STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
SEP 03 2024
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Thomas W. Cooper, Circuit Court Judge

Appellate Case No: **2023-001288**

The State of South Carolina,

Respondent,

v.

Steven Daniel Brown

Appellant.

FINAL BRIEF OF APPELLANT

Dayne C. Phillips, Esq.

SC Bar No. 77712
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234

Jason T. Yonge, Esq.

SC Bar No. 102869
WILLIAMS, STITELY, & BRINK, PC
PO Box 39
Lexington, SC 29071
(803) 359-9000

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Statement of the Facts 3

Argument

1. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS THE DRUG EVIDENCE WHEN THE CONTINUED DETENTION OF APPELLANT EXCEEDED THE SCOPE OF THE TRAFFIC STOP BECAUSE THE OFFICER HAD ISSUED A WARNING TICKET AND DID NOT HAVE REASONABLE SUSPICION OF ILLEGAL ACTIVITY AND DID NOT HAVE APPELLANT'S CONSENT TO SEARCH THE VEHICLE 13

2. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL WHEN THE STATE'S FIRST WITNESS REFERENCED INADMISSIBLE PROPENSITY EVIDENCE, THE STATE PRESENTED INADMISSIBLE DRUG EVIDENCE TO THE JURY, AND THE TRIAL COURT EXCUSED A JUROR FOR WRITING "GUILTY" ON THEIR NOTEPAD DURING THE SECOND DAY OF TRIAL 23

3. THE TRIAL COURT ERRED IN FINDING THE STATE PROVIDED A SUFFICIENT CHAIN OF CUSTODY TO ADMIT A BOX CONTAINING DRUG EVIDENCE AS STATE'S EXHIBIT 7 28

4. THE TRIAL COURT ERRED BY REFUSING TO GRANT A NEW TRIAL WHERE THE CUMULATIVE EFFECT OF THE UNFAIR PREJUDICE CREATED BY ALL THE ERRORS THAT OCCURRED DURING THE TRIAL DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL 33

Conclusion 37

TABLE OF AUTHORITIES

Cases

Arizona v. Johnson, 555 U.S. 323 (2009) 15
Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 (1957) 28
Delaware v. Prouse, 440 U.S. 648 (1979) 21
Florida v. Royer, 460 U.S. 491 (1983) 14, 20
Gallego v. United States, 276 F.2d 914 (9th Cir. 1960) 29
Illinois v. Caballes, 543 U.S. 405 (2005) 14
Johnson v. State, 433 S.C. 550, 860 S.E.2d 696 (Ct. App. 2021) 24, 25
Mapp v. Ohio, 367 U.S. 643 (1961) 13, 18
Rodriguez v. United States, 135 S. Ct. 1609 (2015) 16, 17
State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) 27, 36
State v. Alston, 422 S.C. 270, 811 S.E.2d 747 (2018) 21
State v. Burgess, 394 S.C. 407, 714 S.E.2d 917 (2011) 17
State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000) 16
State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001). 28
State v. Cook, 440 S.C. 308, 891 S.E.2d 35 (Ct. App. 2023) 34
State v. Corley, 383 S.C. 232, 679 S.E.2d 187 (Ct. App. 2009) 14
State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976) 23
State v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007) 23
State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008) 25
State v. Frasier, 437 S.C. 625, 633, 879 S.E.2d 762 (2022) 13
State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) 33
State v. Glenn, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997) 29, 35
State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) 25
State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999) 34
State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750(2011) 29, 30
State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014) 21
State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999) 24, 33
State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997) 16
State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) 24, 25
State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998) 33
State v. Moore, 415 S.C. 245, 781 S.E.2d 897 (2016) 17, 21
State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) 18
State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005) 15
State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983) 23, 24, 27
State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013) 17, 21
State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009) 15, 19
State v. Rogers, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) 16
State v. Simmons, 279 S.C. 165, 303 S.E.2d 857 (1983) 33
State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) 24
State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009) 33, 36
State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007) 23, 28, 30, 31
State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (Ct. App. 2004) 28
State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) ..... passim

State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980) 26
State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001) 19, 22
Terry v. Ohio, 392 U.S. 1 (1968) 13, 14, 18, 19
Texas v. Brown, 460 U.S. 730 (1983) 19, 22
U.S. v. Foster, 634 F.3d 243 (4th Cir. 2011) 17, 18, 22
United States v. Arvizu, 534 U.S. 266 (2002) 14
United States v. Brugal, 209 F.3d 353 (4th Cir. 2000) 15
United States v. Calandra, 414 U.S. 338 (1974) 18
United States v. Cortez, 449 U.S. 411 (1981) 16
United States v. De Larosa, 450 F.2d 1057 (3rd Cir. 1971) 29
United States v. Digiovanni, 650 F.3d 498 (4th Cir. 2011) 20
United States v. Foreman, 369 F.3d 776 (4th Cir. 2004) 21
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 18, 19
United States v. Mendenhall, 446 U.S. 544 (1980) 19
United States v. Rusher, 966 F.2d 868 (4th Cir. 1992) 13
United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998) 15
Whren v. United States, 517 U.S. 806 (1996) 14
Wilson v. Arkansas, 514 U.S. 927 (1995) 13
Wong Sun v. United States, 371 U.S. 471 (1963) 18, 19

Rules

Rule 403, SCRE 25, 26, 34
Rule 404(a), SCRE 24
Rule 404(b), SCRE 24, 26, 34

Constitutional Provisions

U.S. Const., amend. IV. 13, 22

Other Authorities

75B Am.Jur.2d *Trial* § 1284 (1992) 24

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS THE DRUG EVIDENCE WHEN THE CONTINUED DETENTION OF APPELLANT EXCEEDED THE SCOPE OF THE TRAFFIC STOP BECAUSE THE OFFICER HAD ISSUED A WARNING TICKET AND DID NOT HAVE REASONABLE SUSPICION OF ILLEGAL ACTIVITY AND DID NOT HAVE APPELLANT'S CONSENT TO SEARCH THE VEHICLE.

II. WHETHER THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL WHEN THE STATE'S FIRST WITNESS REFERENCED INADMISSIBLE PROPENSITY EVIDENCE, THE STATE PRESENTED INADMISSIBLE DRUG EVIDENCE TO THE JURY, AND THE TRIAL COURT EXCUSED A JUROR FOR WRITING "GUILTY" ON THEIR NOTEPAD DURING THE SECOND DAY OF TRIAL.

III. WHETHER THE TRIAL COURT ERRED IN FINDING THE STATE PROVIDED A SUFFICIENT CHAIN OF CUSTODY TO ADMIT A BOX CONTAINING DRUG EVIDENCE AS STATE'S EXHIBIT 7.

IV. WHETHER THE TRIAL COURT ERRED BY REFUSING TO GRANT A NEW TRIAL WHERE THE CUMULATIVE EFFECT OF THE UNFAIR PREJUDICE CREATED BY ALL THE ERRORS THAT OCCURRED DURING THE TRIAL DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

STATEMENT OF THE CASE

On October 12, 2020, the Lexington County Grand Jury indicted Appellant, Steven Brown, for Trafficking Methamphetamine, 400 grams or more. (R. 616).

