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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
General Sessions Court
Jocelyn Newman, Circuit Court Judge

Case No. 2016-GS-28-01123
Appellate Case No. 2024-001890

The State,

Respondent,

v.

Walter Wade Goad,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying the defense's motion to strike jurors 27 and 33 for cause?

2. Did the trial court err in admitting testimony of Joshua Parnell concerning prior alleged drug dealings with the defendant?

3. Did the trial court err in admitting testimony of the lead investigator that the defendant was a large-scale marijuana dealer?

4. Did the trial court err in denying the request for a jury charge on a lesser quantity of cocaine than the 200 to 400 grams charged in the indictment?

STATEMENT OF THE CASE

Appellant, Walter Wade Goad, was indicted in 2016 on a charge of trafficking cocaine, 200 to 400 grams. R. pp. __[indictment]. His case was tried before a jury on October 28-31, 2024, in the Kershaw County General Sessions Court, with Judge Jocelyn Newman presiding. Tr. p. 1. The jury found Appellant guilty of the charged offense. Tr. p. 626. Judge Newman sentenced Appellant to a term of imprisonment of 25 years and a fine of $100,000. R. pp. __ [sentence sheet]; Tr. p. 635.

ARGUMENT

The charge in this case stemmed from a single alleged drug transaction. The state contended Appellant sold and delivered over 200 grams of cocaine to Joshua Parnell in a transaction alleged to have occurred on September 22, 2016, outside the home of Parnell's mother located on Ward Road in Lugoff, where Parnell conducted his illegal drug activities.

At the time of the alleged transaction giving rise to the charge against Appellant, the Ward Road residence was under surveillance by law enforcement officers. Tr. pp. 127-29, 200. The

surveillance officers were equipped with video cameras and cameras with telephoto lenses. Tr. pp. 200-01. Although the surveillance officers observed a person, later identified to have been Appellant, arrive at the Ward Road residence and observed that person talking to Parnell outside the residence, they did not observe a transfer of anything from that person to Parnell. Tr. pp. 199, 202. Nor did they photograph or video a transfer of anything from that person to Parnell. Tr. pp. 201-03. Although the lead investigator, Michael Sellers, claimed during his direct testimony that they witnessed Appellant deliver drugs to Parnell, on cross-examination he admitted no one witnessed any delivery whatsoever. Tr. pp. 168, 199.

The officers were at the Ward Road location due to a criminal investigation of Parnell's drug activities being conducted by Kershaw County Sheriff's Department employees and officials from other law enforcement agencies. Parnell had earlier become a target of an investigation based on a tip from a confidential informant. Tr. pp. 117-18. In the course of the investigation, law enforcement officials set up three controlled purchases involving Parnell and confidential informants, occurring August 5, August 24, and September 13, 2016. Tr. pp. 120-25. After the third controlled purchase of drugs from Parnell, which occurred at the Ward Road residence, they obtained a warrant to search that residence. Tr. p. 125. Before executing the search warrant, they had one of their confidential sources arrange another controlled purchase from Parnell, and they set up surveillance of the Ward Road residence. Tr. pp. 126-28. It was during this surveillance on September 22 that a white male arrived at the property, in a vehicle registered to Jennifer Goad. Tr. pp. 129-30. According to the lead investigator, Parnell and his brother were there and came outside, and the person who had arrived interacted with the two brothers in the front yard, then returned to the vehicle and drove away. Tr. pp. 129-31. Officers followed that vehicle until it was on the interstate highway, then other officers still at Ward Road conducted a search of the

residence, where a large quantity of cocaine was found. Tr. pp. 131-34, 206-11. Also found in the search was a drug ledger listing the people that owed Parnell money and the amounts they owed Parnell, as well as multiple scales and other items associated with drug dealing. Tr. pp. 140-43, 210-11, 384. Appellant's name did not appear on Parnell's drug ledger. Tr. p. 213. Apart from the cocaine Parnell claimed Appellant had delivered that day, other cocaine was found in various places throughout the house. Tr. pp. 209-11.

Parnell was questioned by law enforcement at the time of the search. Parnell claimed the person who had just left had given him a package of cocaine and Parnell had broken out a portion for the transaction he was preparing to have with the confidential informant he knew as Jose. Tr. pp. 388-92. Parnell initially indicated the person who had brought him the cocaine was someone named Ethan. Tr. pp. 144, 216-17, 394-95. Later, he changed his story and implicated Appellant. Tr. pp. 144-45, 217.

The large package of cocaine Parnell claimed Appellant had just delivered was found in a camouflage bag. Tr. pp. 136, 207-08; R. pp. __ (State's Ex. 6, 7). By Parnell's own admission, the camouflage bag belonged to Parnell. Tr. pp. 432-33. Parnell testified Appellant did ***not*** deliver that bag to Parnell. Tr. p. 432. No witness observed Appellant deliver the camouflage bag to Parnell. Tr. pp. 199, 208. A smaller quantity of cocaine in a clear plastic bag was found in plain view on a chair, next to a digital scale. Tr. pp. 135, 207; R. pp. __ (State's Ex. 4, 5).

Contrary to Parnell's claim that Appellant brought the cocaine to him that day, there was evidence Parnell already had the cocaine before he went to his mother's house and brought it with him. Parnell was recorded talking to the person he knew as Jose, to whom he planned to sell a quantity of cocaine that day. In the recorded phone conversation, Parnell told Jose he had just gotten the cocaine and was on his way to his mother's house. Tr. pp. 386-88. On the witness

stand, Parnell claimed he was already at his mother's house when the conversation with Jose occurred and was lying to Jose to buy time to break out a quantity for Jose. Tr. p. 388. However, the recorded conversation supports the defense contention that it was Parnell who brought the cocaine to the house, not Appellant. Tr. pp. 387-88. The defense contention is consistent with the fact that none of the surveillance officers observed anything being delivered by Appellant to Parnell. The defense contention is also consistent with the fact the largest quantity of drugs was found in Parnell's camouflage bag, a bag Parnell unequivocally claimed was his own and was not delivered to him by Appellant. Tr. pp. 207-08, 390, 432-33; R. pp. __ (State's Ex. 6, 7).

During the search, Sellers weighed the two bags of drugs found in the living room on one of the scales found in the house and obtained a preliminary weight of approximately 281 grams. Tr. pp. 134, 143; R. p. __ (State's 9). The larger quantity found in the camouflage bag was tested by SLED and determined to be 221 grams. Tr. pp. 303, 305. The smaller quantity was determined by SLED to be 55 grams. Tr. pp. 303, 305.[1]

Parnell was a roofer, and he and Appellant had a history of working together in the construction business, on siding and other jobs related to Appellant's house construction business. Tr. pp. 453-55. The state introduced testimony concerning phone calls between Parnell and Appellant, as well as a recording of one of those calls. Tr. pp. 386, 395. Parnell testified the calls were about Appellant seeking to be paid for drugs Parnell claimed Appellant had delivered to him. Tr. pp. 396-97. But the recorded call contained no mention of any drug delivery or owing money for drugs, tr. pp. 454-57, and it is equally plausible the various phone calls were about matters related to the men's activities in working together on construction projects. On one occasion,

[1] Although the SLED weights were 221 and 55 grams, for a total weight of 276 grams, throughout the trial the witnesses and attorneys referred to the quantity as 281 grams, the amount Sellers determined as the preliminary weight.

Appellant met Parnell at a job site and Parnell said he gave Appellant some money, but their conversation was not recorded and there was nothing to corroborate that payment was for drugs. Tr. pp. 156-58, 244-45.

