the question of whether Appellant's omission was from "records he was required to keep" under Article 3 and DHEC regulations. Contrary to Appellant's contentions, the State introduced testimonial evidence that directly referenced the requirements that appear in the relevant regulations issued by DHEC. The State also offered testimonial evidence that referenced the record-keeping requirements of Appellant's residency contract, which followed many of those DHEC regulations.

As to the **second *statutory* element**, there is ample direct and substantial circumstantial evidence that Appellant "omitted material information" from his records, by either not creating those records in the first place or by failing to keep or maintain them sufficiently for the material information in those records to be "readily retrievable." Sheridan Spoon testified that a medical professional is required by the Medical Board to keep records, opining that "[r]ecord keeping is

paramount." (Tr.p.112-p.118). Dr. Collier testified he was familiar with the record-keeping requirements within the residency agreement executed by Appellant, including a clause that says physicians are required to maintain medical records for all their patients. (Tr.p.123-p.126). Billy Davis testified that medical records consisted of patient files and that each such file told the story of an individual patient including medical history, diagnoses, and medications. (Tr.p.127-p.131).

In his audio recorded interview, Appellant *never disputed* the fact that he had an obligation to keep and maintain prescription records. Instead, he proceeded to offer various explanations for why he may be unable to meet that obligation. (Tr.p.132-p.134; State's Exhibit #1). He insisted he created these records *because that was how he was trained by the residency director*—thereby offering direct evidence both that the prescription records were records he was required to create, keep, and maintain, and that he knew a failure to create such records would effectively constitute an omission because the material information would be left out or unmentioned. (State's Exhibit #1, 1:45-3:20). *Omit*, Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/omit*. Strikland asked if Appellant could provide the required records and Appellant said he could not produce records the day of the interview but could try to find them. (State's Exhibit #1, 3:20-4:20). He swore he was being honest, saying he always kept documentation and it was all kept in his former house. Appellant agreed he had written prescriptions for people who were not patients at the clinic and did not have documentation with him, but he claimed he had it elsewhere. (State's Exhibit #1, 4:21-5:49).

Appellant continued to insist he wrote everything down, claiming he did a medical history on each person, took blood pressure, and talked about side effects of medication. He said he *did* have documentation and could look for his notebooks, but that the notes he kept on his phone could not be recovered. (State's Exhibit #1, 9:16-13:34). Appellant specifically admitted

authorizing the prescriptions for the three individuals named in this case. When Appellant again said he had records, Strickland offered to drive with him to his home in Hartsville to look. Appellant said he had the records but may not be able to get them all. He said if they were not in his current house in Hartsville, they might be in the former marital home in Conway. Appellant said the records could be in notebooks, or looseleaf paper, or various locations in the office of his house. (State's Exhibit #1, 17:28-24:00). Appellant then started asking questions about what would happen if his ex-wife threw away the records. Strickland said he would not charge Appellant with anything without giving him a fair opportunity to produce the records. (State's Exhibit #1, 24:00-25:16). Appellant said there was a bag full of documents in his office in Hartsville; however, even after searching at his house in Hartsville and being given a month to continue looking, Appellant was unable to locate or produce any such purported records. (State's Exhibit #1, 25:17-end).

Dr. Williams testified she searched the records at GSMC and did not find any prescriptions for the three relevant names during the relevant time period. (Tr.p.138-p.143). Pharmacists Leonard Cummings, Kate Birringer, and Karissa Proctor testified about filling the three prescriptions at issue in this case. (Tr.p.144-p.160). Investigator Strickland then testified that while DHEC does not have any specific guidelines for *how* records must be kept, information about the prescription *must be documented.* Strickland explained that per DHEC regulations a physician who writes prescriptions could keep a simple memorandum as long as the records were readily retrievable and, upon request, could be provided to an inspector. He said it is the responsibility of the registrant to maintain the records. Strickland explained that both pharmacists and physicians are "registrants" and that both are required to keep records under the regulations. Strickland went on to explain that when a registrant omits information from his

documentation, or fails to document the prescription at all, it is against the law. (Tr.p.163, line 24-p.166, line 20; Tr.p.181-p.182).

