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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2024-001890

The State,Respondent,

v.

Walter Wade Goad,Appellant.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly denied Appellant's requests to strike Juror #27 and Juror #33 for cause where the rulings that each could be fair and impartial were supported by ample evidence in the record. In any event, the trial court's rulings should be affirmed where Appellant failed to demonstrate prejudice and effectively waived any complaints in his opening statement
2. Whether, even if it had otherwise been inadmissible, the trial court properly admitted testimony about Appellant's prior history of dealing marijuana as an invited response to Appellant's opening statement. In any event, whether the prior bad acts evidence was properly admitted under Rule 404(b), SCRE, where: (1) the trial court's implied conclusion that it was proven by clear and convincing evidence has support in the record; (2) the prior bad acts were logically relevant to show a common scheme or plan and to show intent; and (3) the trial court's finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice has support in the record. Finally, whether any possible error in admitting the evidence was harmless in this case where, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt
3. Whether the trial court properly admitted Sellers' testimony that Appellant was known as a large-scale marijuana dealer in the area because that testimony was not hearsay as defined by Rule 801, SCRE. Furthermore, whether even if the testimony would have otherwise constituted inadmissible hearsay or character evidence, it was properly admitted by the trial court in rebuttal after Appellant opened the door to the testimony by placing the particular fact or transaction in issue. Finally, whether even if the trial court erred in determining Appellant opened the door to the introduction of otherwise inadmissible evidence, any error was harmless in light of: (1) the overwhelming evidence of guilt, (2) the minimal effect of the challenged testimony on the remaining evidence as a whole, and (3) the cumulative nature of the testimony, such that, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.
4. Whether the trial court properly declined to instruct the jury with the lesser included offense requested where no testimony or evidence was presented to establish the elements of *only* that lesser charge and where the charge given adequately covered the law applicable to the case. Furthermore, whether any possible error in the jury charge was entirely harmless where, beyond a reasonable doubt, it did not affect the jury's deliberations or contribute to the verdict.

STATEMENT OF THE CASE

Walter Wade Goad (Appellant) was indicted at the December 2016 term of the grand jury for Kershaw County for trafficking in cocaine—200 grams or more, but less than 400 grams. (2016-GS-28-1123). He was represented by Jack B. Swerling, Esquire. Respondent (the State) was represented by Assistant Attorneys General Christine Gatte and Jennifer McKeller of the South Carolina Office of the Attorney General. On October 28-31, 2024, the case proceeded to trial before the Honorable Jocelyn Newman and a jury. At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Newman to the mandatory minimum sentence of twenty-five (25) years' imprisonment and fined one hundred thousand dollars (\$100,000). (Tr.p.1; p.633-p.635; Indictment & Sentencing Sheet). Appellant timely filed a notice of intent to appeal his conviction and sentence and a brief in support of his appeal was filed by Mr. Swerling. This Brief of Respondent now follows.

STATEMENT OF FACTS

As briefly summarized by the State in its opening statement, this case involved a “simple” drug deal wherein Appellant either conspired to, attempted to, or did possess and distribute between 200 and 400 grams of cocaine while law enforcement officers were collecting evidence live, as the crime was occurring. The prosecutor said the State would introduce testimony, surveillance photos, and recorded phone calls to prove Appellant’s guilt beyond a reasonable doubt and asked the jurors to stay focused on the evidence and not to get distracted by irrelevant information. (Tr.p.100-p.102). In response, Appellant’s opening statement focused on the State’s burden of proof, reasonable doubt, the presumption of innocence, and the jury’s duty to assess the credibility of witnesses. Appellant implored the jurors to scrutinize the credibility of the State’s main witness, Joshua Parnell, and to consider whether he had a motive or interest to implicate Appellant in the crime. He argued Parnell was not credible because Parnell either

received a reward or expected to receive a reward in exchange for his testimony—and therefore Parnell was lying and Appellant was not guilty. (Tr.p.102-p.111).

On October 28, 2024, before the start of trial, the trial court placed the members of the jury pool under oath and conducted *voir dire*, beginning with a general series of questions about citizenship, county of residence, education level, prior convictions, law enforcement employment, age, recent jury service, status as a student, caretaker duties, and essential employment duties. (Tr.p.17-p.53). The trial judge then asked the venire members more specific questions about potential biases and fitness to serve before addressing Appellant’s requests to strike for cause (see Argument I below), finding the panel qualified, and proceeding to jury selection. (Tr.p.53-p.77).