Officers obtained a search warrant for the home of Appellant. In that search, they did not find drugs or large quantities of cash. Tr. pp. 159-63, 247, 506, 513-14. Although a canine used to detect drugs alerted to a box in the garage, no drugs were found in that box. Tr. pp. 161-62, 355, 361. The officers seized a large scale and an industrial-sized roll of cellophane, but the presence of those items was not necessarily linked to drug activities, since it was equally plausible Appellant possessed those items due to his work in the construction business. Tr. pp. 161-62. Also seized was a list of phone numbers. Tr. pp. 164, 248. Unlike the drug ledger found in the search of the house where Parnell dealt drugs, the list found at Appellant's residence contained no references to monetary amounts, only phone numbers. Tr. p. 248.

There was no evidence presented that Appellant engaged in any controlled buys conducted by law enforcement officials. Although there was testimony from Parnell and the lead investigator, Sellers, as to other alleged drug activities (challenged in two of Appellant's issues on appeal), the state did not produce any evidence of other drug activity by Appellant, apart from Parnell's testimony regarding alleged prior drug dealings with Appellant and Sellers' hearsay testimony as to other people's knowledge of alleged drug activity by Appellant, addressed in Arguments II and III, *infra* pages 14-30.

Parnell was charged with trafficking cocaine, 200 to 400 grams, based on the alleged transaction of September 22, 2016, and was facing a mandatory term of 25 years. Tr. pp. 254, 402, 481. He pled guilty to the lesser offense of trafficking 28 to 100 grams and received a sentence of ten years. Tr. pp. 254-56, 401-06, 482. He was not charged with any distribution crime related to

the three prior controlled sales to confidential informants in which he participated or the numerous other earlier drug deals the admitted to police. Tr. pp. 186-96, 429, 444. Other charges brought against Parnell after his arrest for trafficking cocaine were also dismissed. Tr. pp. 483-86. Parnell was an admitted heroin user, and he continued to use heroin daily after his arrest until his conviction and incarceration. Tr. pp. 479-81. His testimony was at times inconsistent with that of other state's witnesses, and he admitted his recollection of the events about which he was testifying was incomplete. Tr. p. 488.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO STRIKE JURORS 27 AND 33 FOR CAUSE.

During voir dire, the defense challenged a number of prospective jurors for cause. Two of the jurors that the court declined to strike for cause, jurors 27 and 33, were called during jury selection, and the defense exercised peremptory strikes as to those two jurors. The defense exhausted its five strikes before jury selection was complete. Appellant contends the trial court committed prejudicial error in denying the challenges to these two jurors for cause.

Both the federal and state constitutions guarantee to a criminal defendant the right to an impartial jury. *See Warger v. Shauers*, 574 U.S. 40, 50 (2014); *State v. Rowell*, 444 S.C. 109, 113, 906 S.E.2d 554, 556 (2024); *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982), *overruled on other grounds by Rowell*; U.S. Const. amends. VI, XIV; S.C. Const. art. I, § 14. Moreover, a criminal defendant has a due process right to be tried by competent jurors, which implies, among other things, the right to an impartial jury, a jury capable and willing to decide the case based solely on the evidence. *See Tanner v. United States*, 483 U.S. 107, 134 (1987) (Marshall, J., dissenting in part), *citing Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *see also State v. Hurd*, 325 S.C. 384, 389, 480 S.E.2d 94, 97 (Ct.App. 1996); U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3.

By statute, the court is given the responsibility to examine prospective jurors as to their interest, opinion, bias, and impartiality and to excuse any prospective juror who is not indifferent in the cause. *See* S.C. Code Ann. § 14-7-1020. Our Supreme Court considers it the duty – indeed, the "solemn duty" – of the trial court to ensure that every juror is unbiased, fair, and impartial. *See Rowell*, 444 S.C. at 113, 906 S.E.2d at 556, *citing Gulledge*, 277 S.C. at 370, 287 S.E.2d at 489.

The trial court is accorded discretion in determining a juror's competence. *See State v. Simpson*, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996); *State v. Fripp*, 396 S.C. 434, 442, 721 S.E.2d 465, 469 (Ct.App. 2012). In this case, the trial court abused its discretion in denying the defense requests to strike jurors 27 and 33 for cause.

A. Juror 27.

During voir dire, the court informed the prospective jurors that the defendant was charged with trafficking between 200 grams and 400 grams of cocaine. Tr. p. 55. Later, following a bench conference, the trial judge indicated she had an additional question for the prospective jurors. She stated that when she earlier explained the defendant was charged with trafficking cocaine, 200 to 400 grams, someone whistled. She asked who that was, and juror 27 identified himself as the person who had whistled. Tr. p. 77. The court made no further inquiry of the juror with respect to his having whistled or whether he could be fair and impartial, and another bench conference was held. Tr. p. 77.

During jury selection, juror 27 was called, and the defense exercised a peremptory strike of that juror. Tr. p. 79. After the jury selection was complete, the defense placed on the record that it had asked the court to strike juror 27 for cause. Tr. p. 86. The court explained its earlier ruling: "I declined to strike him for cause because that would require the Court to interpret what he meant by the whistle, which I cannot do, and he said he can be fair and impartial." Tr. p. 87.

But, in fact, that did not occur – the court did not ask and the juror did not say whether he could be fair and impartial. Tr. p. 77. The court's ruling was erroneous, and it was prejudicial.

In this case, the trial court failed to properly make a determination as to juror 27's ability to be fair and impartial. The judge stated in her ruling that she could not interpret the witness's whistle. But the statute and case law cited above place on the trial judge the responsibility to inquire into the juror's opinion and impartiality. *See* S.C. Code Ann. § 14-7-1020; *Rowell*, 444 S.C. at 113, 906 S.E.2d at 556. Juror 27 whistled when the court explained the defendant was charged with trafficking 200 to 400 grams of cocaine. That whistle was an expression of an opinion of some sort about the nature of the charge. While the judge may have believed she could not interpret the whistle, she had the authority – indeed, the solemn duty – to make further inquiry to determine if the whistle indicated the juror had an opinion, bias, or lack of impartiality that rendered him incompetent to serve as a juror. *See* S.C. Code Ann. § 14-7-1020; *Rowell*, 444 S.C. at 113, 906 S.E.2d at 556. But the trial judge made no such inquiry.

A judge's failure to exercise her discretion is in itself an abuse of discretion. *See State v. Heyward*, 441 S.C. 484, 494, 895 S.E.2d 658, 663 (2023); *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015); *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987); *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App. 1997). The Court abused its discretion in failing to inquire as to the meaning of juror 27's whistle, the potential opinion or bias of juror 27 with respect to the crime charged, and juror 27's ability to be fair and impartial notwithstanding whatever opinion was the basis for his whistling about the crime charged.

The court's ruling on the defense's challenge to this prospective juror for cause was erroneous in another way. The court stated as part of the basis for its ruling that the juror "said he can be fair and impartial." Tr. p. 87. But this aspect of the ruling was unsupported by the evidence.

When the court inquired as to the identity of the prospective juror that whistled, it made no further inquiry as to the meaning of the whistle or whether the juror, notwithstanding having expressed something by his whistle, could be fair and impartial. Tr. p. 77. The court's finding that this prospective juror said he could be fair and impartial is wholly unsupported by the evidence and therefore an abuse of discretion. *See Simpson*, 325 S.C. at 41, 479 S.E.2d at 59 ("A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence.")