On August 7–10, 2023, Appellant proceeded to trial before the Honorable Thomas W. Cooper, Jr., and a jury. (R. 1–599). Robert "Theo" Williams, Esq., and Jason Yonge, Esq., represented Appellant, and Assistant Solicitors Kelly Oppenheimer and Kyle Smith prosecuted the case on behalf of the State. The jury returned a guilty verdict on August 10, 2023. (R. 579, lines 22 – 24). The Trial Court sentenced Appellant to twenty-five (25) years imprisonment. (R. 594, line 22 – 598, line 1).

On August 11, 2023, Appellant timely filed a Notice of Appeal. (R. 620). This appeal follows.

STATEMENT OF THE FACTS

Background

On June 29, 2020, Trooper Jacob Atwood of the South Carolina Department of Public Safety (SCDPS) received a tip from John Gietz, an investigator with the Lexington County Sheriff's Department, about a vehicle suspected of transporting methamphetamine from Georgia to South Carolina. (R. 74–75).

Pre-trial, the Trial Court denied Appellant's motion to suppress the drug evidence seized after a traffic stop, canine sniff, and search of his vehicle. (R. 123–127; R. 602; R. 605).

During trial, the Trial Court overruled Appellant's objection to the admissibility of a sealed box based on the State's failure to establish a proper chain of custody. (R. 400–410). The Trial Court also denied Appellant's three motions for a mistrial based on separate errors that occurred during the trial. Specifically, the Trial Court denied the first motion for a mistrial based on the State's first witness's testimony that he had "received multiple tips from several sources that [Appellant] was trafficking narcotics." (R. 174–175). The Trial Court then denied Appellant's second motion for a mistrial when the State's witness opened the box containing uncharged, inadmissible drug evidence that was published to the jury. (R. 410–448). The Trial Court also denied Appellant's third motion for a mistrial where a bailiff found a notepad in the jury room after the second day of trial that had the word "guilty" written at the top of the paper. (R. 305–327; R. 601).

After the close of the State's case-in-chief, the Trial Court denied Appellant's motion for a mistrial based on the cumulative effect of the unfair prejudice created by all the errors that occurred during the trial affected the outcome. (R. 525–528).

Traffic Stop, Canine Sniff, and Search

On June 29, 2020, Trooper Gregory Shropshire of the SCDPS conducted a traffic stop on Appellant's vehicle for following another vehicle too closely and failing to maintain his lane. (R. 74, lines 22-24; R. 77, lines 8-15; R. 233, lines 9-11). Trooper Shropshire's bodycam and dashcam recorded the traffic stop. (Court's Exhibits 1 and 2). Prior to initiating the traffic stop, Trooper Shropshire knew that his partner, Trooper Atwood, had received a tip from the Lexington County Sheriff's Department about Appellant being investigated for transporting methamphetamine. Trooper Shropshire had never met Appellant but knew he drove a white Ford F-350, and a license plate reader placed his vehicle in Georgia earlier in that day. (R. 75–76; R. 88, lines 12-16).

During the traffic stop, Trooper Shropshire approached the passenger side of Appellant's vehicle and asked him to exit the vehicle. (R. 88; Court's Exhibit 1). Trooper Shropshire noted that he did not have probable cause to search the vehicle because he "was just stopping the vehicle" and he had to "develop [his] reasonable suspicion once [he] had [Appellant] outside the vehicle." (R. 88–90; Court's Exhibit 1).

While Trooper Shropshire waited for the information to come back from dispatch, he questioned Appellant about where he was coming from and what he was doing before the traffic stop. (Court's Exhibit 1). Appellant told Trooper Shropshire that he was coming from "outside Augusta," Georgia. (Court's Exhibit 2, 4:40–5:00). Appellant responded that he does construction and was in the Augusta area to help a friend do some work on his mom's house. Appellant also explained that they went by the house that day to look at it. (Court's Exhibit 2, 6:00–7:00).

Trooper Atwood subsequently arrived on scene of the traffic stop with his canine, Parker. (R. 93, lines 1-6; Court's Exhibit 1). However, Trooper Atwood and K-9 Parker did not initially

perform a sniff of Appellant's vehicle because he did not have reasonable suspicion of criminal activity:

Solicitor:	Were Sergeant Atwood and Parker already on-scene with you?
Trooper Shropshire:	They were.
Solicitor:	So let me ask you this, Trooper. If Sergeant Atwood and Parker were already on the scene with you, why didn't you go ahead and run them earlier?
Trooper Shropshire:	That's not how we operate. We – for one, it's my stop, and then the thing is I need to be able to develop my reasonable suspicion.
Solicitor:	So is it fair for me to say then that you want to make sure you're going through the proper steps and do the whole investigation?
Trooper Shropshire:	Correct. Don't put the cart before the horse basically.

(R. 85, lines 10 – 86, line 3).

Five minutes into the traffic stop, Trooper Shropshire explained he was still "developing [his] reasonable articulable suspicion." (R. 101, lines 7-19).

Six minutes into the traffic stop, Trooper Shropshire learned that Appellant's driver's license was clear, and he did not have any warrants. (R. 102–103; Court's Exhibit 1).

Nine minutes into the traffic stop, although Trooper Shropshire wrote Appellant a warning ticket, he continued questioning Appellant about whether he had any contraband in his vehicle. (R. 106, lines 16-21; Court's Exhibit 1).

After about a minute of continued questioning, Trooper Shropshire handed the warning to Appellant but continued to cling to it while he asked for consent to search Appellant's vehicle. (Court's Exhibit 1). When Appellant did not consent to the search, Trooper Shropshire pulled the

warning ticket from Appellant's hand and told him that a narcotics detection canine would be performing a free-air sniff around the exterior of the vehicle. (Court's Exhibit 1). Trooper Shropshire also told Appellant that if the canine did not alert on the vehicle, he would be free to leave. (Court's Exhibit 1).

During the suppression hearing, Trooper Shropshire maintained that he had "reasonable articulable suspicion . . . to ask for consent to search" based on the prior tip from the Lexington County Sheriff's Department and the information obtained during the traffic stop. (R. 87, lines 11-16; R. 109, lines 5-19). However, Trooper Shropshire noted that he did not have probable cause to search the vehicle at that time. (R. 109, lines 5-19).

Trooper Shropshire further explained that he also felt he had reasonable suspicion to extend the stop based on a rapid assessment of Appellant's demeanor during the traffic stop. (R. 80, lines 2-23; R. 88-90; R. 95–105). Trooper Shropshire claimed that Appellant was "more nervous than an average person" throughout the traffic stop. (R. 89, lines 15-24).