Strickland then provided details of the three prescriptions at issue, including the controlled substance, the recipient, the date, and the fact that they were prescribed by Appellant. Strickland tried to find documentation of a valid relationship but was unable to find any with GSMC or GSPC. (Tr.p.166-p.173). Finally, Strickland testified he drove two hours to Hartsville where Appellant was unable to provide the requested records. Strickland noted they did find some documentation, which showed *Appellant knew he should keep records*; however, *there were no records* regarding the three prescriptions in this case. He testified that based on the interview with Appellant and his claim that documents may have been lost or destroyed by his ex-wife, Strickland checked police reports from Darlington County, Hartsville, Conway, and Horry County and did not discover any reports filed under Appellant's name alleging missing or stolen medical records. Strickland also checked Appellant's final divorce order and found no reference to missing or destroyed documents. Strickland concluded his testimony by explaining he gave Appellant approximately one month after the interview to provide the requested records and Appellant was *never able to do so*. (Tr.p.173-p.177; p.182-p.183).

The State submits the testimony offered at trial combined with Appellant's recorded interview provided more than sufficient direct and circumstantial evidence to submit to the jury whether Appellant "omitted material information" from his records, by either not creating those records in the first place or by failing to keep or maintain them sufficiently for the material information in those records to be "readily retrievable." The jury was free to consider Appellant's recorded statement in the context of his admission that he knew he was required to keep and maintain prescription records, so that it could assess his credibility and decide whether

he in fact created, kept, or maintained those records at all. This was a proper function for the jury given Appellant's evolving claims, first insisting he had these records and just needed to find them, then coming up with reasons he might not be able to find them, and ultimately not being able to produce the purported records at all. The jury was properly allowed to consider the evidence and make a determination as to whether the State proved the second element of the offenses beyond a reasonable doubt.

As to the first *statutory* element, there is also substantial circumstantial evidence that Appellant knowingly or intentionally failed to keep and maintain the required records. The State acknowledges it was required to present evidence of the requisite mental state for the charges, which the statute sets forth as "knowingly or intentionally." *See State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 319 (1992) (holding that in a prosecution for a knowing or intentional act, knowledge must be established by the State); *State v. Lewis*, 403 S.C. 345, 356, 743 S.E.2d 124, 130 (Ct. App. 2013) (noting the State must present evidence of the requisite mental state of "knowingly" for the charge of aiding and abetting); *see also* 21 Am. Jur. 2d *Criminal Law* § 126 ("A distinction may be drawn between a requirement of knowledge and a requirement of intent as elements of a crime; to say that a person acted "intentionally" means that he or she acted with a conscious objective to cause a result or to engage in the conduct described, while to say that he or she acted "knowingly" means only that the person acted with an awareness of the nature or circumstances of his or her act."). However, the question of intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971). Indeed, the issue of whether Appellant possessed the requisite intent at the time the crime was committed is typically a question for the jury because without an actual statement of intent by the actor, proof

of intent must be determined by inferences from conduct. *State v. Land*, 419 S.C. 191, 202, 797 S.E.2d 48, 54 (Ct. App. 2016). As explained by our Supreme Court, knowledge may be proved circumstantially, and can be proved by evidence of an act, declaration or *conduct* of the accused from which an inference may be drawn that the accused knew what he was doing. *State v. Robinson* at 539, 426 S.E.2d at 319.

As with the second statutory element, the State submits the testimony offered at trial combined with Appellant's recorded interview provided substantial circumstantial evidence to submit to the jury whether Appellant "knowingly or intentionally" failed to keep and maintain required records. The jury was free to consider Appellant's recorded statement in the context of his admission that he knew he was required to keep and maintain prescription records so it could assess his credibility and decide whether he in fact created, kept, or maintained those records at all. The jury could consider his acts, declarations, and conduct to draw an inference that he knew about the requirements and knowingly or intentionally failed to create, keep, and maintain the required documentation. 21 Am. Jur. 2d *Criminal Law* § 126 ("A person may act "unintentionally," in the sense of not having a conscious objective or desire to engage in the conduct in question, and still commit a criminal act, provided he or she acts with "knowledge," in the sense of awareness of the nature of his or her conduct or that the circumstances surrounding his or her conduct exist."). The jury was properly allowed to consider the evidence and make a determination as to whether the State proved the first element of the offenses beyond a reasonable doubt.

To the extent Appellant now complains about the absence of a specific jury instruction describing or reciting the record-keeping requirements in the DHEC regulations (See Argument III below), that issue is not preserved for appellate review because Appellant made no objection

to the charge proposed by the circuit court, nor was any objection made after the charge was presented to the jury. (Tr.p.224, lines 4-8). *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). Similarly, any claim that the jury improperly convicted him of violating the terms of his residency contract rather than the law is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court. *Id.* at 142, 587 S.E.2d at 693.

In conclusion, viewing the evidence in the light most favorable to the State, a jury could reasonably deduce Appellant knowingly or intentionally omitted material information from records he was required to keep pursuant to Article 3, Chapter 53, Title 44 of the South Carolina Code. S.C. Code Ann. § 44-53-390(a)(4) (2016). Accordingly, the trial court properly refused to direct a verdict in Appellant's favor. Appellant's convictions and sentences should be affirmed.