This case is not like those in which our appellate courts have upheld trial judge's decisions not to strike for cause jurors who had a pre-formed opinion. *Cf. State v. Britt*, 237 S.C. 293, 117 S.E.2d 379 (1960), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Gantt*, 223 S.C. 431, 76 S.E.2d 674 (1953), *overruled on other grounds by Torrence*; *Fripp*, 396 S.C. at 442, 721 S.E.2d at 468-69. In two of those cases, the trial judges made specific inquiry and the jurors affirmed their ability, notwithstanding having an opinion, to be fair and impartial and to render a verdict based solely upon the evidence, and further expressed they were not conscious of any bias or prejudice for or against the defendants. *See Britt*, 237 S.C. at 306, 117 S.E.2d at 385; *Gantt*, 223 S.C. at 435, 76 S.E.2d at 676. In the third, the juror specifically stated he could be fair and impartial. *See Fripp*, 396 S.C. at 442, 721 S.E.2d at 468-69.[2] But here, the trial judge made no inquiry whether this prospective juror, notwithstanding whistling and thereby expressing whatever opinion was the basis for his whistling, could be fair and impartial in his role as a juror and render a verdict based solely upon the evidence. The court's

[2] In *Britt, Gantt*, and *Fripp* the reviewing court also noted the challenging party had remaining challenges. *See Britt*, 237 S.C. at 306, 117 S.E.2d at 385-86, and *Fripp*, 396 S.C. at 442, 721 S.E.2d at 468-69 (appellants did not exhaust peremptory challenges); *see also Gantt*, 223 S.C. at 435-36, 76 S.E.2d at 676 (court later stood juror aside, thereby providing to appellants an additional challenge).

ruling – premised on the mistaken belief the juror had stated he could be fair and impartial, when in fact no inquiry was made and no answer given to that effect – was wholly unsupported by the record and amounted to an abuse of discretion.

B. Juror 33.

During voir dire, the court read a list of potential witnesses for the state and asked jurors about any relationship or knowledge of them. Tr. pp. 57-58. One of the listed witnesses was Chelsea Cockrill of the Kershaw County Sheriff's Office. Tr. p. 58. After reading the list of the state's witnesses, the court asked if any member of the jury panel was related by blood, connected by marriage, or had any close, personal relationship with any of the potential witnesses. Tr. p. 59. A number of prospective jurors stood, and the court then questioned them individually as to the nature of such relationships with the listed witnesses.

Juror 33 indicated that one of the witnesses, Chelsea Cockrill, would be marrying his cousin in December. Tr. p. 60. Additional questions and answers followed:

JUDGE NEWMAN:	. . . Do you socialize with her?
JUROR NO. 33:	(Inaudible).
JUDGE NEWMAN:	For how long has that been the case? Months? Years?
JUROR NO. 33:	Three, four years, at least.
JUDGE NEWMAN:	Okay.
JUROR NO. 33:	(Inaudible.)
JUDGE NEWMAN:	Do you believe that you can still be a fair and impartial juror?
JUROR NO. 33:	(Inaudible.)

Tr. p. 61, lines 1-10.

At the conclusion of voir dire and before the jury selection began, there were several bench conferences. Tr. pp. 75, 76, 77. During jury selection, juror 33, who had a years-long social relationship and soon-to-be family relationship with Chelsea Cockrill, was called. Tr. p. 79. The defense exercised a peremptory strike of that juror. Tr. p. 79. After the jury was selected, the defense placed on the record that it had moved the court to excuse for cause members of the jury panel who had a relationship to the Kershaw County Sheriff's Department, which the court overruled. Tr. p. 86. The state put on the record that it objected because all the jurors said they could be fair and impartial regardless of their family's relationship with law enforcement. Tr. p. 86. The court stated for that reason it declined the request to excuse those jurors for cause. Tr. p. 86. As to juror 33, this ruling was both erroneous and prejudicial.

While some of this prospective juror's answers to the court's questions are not preserved by the transcript and instead are noted as "inaudible," two facts are clear: one of the state's potential witnesses was going to marry into juror 33's family in just two months (Tr. p. 60, lines 11-25) and juror 33 and the potential witness had socialized together for at least three to four years (Tr. p. 61, lines 1-5).[3] Unclear is what the juror said without a question being asked (Tr. p. 61, lines 6-7) and what the juror said in answer to the question as to his ability to be fair and impartial (Tr. p. 61, lines 8-10). In light of the nature of the prospective juror's relationship with witness Cockrill and her impending marriage into his family, this prospective juror should have been excused for cause.

[3] Although the answer to the first question – "Do you socialize with her?" – was "inaudible," the follow-up questions – "For how long has that been the case? Months? Years?" – clearly establish the answer to the first question was "Yes." Tr. p. 61. Had the answer to the first question been "No," the follow-up questions would have been non-sensical.

This case is not like those in which the appellate court found no error in a trial court's decision not to remove a juror who had a remote connection with a witness or a witness's family member. *Cf. State v. Eubanks*, 437 S.C. 458, 485-87, 878 S.E.2d 335, 350-51 (Ct.App. 2022) (juror, a realtor, had two years before sold a house to a member of the victim's extended family, which was the family of juror's former wife from whom he had been divorced for 11 years, and Court found the connection remote; juror was also "Facebook friends" with the investigator and a witness's grandmother, which the Court found does not necessarily rise to the level of a close business or social relationship); *State v. Tucker*, 423 S.C. 403, 411-13, 815 S.E.2d 467, 471-72 (Ct.App. 2018) (relationship between juror and witness described as "co-workers and friends" was shown to be one of only sporadic contact at work, rather than one of closeness).[4] Unlike those cases where there was a minor or attenuated connection between the juror and a victim or witness, in this case, juror 33 had a years-long social relationship with one of the Kershaw County Sheriff's employees who was expected to be called as a witness, and that relationship was imminently to become a close family relationship.

This case is more akin to the facts of *Gulledge*, where the Supreme Court found reversible error in the trial court's failure to grant a mistrial due to a non-disclosed connection between a juror and a witness. *See Gulledge*, 277 S.C. at 369-71, 287 S.E.2d at 489-90. While recognizing that a juror's relationship to a police officer or deputy sheriff does not automatically disqualify the juror, the Court further noted that the juror may be biased, prejudiced, or otherwise interested in the action, and, depending on the facts and circumstances, subject to challenge for cause. *See id.*,

[4] *Eubanks* and *Tucker*, like *Gulledge*, also discussed above, involved jurors who had been seated, and challenges made after previously undisclosed information came to light, either during the course of trial or post-trial. The nature of the relationships addressed in those cases, however, is instructive in the context of the challenge to juror 33 for cause.

277 S.C. at 370, 287 S.E.2d at 489-90. In *Gulledge*, it came to light that a juror was related to a testifying witness, a deputy sheriff who had both viewed the crime scene and had custody of the prisoner in the courtroom. The juror was married to the half-brother of the deputy's wife. *See id.*, 277 S.C. at 370, 287 S.E.2d at 489. Similarly, in this case, the juror and the potential Sheriff's Department witness had a social relationship that spanned at least three to four years, and she was soon to become the wife of the prospective juror's cousin. Upon such a close social and familial relationship, the trial court abused its discretion in not excusing this juror for cause, regardless of what the juror's inaudible responses during voir dire may have been.

C. Prejudice.

The defense was allotted five peremptory challenges in this case. *See* S.C. Code Ann. § 14-7-1110. Two of those challenges were used to strike jurors 27 and 33. Tr. p. 79. The remaining three challenges were also used to strike other prospective jurors. Tr. pp. 78, 80, 81-82. The last of the defense's peremptory challenges was used before the complete jury was selected. Tr. p. 82.