On cross-examination during the suppression hearing, Trooper Shropshire was shown his body-worn camera video recording of the traffic stop and asked to describe the nervous behavior. (R. 88-105). Trooper Shropshire described Appellant's behavior as follows:

- [H]e appeared to be very stressed out, had rapid respiration and also a very stiff posture." (R. 89, lines 1-3; Court's Exhibit 1, 0:00–1:21).
- He had rapid, labored breathing, and was fumbling with his paperwork. (R. 95-96; Court's Exhibit 1, 1:21–1:59).
- He was standing with a bladed stance. (R. 96 -97; Court's Exhibit 1, 1:21–1:59).
- He subtly shifted away from Trooper Shropshire. (R. 98-99, lines 17-6; Court's Exhibit 1, 3:10–3:15).
- He "took a swallow" before answering questions while he was "trying to search for the answer." (R. 99, lines 10-23; Court's Exhibit 1, 3:15–4:00).

- He took a deep breath before answering questions while he was "trying to figure out what he was going to say next." (R. 101-102; Court's Exhibit 1, 3:15–5:29).

At approximately ten to twelve minutes after the traffic stop, Trooper Atwood deployed K-9 Parker to conduct a sniff of Appellant's vehicle. (R. 86, lines 4-7). The canine sniff was recorded on Trooper Atwood's bodycam. (Court's Exhibit 3, 8:30–12:00). Trooper Atwood and K-9 Parker circled Appellant's truck multiple times. As they circled, Trooper Atwood constantly tapped different areas of the truck and K-9 Parker jumped onto those areas, putting his paws on the truck and sniffing. K-9 Parker eventually stopped sniffing and sat near the truck's front bumper. (Court's Exhibit 3, 8:30–12:00).

Trooper Atwood then informed Appellant that they were going to conduct a search of the truck and subsequently discovered a liquor box containing approximately 7 pounds of suspected methamphetamine in three clear plastic totes during the search of the vehicle. (R. 196–197; Court's Exhibit 3, 12:35–14:10).

State's Exhibit 7: Box Containing Drug Evidence

John Gietz, the investigator with the Lexington County Sheriff's Department, testified at trial that he provided the tip to Trooper Atwood. (R. 186-187). After providing the tip, he essentially orchestrated the traffic stop by directing law enforcement officers, including the South Carolina Highway Patrol, to position themselves along I-20 heading into Lexington County. (R. 187).

Investigator Gietz positioned himself at mile marker 44, and the traffic stop occurred at mile marker 41. (R. 187, lines 19-20; R. 192, lines 4-5). Investigator Gietz arrived after the K-9 sniff, conducted the search of Appellant's vehicle, and found the suspected methamphetamine in a liquor box. (R. 193-194). Investigator Gietz testified he photographed and field weight tested the seized evidence prior to submitting into evidence. (R. 194, lines 17-21; R. 197-198).

Because of the quantity, Investigator Gietz packaged the seized evidence in a box, "sealed the box and initialed anywhere [he] could find a gap." (R. 198, lines 3-13). The box was marked as State's Exhibit 7 and shown to Investigator Gietz for identification purposes only. (R. 198, lines 18-22). He testified that State's Exhibit 7 was the box he "submitted with [his] signature and the date that it was submitted". (R. 198–199). The dates on the box were June 29, 2020, and another date when the box was opened for trial. (R. 199).

The Trial Court qualified Margaret Walker, a chemist in the drug lab at the Lexington County Sheriff's Department, as an expert in general drug analysis or drug identification. (R. 392-393). Ms. Walker testified that she received State's Exhibit 7 from evidence custodian, Candy Kyzer, and the box had a BEST kit attached to it. (R. 394, line 20 – 395, line 6). She explained that a BEST kit is "a tamperproof bag that narcotics are placed into and then that is turned into evidence for me to complete and for me to do analysis on." (R. 395, lines 7-12). She also noted that "the box was the BEST kit itself," because "[t]here was a fair amount of narcotics." (R. 395, lines 12-15).

Ms. Walker maintained that she checked all the seals Investigator Gietz taped shut on State's Exhibit 7, confirmed Investigator Gietz's initials, the date of 6/29/20 appeared on the box six times, and made sure the box was not opened. (R. 396–398). She concluded that the box did not "appear to be tampered with at all." (R. 396-397). She then took the box to the drug lab and placed it into her vault. (R. 398, lines 19-24). Ms. Walker testified that she subsequently sealed, initialed, and dated the box after testing a sample of the suspected narcotics.

Chain of Custody

After this testimony, Appellant objected when the State moved to admit Exhibit 7 into evidence, arguing that the chain of custody had not been properly established:

> We're cutting out like a million steps, Your Honor, and that would include – and obviously there may or may not be any relevance because I don't know what's in the box either, but the short answer, Your Honor, is we haven't traced it from the – from the date and time which this box allegedly was found on the road until it was placed into evidence – into the locker of the evidence room, how it was maintained in the – because there are a number of people who I assume from what I've observed have touched that box and have at least looked at it, opened it up, did things to it, but she can't just jump from A to Z, Your Honor.

(R. 400–401). The Trial Court overruled the objection and found the State had "met it's burden of proof sufficient to establish that the evidence has been in a secured situation since Deputy Gietz stored it on June 29, 2020, and it has been secured since that time." (R. 405–406). The Trial Court also found that there was "no evidence of tampering." (R. 406, line 2).

Notably, Defense Counsel renewed his pre-trial motions to suppress outside the presence of jury prior to the opening the box and the following discussion occurred:

Solicitor: Judge, the whole box is already in evidence.

Trial Court: I'm sorry.

Solicitor: The whole box is already in evidence. It's just the drugs.

Trial Court: Right. The – the video shows that there were three plastic smaller boxes that were stacked up. Is that what is in this box?

Solicitor: Yes, Your Honor.

Trial Court: *Anything else*?

Solicitor: No. They don't package evidence that way. They keep –

The Court: Ma'am?

Solicitor: *They keep everything separate. They wouldn't put everything in one box with suspected narcotics. They don't do that.*"

Trial Court: *I'm just trying to figure out is there anything in this box that was not seized at the scene on the videotape*?

Solicitor: *There were bags added that she added herself that she will testify to* –

Trial Court: Surely.

Solicitor: —*but that's it.*"

(R. 408, line 24 – 409, line 21) (emphasis added).

Motion for Mistrial: State's Exhibit 7

Notably, State's Exhibit 7 contained additional inadmissible drug evidence that was presented to the jury. The two items contained in the box were "Item 1.1" and "Item 1.2." (R. 411, lines 7-11). Item 1.1 was "three plastic containers containing crystal substance." (R. 411, lines 8-9). Item 1.2 was a "Ziploc bag containing plastic container containing plastic corner bag containing crystal substance." (R. 411, lines 9-11).

Ms. Walker testified about Item 1.1 and explained the method she used for unpacking and testing the substances inside the containers. (R. 411). When she tested the substances in each of the containers in Item 1.1, she added a label to the test tube to signify which container the sample was taken. (R. 415). Therefore, when she finished testing the contents of all three containers, she had results for Item 1.1(1); Item 1.1(2); and Item 1.1(3), which represented containers one, two, and three respectively. (R. 415). Ms. Walker testified that all three containers tested positive for methamphetamine, and the combined weight was 2,917 grams. (R. 413; R. 416).