The State’s first trial witness was former narcotics investigator Michael Sellers of the Kershaw County Sheriff’s Office (KCSO). He explained that the investigation that ultimately led to Appellant’s arrest began when a confidential informant (CI) reported that Parnell was dealing cocaine throughout Kershaw County. (Tr.p.112-p.117). After describing the investigation, several controlled buys from Parnell, and the surveillance of Parnell’s residence, Sellers described Appellant’s arrival and departure from that residence and the subsequent search of the residence pursuant to a search warrant. (Tr.p.112-p.168; p.256-p.274). That search produced, among other things, (1) two large bags of suspected cocaine, one on a chair and another in a camouflage bag, with the two bags having a combined weight of 281.7 grams, or approximately ten ounces, and (2) a “drug ledger” with a list of names of people who owed Parnell money. (Tr.p.135-p.143; State’s #4, #5, #6, #7, #8, #9, & #14). On redirect examination, Sellers testified, over Appellant’s objection, that prior to the transaction he and law enforcement knew Appellant as a large-scale marijuana dealer in the area. (Tr.p.258-p.260; p.308-p.310). (See

Argument III below). The State then proceeded to call various law enforcement officers who either conducted some aspect of the investigation of Parnell and Appellant, participated in the execution of the search warrant, or analyzed the drugs that were seized including: former Agent Damon Robertson of the U.S. Department of Justice's Drug Enforcement Administration (DEA) Task Force (Tr.p.277-p.289); DEA Task Force Officer Kelly Morgan (Tr.p.290-p.296); drug analyst Ashley Lyles from SLED (Tr.p.298-p.306); former Lexington County Sheriff's Office (LCSO) K-9 handler Adam Clayton (Tr.p.342-p.360; p.369-p.371); and Former DEA Special Agent Adam Robert Hardin (Tr.p.494-p.511).

Special Agent Hardin described his role in the investigation of Parnell and testified about the search of Parnell's house. He explained how police established Appellant as the person who came to Parnell's house on the day of the delivery. Hardin noted law enforcement simply had their CI order drugs from Parnell and were not expecting Appellant to come to the home with the delivery as part of the transaction; however, Appellant showed up just before they received a call that the drugs had arrived. As a result, they executed the search warrant after Appellant left. Hardin confirmed that after his arrest, Parnell told them Appellant was his source of supply. He testified that during the investigation law enforcement learned Appellant was dealing to other suppliers but not directly to drug users, and that Parnell and Appellant went way back and had an established relationship. (Tr.p.498-p.504). In regard to the recorded phone call between Parnell and Appellant, Hardin testified he could hear Parnell's voice because they were in a room together, and he could hear Appellant's voice coming through the phone. (Tr.p.505-p.506; State's #13).

In addition to calling law enforcement officers, the State also called Appellant's conspirator, Parnell, to the stand. Near the beginning of Parnell's testimony, Parnell identified

Appellant in the courtroom and testified that after meeting through a mutual friend the two began working together in the business of selling drugs. Appellant objected based on reasons he had argued before (see Argument II below), and the objection was overruled. Parnell went on to explain that when he said they were in business, he meant Appellant was supplying him with drugs. He said Appellant would front the drugs, which Parnell would distribute to other buyers, and Parnell would then pay Appellant back with the proceeds of those sales. Parnell testified the business relationship started around 2015 and continued until his arrest. He said it started with them dealing marijuana and later transitioned to the two men dealing cocaine. (Tr.p.376-p.379). Later, Parnell explained Appellant's delivery of the nearly ten ounces of cocaine in question, how it was packaged upon delivery, and how Parnell broke it down and weighed the two ounces he intended to sell to his buyer José after Appellant left. (Tr.p.389-p.391).

At the conclusion of Hardin's testimony, the State rested. Appellant moved for a directed verdict and the motion was denied. The trial court then questioned Appellant regarding his right to testify and conducted a charge conference during which it rejected Appellant's request for a lesser included offense charge based on an amount of cocaine less than 200 grams. (Tr.p.529-p.537; p.541-p.559). (See Argument IV below). Appellant elected not to testify, rested, and renewed his prior motions. The motions were again denied, and the parties proceeded to closing arguments. (Tr.p.557).