Had the trial court excused either juror 27 or juror 33 for cause, the effect would have been that an additional one or two peremptory strikes would have been available for the defense to use before the selection of the jury was complete. *Cf. Britt*, 237 S.C. at 306, 117 S.E.2d at 385-86; *Gantt*, 223 S.C. at 435-36, 76 S.E.2d at 676; *Fripp*, 396 S.C. at 442, 721 S.E.2d at 468-69. Under the circumstances of this case, where the defense exhausted its peremptory challenges before jury selection was completed, the court's errors in failing to excuse these jurors for cause were prejudicial.

The prejudicial impact on the defense resulting from the court's failure to strike these two jurors for cause is demonstrated by a review of the timing and sequence of the strikes exercised by the defense in the selection of this jury. Jurors 27 and 33 were both called very early in the

selection process. The defense had exercised one strike and only two jurors had been seated when juror 27 was called. The defense was compelled to use its second strike to excuse juror 27. Another juror was seated, then juror 33 was called, and the defense was forced to use its third strike to excuse juror 33. At that juncture, the defense had only two remaining strikes, while nine seats on the jury were still to be filled. Counsel was constrained to reserve those strikes and not strike certain jurors that were selected, because it had to use two strikes on jurors 27 and 33 so early in the process. Three more jurors were seated before the defense used its fourth strike, then five more jurors were seated before the defense used its fifth and final strike, with the twelfth juror seated after the defense's strikes were exhausted. Tr. pp. 77-82. The court's failure to strike jurors 27 and juror 33 for cause had an extremely prejudicial impact on the defense, hampering its ability to exercise its peremptory challenges as it otherwise would with respect to the nine jurors seated after juror 33 was excused. This Court should find the court's failure to strike jurors 27 and 33 for cause was prejudicial, and it should grant Appellant a new trial.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING TESTIMONY OF JOSHUA PARNELL CONCERNING PRIOR ALLEGED DRUG DEALINGS WITH APPELLANT.

The defense objected to testimony from Parnell regarding prior alleged drug dealings with Appellant. Tr. pp. 333-34. The state argued the evidence was admissible to show Parnell was a credible witness and knew what he was talking about, and as evidence of common scheme or plan. Tr. pp. 335-36. The court ruled the evidence admissible,[5] stating it was not being offered to prove the defendant's character or to show action in conformity therewith; the probative value outweighed the danger of unfair prejudice; and it was being offered to explain the closeness of the

[5] The defense objected to similar testimony coming in earlier through the lead investigator, Michael Sellers, and the court sustained the objection. Tr. p. 145.

relationship between the defendant and the witness, to explain their course of dealing, and to enhance Parnell's credibility as a witness. Tr. p. 336.

Because this ruling was made *in limine*, the defense asked that it be allowed to incorporate the arguments made at the time the testimony is given, and the court agreed. Tr. pp. 336-37. When the state first sought this testimony from Parnell, the defense renewed its objection, based on all the reasons previously stated, and the court overruled the objection. Tr. p. 376. As the testimony ensued, the defense requested that the objection run throughout the testimony, and the court agreed. Tr. p. 377. The state elicited testimony from Parnell about his alleged history of dealings with Appellant, for years in marijuana and recently in cocaine. Tr. p. 377 *et seq.* The admission of this evidence was both erroneous and prejudicial.

Evidentiary rulings are reviewed under an abuse of discretion standard. *State v. Benton*, 443 S.C. 1, 6, 901 S.E.2d 701, 703 (2024); *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). An abuse of discretion occurs when the ruling of the lower court is controlled by an error of law or when factual conclusions are without evidentiary support. *State v. Robinson*, 438 S.C. 421, 430, 882 S.E.2d 883, 888 (Ct.App. 2023); *Black*, 400 S.C. at 16, 732 S.E.2d at 884.

With certain exceptions not applicable here, evidence of a defendant's character or trait of character is not admissible to prove action in conformity therewith. Rule 404(a), SCRE. Specifically, evidence of a defendant's prior crimes or other bad acts is not admissible to prove his character in order to show action in conformity therewith. Rule 404(b), SCRE; *State v. Perry*, 430 S.C. 24, 29, 842 S.E.2d 654, 657 (2020); *Black*, 400 S.C. at 17, 732 S.E.2d at 884. Rather, evidence of other bad acts is admissible only for the limited purposes allowed under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE, and then only if other requirements are also met.

Prior acts evidence "'may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged.'" *State v. Fonseca*, 383 S.C. 640, 647, 681 S.E.2d 1, 4 (Ct. App. 2009), *aff'd and adopted by Supreme Court as its own opinion*, 393 S.C. 229, 711 S.E.2d 906 (2011), *quoting Lyle*, 125 S.C. at 415, 118 S.E. at 807. Such evidence is not admissible to show a propensity of the defendant to commit the crime for which he is on trial. *See Perry*, 430 S.C. at 30, 842 S.E.2d at 657; .

"'A necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is.'" *State v. Nelson*, 331 S.C. 1, 15, 501 S.E.2d 716, 723 (1998) (citation omitted). Prior acts evidence may not be admitted "to show criminal propensity or that the defendant is a bad person unworthy of the presumption of innocence." *State v. Tuffour*, 364 S.C. 497, 504, 613 S.E.2d 814, 818 (Ct. App. 2005), *vacated on other grounds due to plea to a lesser offense*, 371 S.C. 511, 641 S.E.2d 24 (2007). The Supreme Court describes propensity evidence "as having 'the inevitable tendency to raise a legally spurious presumption of guilt in the minds of the jurors.'" *See Perry*, 430 S.C. at 30, 842 S.E.2d at 657, *quoting Lyle*, 125 S.C. at 417, 118 S.E. at 807 (additional quotation omitted). The state, as the proponent of the evidence, had the burden to demonstrate the evidence had a legitimate purpose – that it does something more than prove a person has a propensity to commit crimes. *See Robinson*, 438 S.C. at 435, 882 S.E.2d at 891.

The only purposes for which evidence of prior crimes, wrongs, or other acts may be introduced is to establish motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; *Perry*, 430 S.C. at 30-31, 842 S.E.2d at 657-58; *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); *Lyle*, 125 S.C. at 416, 118 S.E. at 807. To be admissible, the prior act must have a logical relevancy or logical connection to the

crime with which the defendant is charged. *Perry*, 430 S.C. at 31, 34, 44, 842 S.E.2d at 658, 659, 664-65; *Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483. Mere similarity is not enough. *Perry*, 430 S.C. at 35-36, 660-61.

For evidence to be admitted under the common scheme or plan exception, the evidence must pertain to "**a common scheme or plan involving other crimes so closely related to the one charged that proof of one tends to prove the other**." *See State v. Barroso*, 328 S.C. 268, 271-72, 493 S.E.2d 854, 855 (1997) (emphasis in original). As the Supreme Court made clear in *Perry*:

> It is not enough to meet the "logical connection" standard for admission of other crimes under the common scheme or plan exception to Rule 404(b) that the defendant previously committed the same crime. "Repetition of the same act or same crime does not equal a 'plan.'" . . . When evidence of other crimes is admitted based solely on the similarity of a previous crime, the evidence serves only the purpose prohibited by Rule 404(b), and allows the jury to convict the defendant on the improper inference of propensity that because he did it before, he must have done it again. . . . "[T]he repeated commission of the same criminal offense [is] offered obliquely to show bad character and conduct in conformity with that bad character."
>
> The common scheme or plan exception demands more. There must be something in the defendant's criminal process that logically connects the "other crimes" to the crime charged. . . .