After Ms. Walker testified about Item 1.1—and presented all three bags to the jury—the State then asked her about Item 1.2. (R. 418, lines 16-17). She testified that Item 1.2 weighed 5.22 grams and also tested positive for methamphetamine. (R. 418-419). The State then requested that Ms. Walker show the jury Item 1.2, and she complied. (R. 419, lines 23-24).

Defense Counsel moved for a mistrial based on Item 1.2 not being seized during the traffic stop after questioning Ms. Walker about the chain of custody for State's Exhibit 7. (R. 422–449). The State conceded that Item 1.2 was not seized during the traffic stop. (R. 432–433). After

hearing arguments from Defense Counsel and the State, the Trial Court "**regrettably**" denied the motion for a mistrial. (R. 437–443) (emphasis added).

The Trial Court then suppressed Item 1.2 and issued a curative instruction that the jury disregard any testimony related to Item 1.2. (R. 442–448). The Trial Court explained that he could suppress Item 1.2 because State's Exhibit 7 had not been admitted into evidence (despite that the contents of Exhibit 7 had been shown to the jury and both the State and Defense Counsel's belief that Exhibit 7 had been admitted into evidence). (R. 443–447). The Trial Court further noted that if he "had ruled into evidence 1.2 . . . that would have been reversible error." (R. 445–446).

The three containers that made up Item 1.1 were then separately marked as State's Exhibits 11, 12, and 13, and subsequently admitted into evidence. (R. 447–454). No witness testified about how Item 1.2 ended up in State's Exhibit 7. (R. 171–525).

Motion for Mistrial: Rule 404(b) Inadmissible Propensity Evidence

The State's *first* witness, Investigator Gietz, testified that he had "received multiple tips from several sources that [Appellant] was trafficking narcotics." (R. 174, lines 4-5). The Trial Court interjected, "Wait. Wait. Wait. Wait. Wait." (R. 174, line 6). Defense Counsel then moved for a mistrial, arguing that the witness was "bringing up the fact that he is guilty of other offenses for which he's not being tried." (R. 174–175). After performing a Rule 404(b) analysis, the Trial Court denied the motion and gave the following curative instruction to the jury:

> You are to disregard any testimony offered by the investigator that goes beyond the scope of this case when it comes to the investigation of the defendant in this particular case. There's a – he's on trial for one offense and it's included in the indictment. You're to disregard any testimony regarding the scope of this investigation beyond that particular event.

(R. 175-179; R. 179, lines 4-10).

Motion for Mistrial: Juror Notepad ("Guilty")

After the second day of trial, a bailiff discovered a notepad on the jury room table that had the word "**guilty**" written at the top of the paper. (R. 305, lines 8-17; R. 601) (emphasis added). Defense Counsel noted his concern that questioning the jurors individually potentially creates unfair prejudice to Appellant. The Trial Court ultimately questioned the jurors individually on the witness stand about the note and determined the following:

- Juror 226 wrote the note, including the word "guilty". (R. 325–326).
- The following jurors saw the note: 165, 53, 20.
- Juror 29 saw a "Hispanic male" and "younger black male" writing but did not see the contents of their writings.
- Juror 211 saw Juror 226 doodling, but did not see the contents of the doodling.
- The following jurors did not see the note: 24, 160, 184, 186, 209, 65, 254, 137.

(R. 305-357). Consequently, the Trial Court excused Juror 226. (R. 327, lines 11-20).

Motion for a New Trial: Cumulative Error

After the close of the State's case-in-chief, Appellant renewed the previous motions and requested a mistrial based on the cumulative effect this unfair prejudice had on Appellant's right to a fair trial. (R. 527). After the jury verdict, the Trial Court denied Appellant's motion for a new trial and the motions for a mistrial. (R. 527–528; R. 588–589).

ARGUMENT

I. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS THE DRUG EVIDENCE WHEN THE CONTINUED DETENTION OF APPELLANT EXCEEDED THE SCOPE OF THE TRAFFIC STOP BECAUSE THE OFFICER HAD ISSUED A WARNING TICKET AND DID NOT HAVE REASONABLE SUSPICION OF ILLEGAL ACTIVITY AND DID NOT HAVE APPELLANT'S CONSENT TO SEARCH THE VEHICLE.

Standard of Review

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means [the appellate court] review[s] the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to *de novo* review." *State v. Frasier*, 437 S.C. 625, 633, 879 S.E.2d 762, 766 (2022).

Law

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." *Wilson v. Arkansas,* 514 U.S. 927, 931 (1995). The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio,* 367 U.S. 643 (1961).

Traffic stops are reviewed under the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. *See United States v. Rusher,* 966 F.2d 868, 875 (4th Cir. 1992). Consequently, *Terry* outlines a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. *Rusher,* 966 F.2d at 875.

As to the scope component of a *Terry* stop, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer,* 460 U.S. 491, 500 (1983) (plurality opinion). As to the duration component of the second prong, a traffic stop may become "unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." *Illinois v. Caballes,* 543 U.S. 405, 407 (2005); *See Royer,* 460 U.S. at 500 (noting the scope of a seizure "must be carefully tailored to its underlying justification," and that the government bears the burden to "demonstrate that the seizure it seeks to justify . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure").

Furthermore, temporary detention of an individual during a traffic stop by police, even if only for a brief period and for a limited purpose, constitutes a seizure of the persons within the meaning of the Fourth Amendment. *See Whren v. United States,* 517 U.S. 806, 809–10 (1996); *see also United States v. Arvizu,* 534 U.S. 266, 273 (2002) (noting the Fourth Amendment's protection against "unreasonable searches and seizures" extends to "brief investigatory stops of persons or vehicles"). *See State v. Corley,* 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (noting during a traffic stop, "the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity"; "[t]he scope and duration of [this investigative] detention must be strictly tied to and justified by the circumstances that rendered its initiation proper"; and normally, this permits an officer to attempt to obtain information confirming or dispelling the officer's suspicion), *aff'd as modified,* 392 S.C. 125, 708 S.E.2d 217 (2011)).

"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren,* 517 U.S. at 810.

However, a traffic stop typically ends when the police officer has "no further need to control the scene and inform[s] the driver and passengers they are free to leave." *Arizona v. Johnson,* 555 U.S. 323 (2009); *See United States v. Sullivan*, 138 F.3d 126, 132 (4th Cir. 1998) (finding the test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is "whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position would have felt free to decline the officer's requests or otherwise terminate the encounter").

In *State v. Pichardo*, this Court held, "Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." *Pichardo*, 367 S.C. 84, 998, 623 S.E.2d 840, 848 (Ct. App. 2005). Our Supreme Court held in *State v. Tindall* that the purpose of the traffic stop was accomplished when the dispatcher reported no problems with defendant's license and vehicle, and the only remaining task was the issuance of the warning ticket. *Tindall*, 388 S.C. 518, 522-23, 698 S.E.2d 203, 205-06 (2010).

In *State v. Rivera*, this Court held that the purpose of the traffic stop was accomplished when the officer informed the defendant that he would receive a warning citation and found the officer's questions regarding the transport of drugs exceeded the scope of the initial traffic stop and constituted a second illegal detention. *Rivera*, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009).