II.

The trial court properly denied Appellant's motion for a new trial where there was sufficient, competent evidence to sustain the jury's convictions of Appellant for violating the drug distribution law described in section 44-53-390(a)(4) of the South Carolina Code, including testimony that described the relevant record-keeping requirements set forth in Chapter 61-4 of the South Carolina Code of Regulations.

Essentially repeating the arguments made in relation to the trial court's denial of his motion for a directed verdict, Appellant argues the trial court erred in denying his motion for a new trial because the State failed to directly reference any statute contained within Article 3, any rule issued by DHEC, or any federal law setting forth record-keeping requirements. He contends "the trial court intended to grant a directed verdict or a new trial, as is evidenced by [its] findings of fact and conclusions of law" in the order granting his motion for verdict in arrest of judgment, which was later reversed by this Court. (Brief of Appellant, p.20). Appellant argues the trial

court cited "the correct standard for granting a directed verdict" but then "chose the one remedy presented to it that was not permitted under South Carolina law," and that as a result this Court should reverse the trial court's denial of his motion for a new trial. (Brief of Appellant, p. 21-p.24). The State disagrees and for the same reasons argued in response to Argument I above, submits Appellant's arguments are entirely without merit.

Standard of Review

The decision whether to grant a new trial rests within the sound discretion of the trial court, and the appellate court will not disturb the trial court's decision absent an abuse of discretion. *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); *State v. Guillebeaux*, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004). Where there is no evidence to support a conviction, an order granting a new trial should be upheld. *State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). However, where there is competent evidence to sustain the jury's verdict, the judge may not substitute his judgment for that of the jury. *State v. Prince*, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993).

Analysis

For all the same reasons set forth in Argument I above, the State submits the trial court properly denied Appellant's motion for a new trial. The State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of each element of violating the drug distribution law described in section 44-53-390(a)(4) of the Code. The evidence, viewed in a light most favorable to the State, showed that Appellant: (1) knowingly or intentionally, (2) omitted material information; (3) from records he, as a person registered to manufacture, distribute, or dispense controlled substances under Article 3, Chapter 53, Title 44 of the Code, was required to keep in conformance with rules issued by DHEC.

Taken together, the evidence presented at trial supports the jury's conclusion that Appellant was guilty of committing three counts of violating the drug distribution laws of South Carolina. Thus, the trial court did not abuse its discretion in denying Appellant's motion for a new trial, and Appellant's convictions should be affirmed.

III.

Appellant's arguments that: (1) the trial court erred in failing to charge the jurors on the relevant laws and regulations that contain the requirements for record keeping, and (2) trial counsel was ineffective both for failing to request such jury instructions and for failing to object to the instructions that *were* given to the jury, are not preserved for appellate review because they were neither raised to nor ruled upon by the trial court during trial. Even if preserved, in regard to the allegation of trial court error, the trial court properly charged the jury because the charge was substantially correct and adequately covered the law applicable to the case such that a reasonable juror would have understood the charge, and in regard to the allegations of ineffective assistance of counsel, such allegations are not properly raised in this direct appeal. Finally, any possible error in the jury charge was entirely harmless where there was overwhelming evidence of Appellant's guilt.

Appellant argues the trial court erred in failing to charge the jury on the relevant laws and regulations that contain the requirements for record keeping pursuant to S.C. Code section 44-53-390(a)(4), and that trial counsel was ineffective both for failing to request such jury instructions and for failing to object to the allegedly inadequate instructions that *were* given to the jury by the trial court. He acknowledges these issues are not preserved for appellate review; however, he contends the errors are flagrant and resulted in clear prejudice, and because they constitute "plain error" this Court should reverse his convictions and remand for a new trial. (Brief of Appellant, p.25-p.27). The State disagrees and submits Appellant's arguments should be denied and dismissed for the procedural reasons set forth below. Alternatively, as to the allegation of trial court error in regard to the jury charge, the State submits it is without merit and that Appellant's convictions should be affirmed.

Argument not Preserved for Appeal

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the Petitioner; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so, or the issue is waived. *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993). The issue preservation requirement also applies to assertions of constitutional violations. *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005). Furthermore, our courts have consistently refused to apply the plain error rule. *State v. Vanderbilt*, 287 S.C. 597, 598, 340 S.E.2d 543, 543-44 (1986); *Passmore* at 583-84, 611 S.E.2d 273 at 281-82.