See Perry, 430 S.C. at 41, 842 S.E.2d at 663 (multiple citations omitted). The courts are to apply the logical relevancy test with "rigid scrutiny." *Robinson*, 438 S.C. at 436, 882 S.E.2d at 891; *Lyle*, 125 S.C. at 417, 118 S.E. at 807. If the logical connection between the extraneous criminal conduct and the crime charged is not clearly established, the court must give the accused the benefit of the doubt and reject the evidence. *See Lyle*, 125 S.C. at 417, 118 S.E. at 807; *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 328 (2000); *State v. Ostrowski*, 435 S.C. 364, 390, 867 S.E.2d 269, 282 (Ct.App. 2021).

In this case, the court's reasons for admitting this evidence are not within the exceptions for admission of prior acts evidence under Rule 404(b), SCRE. There is no exception for use of

such evidence to enhance a witness's credibility, or to explain the relationship or closeness a witness had with the defendant, or to explain the course of dealing between a witness and the defendant. Course of dealing is not the equivalent of common scheme or plan. In fact, as the passage quoted above makes clear, the fact a party engaged in the same criminal act before does not justify admission of such evidence under the common scheme or plan exception: "Repetition of the same act or same crime does not equal a 'plan.'" *See Perry*, 430 S.C. at 41, 842 S.E.2d at 663, *quoting State v. Perez*, 423 S.C. 491, 502, 816 S.E.2d 550, 556 (2018) (Hearn, J., concurring). The court's findings, premised on those articulated reasons, *see* Tr. p. 336, was an error of law, amounting to an abuse of discretion.

The court also concluded this evidence was not offered to prove the defendant's character or to show action in conformity therewith. Tr. p. 336. Appellant submits this was the very purpose for the state's seeking to introduce this evidence. As *Perry* noted, in a criminal case, evidence the defendant committed similar criminal acts has the inherent tendency to show propensity, a prohibited purpose. *See Perry*, 430 S.C. at 30, 842 S.E.2d at 657. In numerous cases addressing whether a proper purpose was established, our appellate courts have found the state's actual purpose was in fact the prohibited purpose. *See, e.g., Brooks*, 341 S.C. at 62, 533 S.E.2d at 328; *Ostrowski*, 435 S.C. at 392-93, 867 S.E.2d at 283-84; *State v. Carter*, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct.App. 1996); *State v. Campbell*, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct.App. 1994).

Under the *Lyle* standard, as revisited in *Perry*, the state was required to demonstrate the evidence of the other crime served some purpose other than using the defendant's character to show his propensity to commit the crime charged. *See Perry*, 430 S.C. at 31, 44, 842 S.E.2d at 657-58, 665. The state had the burden to show a "logical connection" between the other crimes

and the crime charged "such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *See Perry*, 430 S.C. at 44, 842 S.E.2d at 665, *quoting Lyle*, 125 S.C. at 417, 118 S.E. at 807. In this case, the state did not make such a showing.

Parnell's testimony about his alleged prior drug dealings with Appellant did not tend to prove any fact in issue. The charged crime was trafficking in cocaine, 200 to 400 grams. R. p. __ [indictment]. Upon the specific charge in this case, the state was required to prove the defendant knowingly sold or delivered cocaine, and that the quantity of the cocaine was 200 grams or more but less than 400 grams. *See* S.C. Code Ann. § 44-53-370(e)(2)(d) ("A person who knowingly sells, . . . distributes, . . . cocaine or any mixtures containing cocaine . . . two hundred grams or more, but less than four hundred grams . . ."). The case was premised on the allegation that Appellant did so on September 22, 2016, by delivering to Parnell approximately 281 grams of cocaine. Parnell's testimony about past dealings he alleged he had with Appellant did not reasonably tend to prove a material fact in issue or an element of the crime charged, and thus did not have a logical connection to the crime charged.

Particularly instructive are the prior decisions of this Court involving admission of evidence of drug activity other than the specific drug offense for which the defendant was on trial. In a number of those cases addressing the common scheme or plan exception, the Court has recognized that, where a single act of distribution or trafficking is charged, the crime stands on its own and evidence of prior sales is not admissible, because the technique or methodology of prior sales is not relevant to prove the transaction. *See Tuffour*, 364 S.C. at 507, 613 S.E.2d at 820; *Carter*, 323 S.C. at 468, 476 S.E.2d at 918; *Campbell*, 317 S.C. at 451, 454 S.E.2d at 901.

More recently, in *Ostrowski*, the Court reached a similar result, addressing a claim that certain prior bad acts evidence was admissible to prove identity and intent. The defendant was

charged with trafficking more than 28 grams of methamphetamine, based on the seizure of that quantity in a search of the defendant's residence. The trial court admitted text messages to and from a phone seized from the defendant that tended to show the defendant was dealing drugs. Some of the text messages were dated three and six weeks prior to the seizure of the drugs that were the subject of the offense for which the defendant was on trial. This Court noted that the state did not cite any specific facts or evidence that illustrated how the text messages – even if they proved a drug trafficking scheme – connected the defendant to the specific drugs at issue in the case. *See Ostrowski*, 435 S.C. at 392-98, 867 S.E.2d at 283-87. Similarly, in this case, Parnell's alleged years-long dealings with Appellant in illegal drugs did not have any connection to the specific drugs Appellant was alleged to have delivered to Parnell on September 22, 2016, which served as the basis for his trafficking charge.

Even if the state had met its burden of showing this evidence had the necessary logical connection to the crime charged to be admitted under the common scheme or plan exception, the evidence was nonetheless inadmissible because the evidence of Appellant's other alleged drug activity was not clear and convincing, as required where the prior acts are not the subject of a criminal conviction. *See Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483. "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." *Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483. Here, the testimony about Parnell's alleged history with Appellant came exclusively through the testimony of Parnell, who was a biased witness, who gave inconsistent and spotty testimony, and whose recollection was admittedly impaired by his own daily heroin use during the period about which he testified. Significantly, he was the party found to be in possession of a quantity of drugs sufficient to support a charge of trafficking 200 to 400 grams, but he implicated another in an effort

to mitigate his own culpability. His testimony was replete with contradictions and denials of his statement to law enforcement officials made at the time of the search. His testimony cannot be deemed clear and convincing evidence of the alleged history of drug dealing with Appellant.

Moreover, even if the evidence were clear and convincing and the state had met its burden to establish this evidence was within the common scheme or plan exception, the state also had the burden to establish the evidence was admissible under Rule 403, SCRE. *See Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483. In the context of Rule 404(b) evidence, the state must establish "that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes." *See Perry*, 430 S.C. at 44, 842 S.E.2d at 665; *see also Perry*, 430 S.C. at 31, 842 S.E.2d at 657-58. This the state did not do. Indeed, the state did not even address the defense's argument that the evidence was inadmissible under Rule 403 because the prejudicial effect outweighed the probative value. *See* Tr. p. 334 (defense argument); Tr. p. 335 (state argument).

As the *Perry* Court emphasized, "Whether the State has met its burden 'should be subjected by the courts to rigid scrutiny,' considering the individual facts of and circumstances of each case." *See Perry*, 430 S.C. at 44, 842 S.E.2d at 665, *quoting Lyle*, 125 S.C. at 417, 118 S.E. at 807. On the Rule 403 aspect of this issue, the trial court did not require any showing by the state, making a determination that the probative value outweighed the danger of unfair prejudice without any argument by the state as to the weighing of the probative value against the prejudicial effect. Where the state did not address this aspect of the issue at all, it cannot be said that the trial court fulfilled the requirement of subjecting the state's argument to rigid scrutiny. Under these circumstances, the court abused its discretion, where the state did not articulate how the probative

value of this evidence was not substantially outweighed by the danger of unfair prejudice. Parnell's testimony concerning years of alleged prior drug dealings with Appellant was manifestly prejudicial. It was quintessential propensity evidence, and its minimal to non-existent probative value was substantially outweighed by the danger of unfair prejudice, precluding its admission under Rule 403, SCRE.