The extension of a lawful traffic stop is permitted when: (1) the encounter becomes consensual; or (2) the officer has a reasonable, articulable suspicion of other illegal activity. *See Pichardo,* 367 S.C. at 99, 623 S.E.2d at 848; *see also United States v. Brugal*, 209 F.3d 353, 358 (4th Cir. 2000) (finding "[t]he *Terry* reasonable suspicion standard required an officer to have a reasonable suspicion that criminal activity is afoot before he may . . . continue to seize a person following the conclusion of the purposes of a valid stop"). The State has the burden to articulate

facts, which are sufficient to support an officer's reasonable suspicion that criminal activity has occurred or is occurring. *See generally State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); *see also Tindall*, 388 S.C. at 527, 698 S.E.2d at 208 ("[T]he nature of the reasonableness inquiry [in determining the existence of reasonable suspicion] is highly fact-specific").

Reasonable suspicion requires "a particularized and objective basis that would lead one to suspect another of criminal activity." *State v. Lesley,* 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting *United States v. Cortez,* 449 U.S. 411, 417 (1981) (internal quotations omitted). Reasonable suspicion also requires "something more than an inchoate and unparticularized suspicion or hunch." *State v. Rogers,* 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). It is critical to determine when a traffic stop "ends" because an officer must gain reasonable suspicion of a serious crime before detaining a suspect beyond the conclusion of the traffic stop. *See Tindall*, 388 S.C. at 518, 698 S.E.2d at 205 (a traffic stop ends when the purpose of the initial stop is accomplished). Notably, in determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. *Id.*

In *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the United States Supreme Court held that a traffic stop becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. The *Rodriguez* Court noted an officer's mission includes addressing the traffic violation that warranted the stop, checking the driver's license, inspecting the registration, and proof of insurance. *Id.* The *Rodriguez* Court also explained that the reasonableness of the seizure depends on what the police in fact do (i.e., their actions during the seizure). *Id.*

An officer must be reasonably diligent in his investigation of the traffic violation and is not permitted to use dilatory tactics to extend the traffic stop for additional questioning or

investigation. *See Rodriguez*, 575 U.S. at 357 (holding "the government acknowledges that 'an officer always has to be reasonably diligent.'"); *State v. Provet*, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (finding "[t]he officer cannot avoid this rule by employing dilatory tactics.").

Notably, "[t]his is a temporal inquiry, not a reasonableness inquiry." *Provet*, 405 S.C. at 111, 747 S.E.2d at 459. "[T]he proper inquiry is not whether an officer 'unreasonably' extended the duration of the traffic stop with his off-topic questions but whether he 'measurably' extended it." *Id.* "[E]ven a *de minimis* extension of a traffic stop is unconstitutional absent reasonable suspicion." *State v. Moore*, 415 S.C. 245, 252, 781 S.E.2d 897, 901 (2016) (citing *Rodriguez*, 575 U.S. 356-57).

"Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." *Tindall*, 388 S.C. at 523-24, 698 S.E.2d at 206 (quoting *Adams*, 377 S.C. at 339, 659 S.E.2d at 275) (finding "any time" meaning (1) during a lawful traffic stop, (2) post-traffic stop investigatory detention, or (3) a consensual encounter)).

In *State v. Burgess*, 394 S.C. 407, 415, 714 S.E.2d 917, 921 (2011), our Supreme Court recognized the same concerns as the Fourth Circuit Court of Appeals in *U.S. v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011):

> We are mindful of concerns regarding the State *'using whatever facts are present, no matter how innocent, as indicia of suspicious activity' and that the State 'must do more than simply label a behavior as 'suspicious' to make it so.'* The State must 'be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.'

(internal citation omitted) (emphasis added). The Fourth Circuit further emphasized:

> *We are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception.* Although these matters generally only come before this Court where a police seizure uncovers some wrongdoing, we would be remiss if we did not acknowledge that *the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone*—whether he or she is one of the most affluent or most vulnerable members of our community.

Foster, 634 F.3d at 248-49 (emphasis added) (citing *Terry*, 392 U.S. at 12-13 (finding "Courts which sit under our Constitution cannot and will not be made party to lawless invasion of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions")). The *Foster* Court further noted, "The Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband." *Id.* 634 F.3d at 249; (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976) (noting one purpose of the Fourth Amendment is to "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure").

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruit of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 554 (1976)). The United States Supreme Court and our Supreme Court have recognized and applied the principle that police officers are not granted under *Terry*, "a general warrant to rummage and seize at will" and that any evidence seized from an unlawful detention must be excluded as "fruit of the poisonous tree." *State v. Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (Ct. App. 2001) (citing *Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring) (The United States Supreme Court "*has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will*") (emphasis added).

In *Wong Sun*, 371 U.S. 471, the United States Supreme Court held, "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (citation and internal quotation marks omitted).

Discussion

In this case, the Trial Court erred by refusing to suppress the drug evidence when the continued detention of Appellant exceeded the scope of the traffic stop because the officer had issued a warning ticket and did not have reasonable suspicion of illegal activity and did not have Appellant's consent to search the vehicle. *See Tindall*, 388 S.C. at 522-23, 698 S.E.2d at 205-06; *Rivera*, 384

S.C. 356, 682 S.E.2d 307; *see also Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification.").

A. The continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment after Trooper Shropshire had issued a warning ticket and Appellant did not consent to a search of the vehicle.

Although Trooper Shropshire wrote Appellant a warning ticket, he continued questioning Appellant about whether he had any contraband in his vehicle. (R. 106, lines 16-21; Court's Exhibit 1). After about a minute of continued questioning, Trooper Shropshire handed the warning to Appellant but continued to cling to it while he asked for consent to search Appellant's vehicle. (Court's Exhibit 1). When Appellant did not consent to the search, Trooper Shropshire pulled the warning ticket from Appellant's hand and told him that a narcotics detection canine would be performing a sniff around the exterior of the vehicle. (Court's Exhibit 1). See *United States v. Digiovanni*, 650 F.3d 498, 508-09 (4th Cir. 2011) (holding the officer "definitely abandoned the prosecution of the traffic stop and embarked in another sustained course of investigation.") (citation and internal quotation marks omitted)). Therefore, the continued detention of Appellant exceeded the scope of the traffic stop and constituted a second seizure for purposes of the Fourth Amendment after Trooper Shropshire had issued a warning ticket and did not consent to a search of his vehicle.

B. Trooper Shropshire did not have reasonable and articulable suspicion of illegal activity under the totality of the circumstances to extend the traffic stop and unlawfully detain Appellant after he did not consent to a search of the vehicle.

During the suppression hearing, Trooper Shropshire maintained that he had "reasonable articulable suspicion . . . to ask for consent to search" based on the prior tip from the Lexington County Sheriff's Department, and the information obtained during the traffic stop. (R. 87, lines 11-16; R. 109, lines 5-19). Trooper Shropshire claimed that he also felt he had reasonable

suspicion to extend the stop based on a rapid assessment of Appellant's demeanor during the traffic stop. (R. 80, lines 2-23; R. 88-90; R. 95–105). Trooper Shropshire testified that Appellant was "more nervous than an average person" throughout the traffic stop. (R. 89, lines 15-24).