In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure also provide specific guidance in regard to raising and preserving an objection to a jury charge. *See* Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to Rule 20, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985). Thus, the rule in South Carolina "is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded,

constitutes a waiver of any right to complain on appeal of an alleged error in the charge." *State v. Williams*, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976). Here, no part of Appellant's argument about the jury charge was raised to or ruled upon by the trial court; therefore, the entire argument is not preserved for consideration in this appeal. *Rogers* at 183, 603 S.E.2d at 912-13; *Williams* at 335, 223 S.E.2d at 43.

Ineffective Assistance of Counsel Claims not Proper for Direct Appeal

The appellate court usually will not consider an ineffective assistance of counsel issue on appeal from a conviction. *State v. Felder*, 290 S.C. 521, 522, 351 S.E.2d 852, 852 (1986). This is especially true where the issue below was not presented to the trial court and, therefore, there is nothing in the record for the appellate court to review. *Id.* Indeed, in direct appeals, the record rarely contains a factual basis for a claim that counsel's performance was deficient, because it does not reveal counsel's possible strategic explanation (or lack thereof) for taking or omitting the challenged action. *Williams* at 337, 223 S.E.2d at 44.

Here, Appellant's claims that trial counsel was ineffective for failing to request a particular jury instruction, and then for failing to object to the instructions that *were* given, cannot be adequately reviewed by this Court where the record does not reveal counsel's strategic explanation for failing to take the challenged actions. Consequently, this Court should not consider those claims in this direct appeal. *Felder* at 522, 351 S.E.2d at 852.

Standard of Review

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. The law to be charged is determined by the evidence presented at trial. *State v. Holland*, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). When reviewing the trial judge's jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. *Sheppard v. State*, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996).

Analysis

The State submits that even if this issue had been preserved for review, the trial court properly charged the jury in Appellant's trial because the charge was substantially correct and adequately covered the law applicable to the case such that a reasonable juror would have understood the charge and what he or she was called upon to decide. Indeed, the trial court properly charged the jury on the relevant and applicable law to Appellant's case. Specifically, the trial judge instructed the jury on Appellant's right not to testify, the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, direct evidence, circumstantial evidence, credibility of witnesses, criminal intent, and the elements of the crimes. (Tr.p.213-p.224). As to the elements of the crimes, the trial court charged sections 44-53-390(a)(4) and 44-53-340 of the South Carolina Code, including the statutory requirement that the records in question must be kept in conformance with the requirements of Federal law "and any

additional regulations by [DHEC]." (Tr.p.216, line 15-p.217, line 14). The trial court also charged the jury with the definitions of the terms "knowingly" and "intentionally," which appear in the statute, as well as giving a detailed charge on criminal intent. (Tr.p.216, line 16-p.217, line 2; p.219, line 16-p.220, line 12). Furthermore, when instructing the jury on credibility of witnesses, the trial judge explained the jury was the sole judge of the testimony and that it was the jury's duty alone to weigh the testimony and evidence and to pass upon the credibility of witnesses. (Tr.p.214, lines 5-9; p.222, lines 1-5). Finally, the trial judge repeatedly charged the jury that Appellant was presumed innocent and could not be found guilty unless the State carried its burden of proof beyond a reasonable doubt. (Tr.p.215, line 24-p.216, line 3; p.217, line 15-p.218, line 14; p.222, lines 5-8). Thus, by instructing the jury on the applicable law with an appropriate recitation of the statutory elements of the crimes, the trial judge committed no error in instructing the jury during Appellant's trial. *Sheppard* at 665, 594 S.E.2d at 472 ("[T]he trial court is required to charge only the current and correct law of South Carolina.").

Harmless Error

Even assuming the trial judge somehow erred in failing to charge the jury on the specific DHEC regulations that contain the requirements for record keeping in this case, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of Appellant's guilt. *See Chapman v. California*, 386 U.S. 18, 22 (1967) (holding that some errors, when considered in the context of the facts of a particular case, are so insignificant and inconsequential they do not require reversal of a conviction); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial); *State v. Reyes*,

432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (finding "overwhelming evidence" of a defendant's guilt is a relevant consideration in the harmless error analysis).

Here, the testimony offered at trial, particularly from Investigator Strickland, combined with Appellant's recorded interview where he essentially admitted that records of prescriptions Appellant wrote were records he knew he was required to create, keep, and maintain (State's Exhibit #1, 1:45-3:20; 5:50-9:15), and his subsequent failure to produce such records, provided overwhelming direct and circumstantial evidence that Appellant violated the drug distribution law described in section 44-53-390(a)(4) of the South Carolina Code for each of the three charges. He omitted material information from records he was required to keep as a person registered to manufacture, distribute, or dispense controlled substances under Article 3, Chapter 53, Title 44 of the Code. Any error in the jury charge was entirely harmless. For all of these reasons, the State submits Appellant's convictions should be affirmed.