For this Court to affirm despite the trial court's error in allowing this improper character and propensity evidence, it must determine the error was harmless beyond a reasonable doubt. *See Ostrowski*, 435 S.C. at 401, 867 S.E.2d at 288; *Fletcher*, 379 S.C. at 25, 664 S.E.2d at 484; *State v. King*, 334 S.C. 504, 514, 514 S.E.2d 578, 583 (1999).

> Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. An insubstantial error not affecting the result of the trial is harmless where guilt has been ***conclusively*** proven by competent evidence ***such that no other rational conclusion could be reached.***

Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 (citations and quotation marks omitted) (emphasis added). In this case, guilt had not been conclusively proven. Other rational conclusions than guilt could have been reached based on the evidence before the jury. Parnell was the only witness that directly implicated Appellant in the delivery of drugs on September 22, 2016, and he was not a disinterested witness. He was caught with a quantity of cocaine that warranted a charge of trafficking at a level requiring a mandatory 25-year prison term. He began cooperating with law enforcement to help himself with his own charge, and he was ultimately allowed to plead guilty to a lesser quantity and a ten-year sentence. It was only Parnell that linked Appellant to the quantity of drugs charged, through his testimony that Appellant brought the large package of cocaine from which Parnell cut a smaller amount. The event was witnessed by officers conducting surveillance, but no witness saw a transfer of anything from Appellant to Parnell, and no still photograph or video shows any such transfer. The large package of drugs was found in Parnell's house in a

camouflage bag owned by Parnell. No witness observed Appellant deliver a camouflage bag to Parnell, and no photograph or video depicts any such delivery. In the absence of such evidence, the jury could have disbelieved Parnell's claim that the large package was delivered by Appellant and concluded there was either no delivery by Appellant or that he delivered only the smaller amount found in plain view on a chair during the search conducted immediately after Appellant left. Indeed, such a conclusion by the jury would have been consistent with the evidence that cocaine not attributed to Appellant was found in various places throughout the house, and also consistent with the recorded conversation between Parnell and Jose in which Parnell stated he had just got his hands on the cocaine and was on his way to his mother's house. Because the evidence did not conclusively prove Appellant's guilt such that no other rational conclusion could have been reached than a finding by the jury that Appellant trafficked in cocaine, 200 to 400 grams, the appellate court cannot find the error in the admission of this propensity evidence harmless beyond a reasonable doubt. This Court should find reversible error in the admission of Parnell's testimony about past drug dealings and grant Appellant a new trial.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING TESTIMONY OF THE LEAD INVESTIGATOR THAT APPELLANT WAS A LARGE-SCALE MARIJUANA DEALER.

Michael Sellers, the lead investigator, testified for the state concerning the investigation that began in July 2016 into Joshua Parnell's drug activities and the three controlled purchases officials set up with Parnell in August and September 2016 to build a case against Parnell. Tr. pp. 116-23. During that testimony, the state asked and Sellers answered:

Q. . . . And so at this point do you know of the defendant, Mr. Walter Goad?

A. I do not.

Tr. p. 121, lines 5-7.

On cross-examination, the following examination occurred:

Q. . . . So, let me go to September 22nd, 2016. I believe you told the Solicitor yesterday, Attorney General, that Goad was -- you didn't know about Goad at all until that day, correct? Or his name.

A. Actually I knew about Goad prior to --

Q. I thought you said you didn't.

A. No, I'm talking about -- you just asked me if I knew about Goad prior to this whole event or?

Q. My understanding of what your testimony yesterday Goad was not a name that was familiar to you at that point?

A. No, he was not familiar with me during this buy, during -- at -- we didn't know that Goad was his supplier. That's what I was testifying to yesterday.

Q. Maybe I misunderstood.

A. Okay.

Q. But that's what you said yesterday?

A. Yeah, I did not know Goad was Josh's supplier until we identified him.

Q. Okay. All right. The jury will remember what was said.

A. Okay.

Tr. p. 196, line 22 – p. 197, line 18.

On redirect, the state revisited this area of examination:

Q. Mr. Swerling asked you about your familiarity with the defendant as it related to this investigation, can you please clarify for the jury, were you familiar with Mr. Goad in general --

A. Yes, I was.

Q. -- prior to this investigation?

A. Yes, I was.

Q. Okay, what was your familiarity with him prior to this investigation?

A. He was --

MR. SWERLING: Objection, hearsay.

JUDGE NEWMAN: Overruled.

. . . .

A. He was a -- a large-scale marijuana dealer in this area.

Q. So law enforcement was familiar with the name Walter Goad?

A. That is correct.

MR. SWERLING: Your Honor, I'm going to have to (inaudible) right back about any testimony from him, you already ruled that he could not go into it himself, and so I -- at this point I have objected to it, I move that it be struck.

MS. GATTE: He just testified to it.

MR. SWERLING: He testified to what?

JUDGE NEWMAN: Overruled.

MR. SWERLING: Judge, may I please put on the record later what my objection is?

JUDGE NEWMAN: Yes, sir.

MR. SWERLING: About what he is going into?

JUDGE NEWMAN: Yes, sir.

Tr. p. 258, line 12 – p. 259, line 20.

Later, the defense did place on the record its the objection to Sellers' statement that Appellant was a large-scale marijuana dealer. Tr. pp. 308-309. The defense stated the court had earlier ruled the evidence would not be admissible through this witness,[6] therefore the defense

[6] The earlier objection to such evidence had occurred at page __ (tr. p. 145) of the record and, following a bench conference, the court had sustained that objection.

objected to it and moved that be struck because it goes into another matter, other evidence that is not admissible in the case. Tr. pp. 308-09. The state then put on the record that it believed the defense opened the door to this questioning during cross-examination and it was "fair game." Tr. p. 309. The judge then stated the basis for her earlier ruling:

> . . . And as I understand from the bench conference, [the state] didn't anticipate that the witness would answer the question the way he did. However, on cross-examination, I believe the defense opened the door by going on and on and on, and sort of hammering home the point -- or trying to make the distinction between, did you know him and did you not know him, how did you know him, or maybe I'm confused, etcetera, etcetera, about the witness's familiarity with the defendant. And that's the reason that I overruled the objection.

Tr. pp. 309-310. The defense responded that it thought it "only asked one question about how long have you known him. As far as his knowledge of who he was." Tr. p. 310. The judge then stated:

> Oh, the record will speak for itself but --
>
> . . . .
>
> -- my recollection is that it was --
>
> . . . .
>
> -- far more detailed than that, and that was, you know, in part -- the basis for my ruling.

Tr. p. 310.

Sellers' testimony that Appellant was a large-scale marijuana dealer was inadmissible prior acts evidence. *See* Rules 404(b), 403, SCRE, and the authorities cited in Argument II, *supra* pages 14-22, incorporated herein by reference. As the defense placed on the record, the court had earlier sustained the defense's objection to Sellers testifying about past alleged drug dealings. Tr. pp. 145, 308-09. Sellers' testimony, at page __ (tr. p. 259) of the record, that Appellant was a large-scale marijuana dealer was improper evidence of alleged prior bad acts, in keeping with the trial

court's earlier ruling. It was also inadmissible hearsay, because Sellers had testified he had no personal knowledge of Goad until September 22, 2016. Tr. p. 121, lines 5-7; Tr. p. 197, lines 8-10, 14-15. Where he had no personal knowledge of Goad, any information as to Goad's being a large-scale marijuana dealer could only have been learned through other people. His testimony as to what they may have known and told him was inadmissible hearsay. *See* Rules 801, 802, SCRE.