However, the body-worn camera and dash-camera video recordings directly refuted Trooper Shropshire's testimony because Appellant is seen calmly answering Trooper Shropshire's questions on the side of a busy interstate during a hot summer day. (Court's Exhibits 1 and 2). Even if Appellant appeared nervous, that factor combined with the tip is insufficient to establish reasonable suspicion of illegal activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979) (holding although "extreme nervousness" is a factor to be considered in a reasonable suspicion analysis, courts must be skeptical of using nervousness as a factor because a traffic stop is an "unsettling show of authority" that may "create substantial anxiety"); *State v. Hewins*, 409 S.C. 93, 760 S.E.2d 814 (2014) (finding no reasonable suspicion but noting one factor was the defendant being nervous despite being issued a warning citation); *Tindall*, 388 S.C. 518, 698 S.E.2d 203 (noting the "felony stretch" – designated as a sign of stress – and nervousness listed as separate factors on list of four factors).

The factors provided by Trooper Shropshire also did not eliminate a substantial portion of innocent travelers and are distinguishable from the cases where our appellate courts have found reasonable suspicion to justify continued detention. *See United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004) ("[A]rticulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied."); *cf. Provet*, 405 S.C. 101, 747 S.E.2d 453; *Moore*, 415 S.C. 245, 781 S.E.2d 897; *State v. Alston*, 422 S.C. 270, 811 S.E.2d 747 (2018). Therefore, Trooper Shropshire did not have reasonable and articulable suspicion of illegal activity under the totality of the circumstances to extend the traffic stop and

unlawfully detain Appellant after he did not consent to a search of the vehicle.

The exclusionary rule is reasonable and necessary given the unique circumstances and unlawful actions of the police officers to prevent this type of harassment behavior (i.e., conducting unlawful fishing expeditions via traffic stops). *See United States v. Foster*, 634 F.3d 243, 248-49 (4th Cir. 2011) ("[T]he exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone" and "The Government cannot rely on post hoc rationalizations to validate those seizures that happen to turn up contraband."). Therefore, the evidence seized from this unlawful detention and warrantless search must be excluded as "fruit of the poisonous tree." *See* U.S. Const. amend. IV; *see also Woodruff*, 344 S.C. at 549, 544 S.E.2d at 296-97, n. 1 (citing *Brown*, 460 U.S. at 748 (Stevens, J., concurring) (The United States Supreme Court "*has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will*") (emphasis added).

[Remainder of Page Intentionally Left Blank]

II. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL WHEN THE STATE'S FIRST WITNESS REFERENCED INADMISSIBLE PROPENSITY EVIDENCE, THE STATE PRESENTED INADMISSIBLE DRUG EVIDENCE TO THE JURY, AND THE TRIAL COURT EXCUSED A JUROR FOR WRITING "GUILTY" ON THEIR NOTEPAD DURING THE SECOND DAY OF TRIAL.

Standard of Review

"Decisions regarding the admissibility of evidence and whether to grant or deny a mistrial are within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *State v. Sweet*, 374 S.C. 1, 4-5, 647 S.E.2d 202, 204 (2007). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*, 374 S.C. at 5, 647 S.E.2d at 204-05.

Law

In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. *See State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

Discussion

In this case, the Trial Court erred by refusing to grant a mistrial when the State's first witness referenced inadmissible propensity evidence, the State presented inadmissible drug

evidence to the jury, and the Trial Court excused a juror for writing "guilty" on their notepad during the second day of trial. *See Prince,* 279 S.C. at 33, 301 S.E.2d at 472; *State v. Simpson,* 325 S.C. 37, 479 S.E.2d 57 (1996); *see also* 75B Am.Jur.2d *Trial* § 1284 (1992) ("Error is not always rendered harmless by instructions to the jury to disregard it or to give it only a limited effect. The test is one of prejudice.") (footnotes omitted); *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (To warrant reversal, "the errors must adversely affect [the defendant's] right to a fair trial.").

A. The Trial Court erred by refusing to grant a mistrial when the State's first witness referenced inadmissible propensity evidence and denied Appellant's right to a fair trial.

Generally, evidence of a person's character is not admissible to prove the person acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. Under Rule 404(b), SCRE, evidence of a person's "other crimes, wrongs, or acts" are inadmissible to prove a person's general character "in order to show action in conformity therewith." However, evidence of other bad acts are admissible when that evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime on trial. *See State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923).

The proponent of prior bad act evidence must demonstrate it has a legitimate purpose, "i.e., the evidence does something more than prove a person has propensity to commit crimes." *Johnson v. State*, 433 S.C. 550, 555, 860 S.E.2d 696, 699 (Ct. App. 2021). This Court recently explained the State's initial burden in seeking to admit prior bad act evidence against a criminal defendant *Johnson v. State*:

> In a criminal case, the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime."

Id. (quoting State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923)). This Court also held that trial courts are to apply the logical relevancy test with "rigid scrutiny." *Id.* at 556, 860 S.E.2d at 699.

Specifically, if the trial court concludes the prior bad act evidence serves a purpose other than to show the defendant's proclivity for criminal conduct and the purpose is one listed under Rule 404(b), then such evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see Johnson*, 433 S.C. at 556, 860 S.E.2d at 699. The danger of unfair prejudice is also enhanced when the prior bad act is "strikingly similar" to the one for which the appellant is being tried. *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

Notably, if the prior bad act did not result in a prior conviction, the state must prove the prior bad act by clear and convincing evidence. *See Johnson*, 433 S.C. at 556, 860 S.E.2d at 699. Our Supreme Court explained that clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established, and such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. *See State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008) (citation omitted).

In this case, the Trial Court's curative instruction did not cure the inadmissible testimony of the State's *first* witness that he had "received multiple tips from several sources that [Appellant] was trafficking narcotics." (R. 174–179; R. 179, lines 4-10). The danger of unfair prejudice is

evident where the Trial Court *sua sponte* interrupts the testimony and provided a curative instruction to the jury. Rules 403 and 404(b), SCRE. The State had not proved this propensity evidence by clear and convincing evidence and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant. Therefore, the Trial Court erred by refusing to grant a mistrial when the State's first witness referenced inadmissible propensity evidence and denied Appellant his right to a fair trial. *See State v. Wilson,* 274 S.C. 635, 637-38, 266 S.E.2d 426, 427 (1980) (noting "[t]he inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. . . . Further, the danger of prejudice is enhanced when, as here, there has been no trial and conviction for the [alleged previous criminal activity]. The subsequent acts remain accusations. The manifest prejudice of this evidence is obvious.").

B. The Trial Court erred by refusing to grant a mistrial when the State presented inadmissible drug evidence to the jury and denied Appellant's right to a fair trial.