IV.

Appellant's arguments that: (1) the trial court erred in failing to grant a new trial or directed verdict and instead granting a judgment in arrest of verdicts, and (2) trial counsel was ineffective for failing to object to the trial court's improper ruling, are not preserved for appellate review because they were neither raised to nor ruled upon by the trial court during trial. Even if preserved, the trial court properly denied Appellant's motions for a directed verdict and for a new trial for the reasons addressed in Arguments I and II of this appeal; therefore, his complaint is of no consequence. Furthermore, the allegation of ineffective assistance of counsel is not properly raised in this direct appeal.

Appellant complains that defense counsel did not object when the trial court granted his post-trial motion for judgment in arrest of verdict because it is a remedy that does not exist in criminal cases in South Carolina. He argues the trial court's action in granting that relief after citing the standard for granting a directed verdict was a flagrant error, and that counsel was ineffective for failing to object. Appellant acknowledges these issues are not preserved for

appellate review (Brief of Appellant, p.25); however, he contends the trial court's misinformed ruling constitutes "plain error" and therefore this Court should reverse his convictions and remand for a new trial. (Brief of Appellant, p.27). The State disagrees and submits Appellant's arguments should be rejected for the procedural reasons discussed in detail in Argument III above. Alternatively, as to the allegation of trial court error, the State submits it is without merit and that Appellant's convictions should be affirmed.

No part of Appellant's argument about the post-trial order granting his motion for judgment in arrest of verdicts was raised to or ruled upon by the trial court; therefore, the entire argument is not preserved for consideration in this appeal. *Rogers* at 183, 603 S.E.2d at 912-13; *Williams* at 335, 223 S.E.2d at 43. Furthermore, Appellant's claim that trial counsel was ineffective for failing to object when the trial court granted his motion for judgment in arrest of verdicts cannot be adequately reviewed by this Court where the record does not reveal counsel's strategic explanation for failing to take the challenged action. Consequently, this Court should not consider that claim in this direct appeal. *Felder* at 522, 351 S.E.2d at 852.

Finally, Appellant's arguments are entirely without merit because, as argued in detail in Arguments I and II above, the trial court properly denied both his motion for a directed verdict and his motion for a new trial. Thus, regardless of the trial court's error in granting Appellant's post-trial motion for judgment in arrest of verdicts, Appellant was not entitled to a directed verdict or a new trial. Therefore, neither the trial court's order granting relief on an improper basis nor defense counsel's failure to object to that order resulted in any prejudice to Appellant, and Appellant's convictions and sentences should be affirmed.

V.

Appellant's arguments that: (1) the trial court erred in allowing the jury to hear testimony from a DHEC investigator that Appellant was *not* permitted to bootstrap compliance with the controlled substance record-keeping rules that provide he must keep required records and have them readily retrievable by "recreating" such records after-the-fact because this violated his due process rights, and (2) trial counsel was ineffective for failing to make a contemporaneous objection to the admission of this testimony, are not preserved for appellate review because they were neither raised to nor ruled upon by the trial court during trial. Even if preserved, the testimony was properly allowed because it merely consisted of a description and interpretation of the existing statutory and regulatory mandates applicable to physicians registered to prescribe controlled substances in South Carolina. Furthermore, the allegation of ineffective assistance of counsel is not properly raised in this direct appeal. Finally, any possible error in admitting the testimony was entirely harmless where the trial court properly charged the jury on the statutory elements of the charged offense and there was overwhelming evidence of Appellant's guilt.

Appellant argues the trial court erred in allowing the State to introduce testimony asserting he was not permitted to "recreate" the prescription records in question when they were lost or destroyed due to circumstances beyond his control, which made it impossible for him to comply with the statute. He contends this erroneous admission of evidence was "flagrant and clearly prejudicial" and "violated his right to Due Process under the Fifth and Fourteenth Amendments." He further contends defense counsel was ineffective for failing to object to the admission of the evidence on due process grounds. (Brief of Appellant, p.28-p.33). Appellant acknowledges these issues are not preserved for appellate review (Brief of Appellant, p.25); however, he contends the admission of the allegedly improper testimony constitutes "plain error" and therefore this Court should reverse his convictions and remand for a new trial. (Brief of Appellant, p.33). The State disagrees and submits Appellant's arguments should be rejected for the procedural reasons discussed in detail in Argument III above. Alternatively, as to the

allegations of trial court error, the State submits they are without merit and that Appellant's convictions should be affirmed.