Contrary to the court's ruling, the limited cross-examination by the defense of Sellers' familiarity with the defendant did not open the door to Sellers providing hearsay testimony of ***other people's*** familiarity with the defendant. Tr. pp. 196-97. Counsel merely reiterated the question asked earlier by the state, at page __ (tr. p. 121) of the record, to which Sellers answered that he did not personally know of Goad on September 22, 2016, when the search occurred. Tr. pp. 196-97. When Sellers seemed to contradict himself, counsel asked a follow-up question and elicited the answer from Sellers that confirmed he was not familiar with Goad until they identified Goad, which did not occur until the time of the search on September 22, 2016. Tr. p. 197. These focused questions – addressing ***Sellers' personal knowledge or familiarity*** with Goad – did not open the door to eliciting otherwise objectionable and inadmissible hearsay evidence as to what ***other law enforcement officials may have known and related to Sellers.***

It is true that inadmissible evidence may become admissible when a party opens the door to its admission: "A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction." *See State v. Heyward*, 426 S.C. 630, 636, 828 S.E.2d 592, 595 (2019). But under the "invited response" doctrine, our courts also recognize that the response must be proportional. *See State v. Simmons*, 430 S.C. 1, 14-15, 841 S.E.2d 845, 852 (2020); *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595. "Testimony in response must be 'proportional and confined to the topics to which counsel had opened the door.'"

Heyward, 426 S.C. at 637, 828 S.E.2d at 595, *quoting Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018). Such evidence is appropriate only so long as it does not unfairly prejudice the defendant. *See Simmons*, 430 S.C. at 14, 841 S.E.2d at 852. The Supreme Court has repeatedly admonished, "we will not condone 'a thinly-veiled attempt to show propensity by way of the open-door doctrine.'" *See Simmons*, 430 S.C. at 15, 841 S.E.2d at 85, *quoting Heyward*, 426 S.C. at 637, 828 S.E.2d at 595; *see also State v. Williams*, 430 S.C. 136, 151, 844 S.E.2d 57, 65 (2020) (acknowledging the application of the same principle in the context of impeachment evidence).

The most defense counsel did in its cross-examination of Sellers was to explore Sellers' own knowledge or familiarity with Appellant. The defense did not inquire of Sellers what other law enforcement officials may have known about Appellant. Testimony from Sellers based on the knowledge of other individuals, not his own knowledge, was not an "invited response" to the questions counsel asked. That testimony far exceeded the bounds for an invited response, because it was not confined to the topic of counsel's questions. *See Heyward*, 426 S.C. at 637, 828 S.E.2d at 595. Indeed, it was the very kind of attempt to show propensity through the open-door doctrine that our Supreme Court frowns upon. *See Simmons*, 430 S.C. at 15, 841 S.E.2d at 85; *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595. It was manifestly prejudicial, in contravention of the principle that an invited response not unfairly prejudice the defendant. *See Simmons*, 430 S.C. at 14, 841 S.E.2d at 852.

Contrary to the state's contention, Sellers' statement that Appellant was a large-scale marijuana dealer was not "fair game," where that was something outside his personal knowledge and was in the nature of the propensity evidence the court had already excluded. Moreover, the trial court's ruling was not supported by the record. Even if counsel went "on and on and on" as to whether Sellers knew Appellant or did not know him, as the court characterized the earlier cross-

examination, counsel did ***not*** ask Sellers if Appellant was known to other law enforcement officers. The knowledge of others was a topic not touched on by counsel's questions, and counsel did not open the door to the statement Sellers made concerning what others may have known about Appellant's alleged marijuana dealing.

Based on Sellers' clear testimony, Sellers ***personally*** did not know of Appellant and his alleged prior drug activities. Tr. p. 121, lines 5-7; tr. p. 197, lines 5-8. Counsel's questions of Sellers about his personal knowledge of Appellant did not open the door to hearsay testimony as to what other people may have told Sellers. The testimony that Appellant was a large-scale marijuana dealer was absolutely improper and exceeded the scope of any appropriate response that counsel's questions may have invited. It was inadmissible propensity evidence under Rules 404(b) and 403, and it was inadmissible hearsay under Rules 801 and 802. It was extremely prejudicial, as it invited the jury to convict Appellant not because of a finding that he was guilty of the charged crime but based on a perception that he was a bad person with a history of engaging in criminal drug activity. The trial court abused its discretion in overruling the objection and in refusing the motion to strike this improper testimony.

As set out in the argument of the error in the admission of the Parnell propensity evidence, *supra* pages 22-23, incorporated into this argument by reference, Parnell's testimony was the only testimony directly implicating Appellant in the delivery of cocaine to Parnell on September 22; Parnell's testimony was contradicted by his phone call with Jose in which he indicated he had gotten his hands on the cocaine and was on his way to his mother's house; and Parnell's testimony was far from credible due to his own interest in protecting himself, minimizing his culpability, and placing the greater responsibility on someone else, even though it was Parnell who was found in possession of 281 grams of cocaine. Against this backdrop, the testimony of Sellers that Appellant

was a large-scale marijuana dealer likely influenced the jury to overlook the deficiencies and conflicts in Parnell's testimony, to ignore Parnell's self-interest and bias, and to rely on Parnell's less-than-credible testimony in finding Appellant guilty. Under these circumstances, the trial court's error in admitting this improper propensity and hearsay evidence cannot be deemed harmless beyond a reasonable doubt. The Court should find admission of this evidence was reversible error and grant Appellant a new trial.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING THE DEFENSE REQUEST FOR A JURY CHARGE ON A LESSER QUANTITY OF COCAINE THAN THE 200 TO 400 GRAMS CHARGED IN THE INDICTMENT.

The defense requested that the court give a jury charge on the offense of trafficking in a lesser quantity than the amount charged in the indictment, 200 to 400 grams, on two grounds. As to each argument made by the defense in support of such a charge, the court found there was no evidence to support the defense's theory and denied the request to charge a lesser-included offense. Tr. pp. 541-49. The court's refusal to charge the jury that it could convict the defendant of trafficking in a lesser quantity than 200 to 400 grams was reversible error.

The law to be charged is determined by the evidence presented at trial. *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016); *Cook v. State*, 415 S.C. 551, 559, 784 S.E.2d 665, 669 (2015); *State v. Scott*, 414 S.C. 482, 487, 779 S.E.2d 529, 530 (2015). The trial court is required to charge a lesser-included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense. *State v. Williams*, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019); *Scott*, 414 S.C. at 487, 779 S.E.2d at 531; *Suber v. State*, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007); *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004); *Leggett v. State*, 440 S.C. 590, 602, 892 S.E.2d 153, 160 (Ct.App. 2023); *State v. Brandenburg*, 419 S.C. 346, 350, 797 S.E.2d 416, 418 (Ct.App. 2017). Indeed, the giving of a

jury charge on a lesser-included offense that is supported by the evidence is a requirement of due process. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982); *Cook*, 415, S.C. at 559, 784 S.E.2d 665; *Leggett*, 440 S.C. at 602, 892 S.E.2d at 159; *see* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. Where the jury can rationally infer the defendant was guilty only of the lesser offense, the lesser offense should be charged. *Leggett*, 440 S.C. at 602, 892 S.E.2d at 159.

The failure to give a requested jury charge is reviewed under an abuse of discretion standard. *See Scott*, 414 S.C. at 486, 779 S.E.2d at 531; *Cook*, 415 S.C. at 555, 784 S.E.2d at 667; *Brandenburg*, 419 S.C. at 349, 797 S.E.2d at 418. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *Scott*, 414 S.C. at 486, 779 S.E.2d at 531. A court commits an error of law and thus abuses its discretion when it refuses to charge a lesser-included offense that is supported by the evidence.