In this case, the Trial Court's curative instruction did not cure the prejudice to Appellant after the Court "**regrettably**" denied the motion for a mistrial. (R. 437–443) (emphasis added). The State conceded that Item 1.2 was not seized during the traffic stop. (R. 432–433). The Trial Court maintained that he could suppress Item 1.2 because State's Exhibit 7 had not been admitted into evidence (despite that the contents of Exhibit 7 had been shown to the jury and both the State and Defense Counsel's belief that Exhibit 7 had been admitted into evidence). (R. 443–447). The Trial Court further noted that if he "had ruled into evidence 1.2 . . . that would have been reversible error." (R. 445–446). No witness testified about how Item 1.2 ended up in State's Exhibit 7.

Notably, even the Trial Court voiced his concerns about the effectiveness of another curative instruction:

> I'm beginning to wonder just how clean my curative instructions are going to wash this record of the taints beginning with – well, the initial statement early on about a whole lot of other drug activity in addition to this June 29th stuff that we're dealing with, and now to ask this jury to further disregard this 5.22 grams of drugs, just forget about that.

(R. 436–437). Therefore, the Trial Court erred by refusing to grant a mistrial when the State presented inadmissible drug evidence to the jury and denied Appellant's right to a fair trial. *See Prince*, 279 S.C. at 33, 301 S.E.2d at 472 ("The less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.").

C. The Trial Court erred by refusing to grant a mistrial when the Trial Court excused a juror for writing "guilty" on their notepad during the second day of trial and denied Appellant's right to a fair trial.

In this case, the Trial Court's excusal of Juror 226 for writing "guilty" on their notepad during the second day of trial did not cure the prejudice to Appellant. (R. 305, lines 8-17; R. 601). Notably, Jurors 165, 53, and 20 saw the note and were not excused by the Trial Court. Therefore, the Trial Court erred by refusing to grant a mistrial when the Trial Court excused a juror for writing "guilty" on their notepad during the second day of trial and denied Appellant's right to a fair trial. *See State v. Aldret*, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999) (holding "premature jury deliberations may affect the 'fundamental fairness' of a trial", and the "jury should not begin discussing a case, nor deciding the issues, until all of the evidence, argument of counsel, and the charge of the law is completed."); *Id.* ("The reason for the rule is apparent. The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence.").

III. THE TRIAL COURT ERRED IN FINDING THE STATE PROVIDED A SUFFICIENT CHAIN OF CUSTODY TO ADMIT A BOX CONTAINING DRUG EVIDENCE AS STATE'S EXHIBIT 7.

Standard of Review

"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*, 374 S.C. at 5, 647 S.E.2d at 204-05.

Law

"[Our Supreme] Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007); *see also Benton v. Pellum*, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) (stating "it is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence"). "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." *Benton*, 232 S.C. at 33-34, 100 S.E.2d at 537 (citation omitted). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206 (citing *State v. Taylor*, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct. App. 2004).

Furthermore, "[w]here other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id.* "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of

possession *because the identity of those who handled the [substance] was not established at least as far as practicable*." *Id.* (emphasis added).

"The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011). "Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain of custody as far as practicable." *State v. Glenn*, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997). "A foundation [for fungible evidence] will commonly entail testimony tracing the 'chain of custody' of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with." *Glenn*, 328 S.C. at 306, 492 S.E.2d at 395.

However, courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. *See State v. Hatcher*, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-55 (2011) (citing *United States v. De Larosa*, 450 F.2d 1057, 1068 (3rd Cir. 1971)). "The trial judge's exercise of discretion must be reviewed in the light of the following factors: . . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." *Id.* (internal quotation marks and citation omitted). "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." *Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55 (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)). Accordingly, our Supreme Court held, "The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has

established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case." *Id.*, 392 S.C. at 95, 708 S.E.2d at 755.

Discussion

In this case, the Trial Court erred in finding the state provided a sufficient chain of custody to admit a box containing drug evidence as State's exhibit 7. Specifically, the Trial Court admitted three plastic containers of methamphetamine, and testimony about their analysis into evidence over Appellant's objection to the chain of custody. (R. 400-406; R. 447-454). *See Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55 (noting "the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody."). When the Trial Court questioned the State about the contents of Exhibit 7, the State was adamant that the box only contained those three containers of methamphetamine.

However, despite these assurances from the Prosecutor, State's Exhibit 7 did contain another item ("Item 1.2"), a "Ziploc bag containing a plastic container containing plastic corner bag," which contained methamphetamine. (R. 411, lines 9-11; R. 418-419). Exhibit 7 passed through the hands of three people in this case: Investigator Gietz; evidence custodian Candy Kyzer; and chemist Margaret Walker. The State chose to present only Investigator Gietz and Margaret Walker at trial. (R. 171-219; R. 390-454). The State's decision not to call evidence custodian, Candy Kyzer, to testify about what she did with Exhibit 7 is particularly concerning because no witness testified at trial about how Item 1.2 ended up inside Exhibit 7. (R. 171–525). *See State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007) ("Where an analyzed substance . . . has passed through several hands, the identity of individuals who acquired the evidence *and what was done with the evidence* between the taking and analysis must not be left to conjecture.") (emphasis added).

The State argued that it was "not required to prove every single link in the chain." (R. 402-403). Presumably, the State was trying to make the point that, normally, "[t]estimony from each custodian of fungible evidence . . . is not a prerequisite to establishing a chain of custody sufficient for admissibility." *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206. Rather, "where other evidence establishes the identity of those who have handled the evidence and *reasonably demonstrates the manner of handling the evidence*, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206 (emphasis added).

The State failed to meet that burden in this case because Candy Kyzer did not testify at trial and there was no testimony about what she did with State's Exhibit 7 between the taking by Investigator Gietz and the analysis performed by Margaret Walker. While the State attempted to explain where Item 1.2 may have come from during its chain of custody argument, these explanations amount to nothing more than conjecture. (R. 430–443) Therefore, it was improper for the Trial Court to fill the gaps in the chain of custody and admit the drug evidence.

Both Investigator Gietz and Margaret Walker testified at length and in detail about the steps they took to prevent tampering with State's Exhibit 7. (R. 197–199; R. 393–399). Despite these efforts, and without explanation, when Ms. Walker opened Exhibit 7, she found Item 1.2 and three containers. Ms. Walker then tested the contents of the three containers and Item 1.2, placed them back into Exhibit 7, and sealed Exhibit 7 on August 25, 2020. (R. 393–399).

The unexplained addition of Item 1.2 to State's Exhibit 7 constituted proof of tampering. Therefore, the Trial Court abused its discretion by admitting the drug evidence. *See Sweet*, 374 S.C. at 6, 647 S.E.2d at 205-06 ("Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by

the trial court is shown in admitting the evidence *absent proof of tampering*, bad faith, or ill-motive.") (emphasis added).

[Remainder of Page Intentionally Left Blank]

IV. THE TRIAL COURT ERRED BY REFUSING TO GRANT A NEW TRIAL WHERE THE CUMULATIVE EFFECT OF THE UNFAIR PREJUDICE CREATED BY ALL THE ERRORS THAT OCCURRED DURING THE TRIAL DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

Standard of Review

"[T]he grant or denial of a new trial is within the trial judge's discretion and will not be overturned on appeal absent a clear abuse of discretion." *State v. Smith*, 383 S.C. 159, 167, 679 S.E.2d 176, 181 (2009) (citing *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983)).