No part of Appellant's argument about the admission of allegedly improper testimony in violation of his right to due process was raised to or ruled upon by the trial court; therefore, the entire argument is not preserved for consideration in this appeal. *Rogers* at 183, 603 S.E.2d at 912-13; *Williams* at 335, 223 S.E.2d at 43; *Passmore* at 584, 611 S.E.2d at 282. Furthermore, Appellant's claim that trial counsel was ineffective for failing to object to the admission of such testimony on due process grounds cannot be adequately reviewed by this Court where the record does not reveal counsel's strategic explanation for failing to take the challenged action. Consequently, this Court should not consider that claim in this direct appeal. *Felder* at 522, 351 S.E.2d at 852. Finally, the claim of error is without merit because what would have been the trial court's discretionary decision to admit the evidence being challenged would not constite an abuse of discretion where the testimony merely consisted of a description and interpretation of the existing statutory and regulatory mandates applicable to physicians registered to prescribe controlled substances in South Carolina. As properly found by Judge Culbertson in denying Appellant's motion for a new trial: "Requiring the defendant to produce records mandated by State law is not burden shifting." (August 10, 2023 Order). Similarly, testimony describing that requirement was appropriate.

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. *Black* at 16, 732 S.E.2d at 884; *Pagan* at 208, 631 S.E.2d at 265. A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal

error that results in prejudice to the defendant. *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); *State v. Rice*, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. *State v. Irick*, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); *State v. Mattison,* 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

Analysis

Appellant's due process challenge to the admission of evidence centers on the testimony of Investigator Strickland wherein he explained he cautioned Appellant about "creating the record" he had been unable to produce in compliance with the statutory and regulatory mandates. (Tr.p.181, lines 1-6). Appellant also relies heavily on his theory of defense—that he *did* make and keep documentation each time medications were prescribed for the patients in question, but those records were lost when he was removed from his home during his divorce, which was a circumstance beyond his control—and the claim that this "evidence was uncontradicted at trial." He argues that by instructing Appellant he could not recreate records despite their loss or destruction, and informing the jurors of the same, Strickland made it impossible for Appellant to comply with the statute and essentially provided the jury with his opinion on the ultimate issue of guilt. The State disagrees and submits Appellant is failing to recognize two crucial aspects of the case, as well as conflating this issue with the "burden shifting" argument made in his post-trial motions.

First, Appellant fails to recognize that, as properly instructed by the trial court, the jury is the sole judge of the testimony and it was its duty alone to weigh the testimony and evidence and to pass upon the *credibility* of witnesses. (Tr.p.214, lines 5-9; p.222, lines 1-5). Regardless of whether Appellant's claims about the purported records being destroyed was "uncontradicted by

any testimony or evidence from the State," his credibility was at issue. Additionally, the jury was charged with the definitions of the terms "knowingly" and "intentionally," which appear in the statute, as well as given a detailed charge on criminal intent. (Tr.p.216, line 16-p.217, line 2; p.219, line 16-p.220, line 12). For the jury to convict, it had to determine, beyond a reasonable doubt, that Appellant knowingly or intentionally failed to create, keep, and maintain the required records. This necessarily included an assessment of Appellant's credibility. If the jury *believed* his story about the original records being created and later lost or destroyed, the existence of "recreated" records would have been irrelevant. Similarly, if the jury did *not believe* his story, producing "recreated" records would have had no impact on that belief.

Second, Appellant fails to recognize that the statutes and regulations themselves required him to create, keep, and maintain records—not the testimony from Stickland. Indeed, the testimony Appellant now complains about was *elicited* from Strickland *on cross-examination* rather than being introduced by the State. Strickland was simply trying to answer defense counsel's repeated questions about the possibility of Appellant recreating lost or destroyed records, and his answers merely consisted of a description and interpretation of the existing statutory and regulatory mandates applicable to Appellant. The trial court allowing Strickland to confirm the statutory and regulatory requirements that already existed did not violate Appellant's right to due process and would not have constituted an abuse of discretion.

For all of these reasons, Appellant has shown no abuse of discretion and no exceptional circumstances to warrant reversing what would have been the trial court's discretionary ruling to admit the testimony into evidence. Appellant's convictions should be affirmed.