In determining whether the evidence requires the giving of a charge on a lesser offense, the court must view the evidence in the light most favorable to the defendant. *Williams*, 427 S.C. at 156, 829 S.E.2d at 706; *Scott*, 414 S.C. at 487, 779 S.E.2d at 531. In this case, there was evidence in the record to support the giving of a charge based on a lesser quantity than 200 grams of cocaine, under both the theories argued by the defense.

First, the defense contended that a charge on a lesser quantity should be given because one of the state's witnesses, DEA Special Agent Adam Hardin, testified it was his understanding the amount of cocaine tested by SLED was the total of all the cocaine found in the search of the residence. Tr. pp. 542-43. The state argued the defense was misstating the testimony of Hardin. Tr. pp. 543, 546. In fact, the defense correctly stated the testimony of Hardin. The defense argued Hardin testified "it was his understanding that all the cocaine in the house had been gathered" and "sent to SLED to be tested," and further that it was Hardin's understanding "it was all retrieved,

all taken together, all tested." Tr. p. 542, 543. These were accurate characterizations of Hardin's testimony, at page __ (tr. p. 515) of the record. Hardin testified, "I think the 281 grams is the total amount of cocaine that was seized from inside that residence. . . . I think it was a cumulative amount, a total amount of the cocaine that was seized from inside that residence." Tr. p. 515, lines 12-17.

The state also argued "the only real evidence" on the issue was that of Sellers. Tr. p. 543. But this argument ignored the testimony of Hardin, which conflicted with Sellers' testimony, and from which a rational inference could be drawn that Appellant delivered a lesser quantity of cocaine than the amount Sellers claimed. The state's argument also ignored the controlling principle that a requested charge must be given where there is any evidence to support it.

As noted in the summary of the evidence in the opening pages of the Argument section of this brief, *supra* pages 2-3, the evidence established cocaine was found throughout the house, and only a portion of the cocaine found in the house was attributed to Appellant. Parnell testified specific packages of cocaine found in the living room were brought by Appellant. The remainder of the cocaine found throughout the house was not attributed to Appellant by any witness. Based on Hardin's testimony, the jury could rationally have concluded Appellant delivered an amount smaller than the 281 grams Sellers attempted to attribute to Appellant, especially in light of the additional evidence that the largest amount of cocaine, which weighed 221 grams, was found in the camouflage bag that belonged to Parnell, that Appellant did not deliver the camouflage bag to Parnell, and that Parnell told the person he knew as Jose he had already obtained the cocaine and was on his way to the Ward Road residence.

The defense acknowledged there was a conflict in the evidence, but it correctly argued that the jury could conclude, based on the testimony of Hardin, that a lesser amount than that claimed

by Sellers was delivered by Appellant. Tr. pp. 545-46. Invoking the applicable standard, the defense correctly stated, "there is some evidence." Tr. p. 545. As noted in the cases cited above, a request to charge a lesser-included offense must be granted if there is any evidence in the record to support it. Such is the case here, and the court committed an error of law in concluding there was no evidence to support the lesser charge. Tr. p. 547, line 25.

Second, the defense also contended, apart from the testimony of Hardin, that the jury could conclude based on the evidence presented that Appellant delivered to Parnell only the smaller package of cocaine tested by SLED, which weighed 55 grams. Tr. pp. 548-49. The court ruled there was no evidence to support such a conclusion and the jury would have to completely speculate to reach that conclusion. Tr. p. 549. Again, the court committed an error of law in this ruling, because there was evidence in the record to support such a finding by the jury.

As the defense correctly argued, the jury could believe some but not all of Parnell's testimony. Tr. p. 546. The state introduced a recording of the conversation in which Parnell told Jose he had gotten his hands on the cocaine and was on his way to his mother's house where they were to meet. When officers searched the residence, they found the largest quantity of cocaine in a camouflage bag that belonged to Parnell. Parnell testified unequivocally the camouflage bag was his and Appellant did not deliver it to him. None of the officers conducting surveillance saw Appellant deliver the camouflage bag to Parnell. Parnell had a strong incentive to lie about how much cocaine Appellant brought to him. He was found in actual possession of a quantity of cocaine sufficient to convict him of trafficking cocaine, 200 to 400 grams, which would have resulted in a mandatory sentence of 25 years. He immediately began cooperating with law enforcement to help himself. But in doing so, he was not truthful, as shown by his trying to implicate someone named Ethan, not Appellant, and as further evidenced by his disavowals

throughout his cross-examination of his initial statements to law enforcement. Based on this evidence, particularly with the largest quantity of cocaine being found in Parnell's own camouflage bag which Appellant never possessed, the jury could have rationally concluded that the smaller quantity – only 55 grams found in plain view in the kind of bag in which drugs are commonly delivered – was the only cocaine Appellant delivered to Parnell. At that level, the trafficking offense would have carried a significantly reduced potential sentence – a range of seven to twenty-five years – from the mandatory sentence of twenty-five years for the offense charged in the indictment, as well as a significantly reduced fine. *Compare* S.C. Code Ann. § 44-53-370(e)(2)(b)(1) (trafficking 28 to 100 grams) *with* S.C. Code Ann. § 44-53-370(e)(2)(d) (trafficking 200 to 400 grams). Contrary to the court's ruling, there was evidence from which the jury could rationally infer Appellant was guilty of trafficking in a lesser quantity than 200 to 400 grams, as charged in the indictment. Viewing the evidence in the light most favorable to the defendant, the court erred in concluding it would be speculative for the jury to reach a verdict of guilt as to a lesser quantity.

The court's errors in refusing to charge a lesser offense of trafficking was not harmless beyond a reasonable doubt, as argued with respect to other claims of error, *supra* pages 22-23 and 29-30, incorporated herein by reference. A trial court's error in refusing to charge a lesser-included offense can be deemed harmless only if the reviewing court can determine, beyond a reasonable doubt, that the error did not contribute to the verdict rendered by the jury. *See State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). In this case, the state's witnesses gave conflicting evidence as to what cocaine was weighed by SLED and determined to be a quantity greater than 200 grams, as required for the offense of conviction. The only evidence concerning which drugs were delivered by Appellant came from Parnell, but he was a far-from-credible witness. He

admitted certain lies from the witness stand. He gave evasive, sketchy, and disingenuous answers to many of the defense's questions on cross-examination, and he refused to acknowledge facts that were clearly the case. He admitted the camouflage bag in which the 221-gram-package of cocaine was found was his and was not delivered to him by Appellant. He told Jose he had already obtained the cocaine and was on his way to his mother's house. Had the court indicated it would charge a lesser offense based on a lesser quantity, the defense would have pointed out to the jury in closing argument all the evidence in support of a finding Appellant delivered only the smaller quantity, and not the larger quantity found in Parnell's camouflage bag. Based on this evidence and such argument to the jury by counsel, it is possible – indeed, it is probable – the jury would have concluded Appellant did not deliver to Parnell the 221-gram quantity found in Parnell's camouflage bag, instead convicting him of trafficking in a lesser amount, based on the smaller, 55-gram bag of cocaine. It cannot be said that the court's refusal to charge a lesser-quantity offense of trafficking did not contribute to the jury's verdict, and the error cannot be deemed harmless. This Court should find the failure to charge a lesser-included trafficking offense was reversible error.

CONCLUSION

The Court should reverse and remand this case for a new trial.

Respectfully submitted,

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