Law

In *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), our Supreme Court held that an appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. Specifically, the errors must adversely affect a defendant's right to a fair trial to qualify for reversal. *Id.* the Court has "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Id.* (quoting *State v. Mitchell,* 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998)); *State v. Freeman*, 319 S.C. 110, 123, 459 S.E.2d 867, 875 (Ct. App. 1995) (finding "the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal.").

Discussion

In this case, the Trial Court erred by refusing to grant a new trial where the cumulative effect of the unfair prejudice created by all the errors that occurred during the trial deprived appellant of his right to a fair trial. (R. 527–528; R. 588–589); *See Johnson,* 334 S.C. at 93, 512 S.E.2d at 803. Specifically, as to prejudice, the State presented improper testimony about alleged, inadmissible propensity evidence moments into the direct examination of its first witness:

Solicitor: Now without telling us anything specific, can you tell us whether or not you received any tips in reference to the defendant?

Investigator Gietz: Yes, ma'am, I did. We received multiple tips from several sources that he was trafficking narcotics.

Trial Court: Wait. Wait. Wait. Wait. Wait.

(R. 174, lines 1-6). The danger of unfair prejudice is evident where the Trial Court *sua sponte* interrupts the testimony and provided a curative instruction to the jury. Rules 403 and 404(b), SCRE. Notably, Investigator Gietz's prejudicial testimony took place before any other evidence had been introduced at trial, and it was the first thing the jury learned about Appellant. Investigator Gietz's improper testimony primed the jury to view Appellant as someone who had been involved with other instances of narcotics trafficking. *State v. Cook*, 440 S.C. 308, 318, 891 S.E.2d 35, 40 (Ct. App. 2023), *petition for cert. filed*, (quoting *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999)).

To further prejudice Appellant, the State later elicited testimony about the irrelevant drug evidence described as "Item 1.2." (R. 418-421). Even though the State's case only involved three bags of methamphetamine allegedly seized during the traffic stop, Item 1.2 was discussed at length in front of the jury. The State's expert in drug analysis, Margaret Walker, testified that Item 1.2 was a plastic corner bag containing 5.22 grams of methamphetamine. (R. 418-419). Walker even showed Item 1.2 to the jury at the solicitor's request. To make matters worse, after Appellant requested to take up a matter of law outside the presence of the jury, the Court continued to question Ms. Walker about Item 1.2 in front of the jury:

Trial Court: *All right. So what then is 1.2 with the 5.22 grams?*

Ms. Walker: *That is a Ziploc bag containing plastic container containing plastic corner bag containing crystal substance.*

Trial Court: *Okay. Not the three bags that are in the 1.1? Something different?*

Ms. Walker: *Yes, sir.*

(R. 428, line 24 – 429, line 7) (emphasis added).

After this discussion, the Trial Court excused the jury from the courtroom, and Appellant made a motion for a mistrial. (R. 429). After the Trial Court denied the mistrial motion, the Court suppressed Item 1.2. (R. 437–447). However, the Trial Court also noted its concerns about the effectiveness of another curative instruction:

> I'm beginning to wonder just how clean my curative instructions are going to wash this record of the taints beginning with – well, the initial statement early on about a whole lot of other drug activity in addition to this June 29th stuff that we're dealing with, and now to ask this jury to further disregard this 5.22 grams of drugs, just forget about that.

(R. 436–437). Accordingly, it defies logic to expect jurors to ignore multiple instances of inadmissible evidence, especially when that inadmissible evidence tells a consistent story that supports the State's theory of the case (i.e., Item 1.2 is consistent with Investigator Gietz's testimony that Appellant was involved in multiple instances of trafficking drugs.).

Furthermore, the incomplete chain of custody for State's Exhibit 7 compounded the prejudicial impact Item 1.2 had on the jurors because no explanation was provided to the jury about how Item 1.2 ended up inside Exhibit 7. Because the State never called evidence custodian to testify, Appellant was denied the opportunity to cross-examine her about what was done with Exhibit 7 after it was placed into evidence by Investigator Gietz. Without the evidence custodian's testimony, the State did not meet its burden of proving that Exhibit 7, and the three bags of methamphetamine inside, had not been exchanged, contaminated, or tampered with prior to trial. *See State v. Glenn*, 328 S.C. 300, 305-06, 429 S.E.2d 393, 395 (Ct. App. 1997). Therefore, those

three bags of methamphetamine were improperly admitted into evidence as Exhibits 11, 12, and 13, and the jury was left confused by Item 1.2's unexplained presence in State's Exhibit 7.

The cumulative prejudice of the improper evidence presented to the jurors at trial should also be evaluated in light of the note written by Juror 226 *before* any drug evidence had been admitted. (R. 305–369; R. 601). Juror 226 decision to write the word "guilty" on his notepad before the close of evidence was unduly prejudicial to Appellant because it was seen by other jurors who were not excused despite the Trial Court's erroneous belief that the remaining jurors could be fair and impartial. *See State v. Aldret*, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999) (holding "premature jury deliberations may affect the 'fundamental fairness' of a trial", and the "jury should not begin discussing a case, nor deciding the issues, until all of the evidence, argument of counsel, and the charge of the law is completed."); *Id.* ("The reason for the rule is apparent. The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence.").

Ultimately, the unfair prejudice created by these cumulative errors affected the outcome and denied Appellant of his right to a fair trial when any one of these issues alone may have improperly influenced their verdict. Therefore, the Trial Court erred by denying Appellant's motion for a new trial. *State v. Smith*, 383 S.C. 159, 168, 679 S.E.2d 176, 181 (2009) ("When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law.") (internal citations omitted).

CONCLUSION

Based on the foregoing reasons, Appellant Steven Brown respectfully requests that this Court reverse his convictions and sentences and remand this case to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,

Dayne Phillips
S.C. Bar No. 77712
PRICE BENOWITZ LLP
1614 Taylor Street, Ste. D.
Columbia, SC 29072
803-272-4503 (office)
803-807-0234 (cell)
dayne@pricebenowitz.com

Jason Yonge
S.C. Bar No. 102869
WILLIAMS, STITELY, & BRINK, PC
PO Box 39
Lexington, SC 29071
jyonge@wsblegal.com

ATTORNEYS FOR APPELLANT

August 30, 2024

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
SEP 03 2024
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Thomas W. Cooper, Circuit Court Judge

Appellate Case No: **2023-001288**

The State of South Carolina,

Respondent,

v.

Steven Daniel Brown

Appellant.

CERTIFICATE OF COUNSEL

The undersigned Counsel certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Dayne Phillips
S.C. Bar No. 77712

PRICE BENOWITZ LLP
1614 Taylor Street, Ste. D.
Columbia, SC 29072
(803) 807-0234
dayne@pricebenowitz.com

Attorney for Appellant

August 30, 2024