Finally, even assuming the trial judge somehow erred in allowing the evidence Appellant alleges was improper, any error was harmless beyond a reasonable doubt in light of the

overwhelming evidence of Appellant's guilt. *Chapman* at 22 ; *Mitchell* at 573, 336 S.E.2d at 151; *Reyes* at 406, 853 S.E.2d at 340. Here, the testimony offered at trial, particularly from Investigator Strickland, combined with Appellant's recorded interview where he essentially admitted that the prescriptions records were records he knew he was required to create, keep, and maintain (State's Exhibit #1, 1:45-3:20; 5:50-9:15), and his subsequent failure to produce such records, provided overwhelming direct and circumstantial evidence that Appellant violated the drug distribution law described in section 44-53-390(a)(4) of the South Carolina Code for each of the three charges. He omitted material information from records he was required to keep as a person registered to manufacture, distribute, or dispense controlled substances under Article 3, Chapter 53, Title 44 of the Code. Any error in the admission of this evidence was entirely harmless. For all of these reasons, the State submits Appellant's convictions should be affirmed.

VI.

Appellant's arguments that: (1) the trial court erred in failing to exclude testimony of his prior bad acts pursuant to Rules 403 and 404(b) of the SC Rules of Evidence and (2) trial counsel was ineffective for failing to contemporaneously object to such testimony, are not preserved for appellate review because they were neither raised to nor ruled upon by the trial court during trial. Even if preserved, the trial court properly allowed the testimony either as (a) part of the res gestae; (b) because its probative value was not substantially outweighed by the danger of undue prejudice, or (c) because it was not admitted to prove Appellant's character or his actions in conformity therewith. Finally, any possible error in admitting the testimony was entirely harmless where it had no prejudicial effect and there was overwhelming evidence of Appellant's guilt.

Appellant argues the trial court erred in allowing the State to introduce testimony that referenced "uncharged conduct or prior bad acts" in violation of Rules 403 and 404(b) of the South Carolina Rules of Evidence. Specifically, he complains that "the State introduced testimony regarding the action before the State Board of Medical Examiners" and testimony that, throughout his investigation, Strickland "ultimately found that 19 prescriptions were authorized

by [Appellant] for patients that I was unable to determine a valid patient/practitioner relationship." He contends this erroneous admission of evidence was "flagrant and clearly prejudicial," especially in light of the trial court's pretrial rulings. He also contends defense counsel was ineffective for failing to object to the admission of the evidence on these grounds. (Brief of Appellant, p.33-p.35). Appellant acknowledges these issues are not preserved for appellate review (Brief of Appellant, p.25); however, he contends the admission of the allegedly improper testimony constitutes "plain error" and therefore this Court should reverse his convictions and remand for a new trial. (Brief of Appellant, p.35). The State disagrees and submits Appellant's arguments should be rejected for the procedural reasons discussed in more detail in Argument III above. Alternatively, as to the allegations of trial court error, the State submits they are without merit and that Appellant's convictions should be affirmed.

No part of Appellant's argument about the admission of allegedly improper "uncharged conduct or prior bad acts" testimony was raised to or ruled upon by the trial court; therefore, the entire argument is not preserved for consideration in this appeal. *Rogers* at 183, 603 S.E.2d at 912-13; *Williams* at 335, 223 S.E.2d at 43. Furthermore, Appellant's claim that trial counsel was ineffective for failing to object to the admission of such testimony cannot be adequately reviewed by this Court where the record does not reveal counsel's strategic explanation for failing to take the challenged action. Consequently, this Court should not consider that claim in this direct appeal. *Felder* at 522, 351 S.E.2d at 852. Finally, the claim of error is without merit because what would have been the trial court's discretionary decision to admit the evidence being challenged would not have constituted an abuse of discretion either: (1) because it was admitted in compliance with the court's pretrial rulings and Appellant's consent, or (2) because it would have been admissible as part of the *res gestae*. In the second instance, the State submits

the trial court would have properly admitted the evidence in question under Rules 403 and 404(b), SCRE, even if Appellant hadn't agreed it was admissible, because it was relevant and probative, and its probative value clearly outweighed any minimal danger of unfair prejudice.

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. *Black* at 16, 732 S.E.2d at 884; *Pagan* at 208, 631 S.E.2d at 265. A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. *Douglas* at 429, 632 S.E.2d at 847-48; *Rice* at 314, 652 S.E.2d at 415. An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. *Irick* at 463, 545 S.E.2d at 284; *Mattison* at 575 S.E.2d at 852.

Analysis

As a general rule, all relevant evidence is admissible. *State v. Aleksey,* 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. *In the Matter of Care and Treament of Corley*, 353 S.C. 202, 577 S.E.2d 451 (2003); *State v. King,* 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403,

SCRE; *State v. Cooley,* 342 S.C. 63, 536 S.E.2d 666 (2000). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). Further, Rule 403, SCRE, requires there to be 'unfair prejudice" before the evidence will be excluded. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." *Id.* at 529, 732 S.E.2d at 229. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The appellate courts review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. *Id.* at 358, 543 S.E.2d at 593. *Aleksey,* 343 S.C. at 35, 538 S.E.2d at 256. In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." *State v. Martucci*, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008).

Initially, the State submits Appellant is now objecting to evidence he agreed at the pretrial hearing would be admissible against him at trial. At that hearing, Appellant asked the trial court to exclude three things: (1) *evidence about a pending Medical Board investigation related to his prescribing practices as opposed to the criminal case*, which was about his record-keeping practices; (2) evidence about his divorce – specifically any graphic or salacious allegations regarding improper sexual activity; and (3) evidence about a prior criminal charge

that was dismissed. The State: (1) agreed not to introduce evidence of the prior criminal charge; (2) *agreed to limit references to the pending Medical Board case to simply explaining that it was the reason the DHEC investigator began investigating Appellant's record-keeping practices for this case*; and (3) argued the State should be allowed to reference the divorce proceedings in response to any attempt by Appellant to blame his lack of record-keeping on his wife for losing any such records in the divorce. After hearing from the State, A*ppellant agreed it would be admissible for the investigator to say why he initiated the investigation.* The trial court "granted" the motion in limine pursuant to the terms agreed upon by the parties. (Tr.p.56-p.61).

Here, evidence of both the overall investigation by the Medical Board into Appellant's questionable prescriptions and the fact that the investigation led to the discovery of a number of such prescriptions were related to the reason Investigator Strickland initiated the investigation of Appellant's record keeping – evidence Appellant agreed would be admissible (and to which he raised no objection). Therefore, it could not have been an abuse of discretion to admit. In any event, the evidence was relevant, probative, and admissible as part of the *res gestae* of the crimes charged. *See State v. McGee*, 408 S.C. 278, 287-88, 758 S.E.2d 730, 735-36 (2014) (discussing the *res gestae* theory of admissibility). It was probative as to why Strickland was investigating Appellant in the first place and it was clearly of consequence to the jury's determination of guilt or innocence at trial, particularly in regard to Appellant's state of mind and whether he acted knowingly or intentionally. Indeed, Appellant indirectly presented, through his recorded interview and closing argument, a defense that he could not be found to have knowingly or intentionally failed to produce the required records, because his failure to do so was caused by circumstances beyond his control. The evidence about the origins of the investigation had a tendency to make the determination of whether Appellant knowingly or intentionally failed to

create, keep, and maintain the records more probable than it would be without the testimony. Thus, the testimony at issue was clearly relevant. Rule 401, SCRE. Similarly, in regard to prejudice, Appellant fails to articulate the prejudice he posits from the objected-to evidence, and the State submits it simply does not exist. Instead, the fact that the Medical Board discovered nineteen questionable prescriptions in an administrative investigation that resulted in only three criminal charges likely had the opposite effect, by demonstrating sixteen of those prescriptions were legitimate and bolstering Appellant's theory that he was being unfairly investigated and prosecuted for things beyond his control. For the same reasons, the State submits the evidence admitted would not qualify as "prior bad acts" for purposes of Rule 404(b) because it was never shown to be anything "bad" by Appellant. Thus, no "prior bad acts" evidence was offered and there would have been no basis for exclusion under Rule 404(b). For all of these reasons, Appellant has shown no abuse of discretion and no exceptional circumstances to warrant reversing what would have been the trial court's discretionary ruling to admit the testimony into evidence either per his consent or as part of the *res gestae*.

Finally, even assuming the trial judge somehow erred in allowing the evidence Appellant alleges was improper, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of Appellant's guilt. *Chapman* at 22 ; *Mitchell* at 573, 336 S.E.2d at 151; *Reyes* at 406, 853 S.E.2d at 340. Here, the testimony offered at trial, combined with Appellant's recorded interview and his subsequent failure to produce such records, provided overwhelming direct and circumstantial evidence that Appellant violated the drug distribution law described in section 44-53-390(a)(4) of the South Carolina Code for each of the three charges. He omitted material information from records he was required to keep as a person registered to manufacture, distribute, or dispense controlled substances under Article 3, Chapter

53, Title 44 of the Code. Any error in the admission of this evidence was entirely harmless. For all of these reasons, the State submits Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, convictions, and sentence of the lower court be affirmed.

Respectfully submitted,

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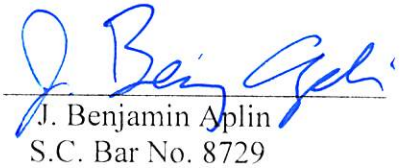
BY: 
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