During the State's close, the prosecutor maintained this was a simple case and asked the jury to focus on two words—sold and delivered. She discussed the State's burden of proof and the meaning of reasonable doubt, and the difference between direct and circumstantial evidence before describing the main evidence and why she believed it proved Appellant was guilty. This included the surveillance which identified Appellant arriving at and leaving from Parnell's house

in his wife's silver Saturn VUE; the approximately 281 grams of cocaine found in the search of Parnell's house; the recorded telephone calls; the drug dog alert at Appellant's house; and the packaging materials found at Appellant's house. The prosecutor did not mention Appellant's prior history of dealing marijuana with Parnell or Sellers' testimony that Appellant was known as a large-scale marijuana dealer. (Tr.p.559-p.569).

The trial judge then charged the jury on the roles of the judge and jury, the indictments, the State's burden of proof, the presumption of innocence, reasonable doubt, direct and circumstantial evidence, credibility of witnesses, expert witnesses, identification testimony, mere presence, criminal intent, the defendant's right to not testify, the elements of the offense including the alternative ways trafficking could be proven, and the verdict forms. (Tr.p.609-p.624). After hearing the trial court's charge on the law, the jury found Appellant guilty as indicted. (Tr.p.625-p.632). Appellant was sentenced by Judge Newman to twenty-five (25) years' imprisonment and fined one hundred thousand dollars (\$100,000). (Tr.p.1; p.633-p.635; Indictment & Sentencing Sheet).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Dent*, 440 S.C. 449, 453, 892 S.E.2d 294, 296 (2023); *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below.").

ARGUMENT

I.

The trial court properly denied Appellant's requests to strike Juror #27 and Juror #33 for cause where the rulings that each could be fair and impartial were supported by ample evidence in the record. In any event, the trial court's rulings should be affirmed where Appellant failed to demonstrate prejudice and effectively waived any complaints in his opening statement.

Appellant argues the trial court abused its discretion and committed reversible error in refusing to strike jurors #27 and #33 for cause. He notes he exercised two of his five peremptory strikes on those two jurors and consequently exhausted his five strikes before jury selection was complete, with the twelfth juror being seated after his strikes were exhausted. Appellant argues this 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." (Brief of Appellant, p.6-p.14).

The State submits this argument is entirely without merit and should be denied and dismissed for several reasons. First, there was no error because the trial judge's rulings were supported by ample evidence in the record. Second, Appellant has failed to show prejudice from the trial court's rulings. Finally, Appellant effectively waived any complaint about the rulings by deeming the jurors selected "fair and impartial" in his opening statement.

Standard of Review

A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence. *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); *State v. Faries*, 125 S.C. 281, 118 S.E. 620, 622 (1923) ("If there is any evidence which in contemplation of law supports or tends to support the court's finding of fact, no error of law is disclosed since, in so

far as such conclusion itself to the circuit judge’s conscience and judgment, his discretion is absolute.”). The scope and limit of the interrogation of a juror on *voir dire* is likewise within the sound discretion of the trial court, and it is for the judge to determine the character of the questions proposed, and when the examination shall end. *State v. Britt*, 237 S.C. 293, 305, 117 S.E.2d 379, 385 (1960).

Relevant Facts

Before the start of trial, during *voir dire*, the trial judge asked the venire members several specific questions about potential biases and fitness to serve. This included a question about whether anyone was related to or knew any of the possible trial witnesses. The twenty-three potential witnesses—including Chelsea Cockrill of the KCSO—were specifically named before the trial judge asked: “Is any member of the jury panel related by blood, connected by marriage, or have any close, personal relationship with any of those potential witnesses? If so, please stand at this time.” (Tr.p.57, line 16-p.59, line 5). The following exchange then occurred:

Judge Newman:	Your name and jury number?
Juror No. 33:	William Coleman, 33.
Judge Newman:	Yes, sir, who do you know?
Juror No. 33:	(Inaudible) he’s [sic] marrying my cousin in December.
Mr. Hough:	Who?
Judge Newman:	Okay. Did you attend the wedding?
Juror No. 33:	It’s coming up.
Judge Newman:	Oh, in - - this December, okay.
Mr. Swerling:	Who?

Mr. Hough: Your Honor, we couldn't hear him, who's getting married?

Judge Newman: His cousin is marrying Chelsea Cockrill? Is Chelsea in here?

Unidentified Person: Yes, ma'am.

Judge Newman: Yeah. In December. There you are. Okay. 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).

Judge Newman: Okay. Thank you. *You may have a seat.*

(Tr.p.60, line 9-p.61, line 11) (emphasis added).

Shortly after this exchange, the same juror—Juror #33—stood in response to the judge's question about whether he or any member of his immediate family had ever been employed by a law enforcement agency. He said his father was a correctional officer at "the CCI." Judge Newman asked: "Do you believe you can *still be a fair and impartial juror in this trial?*" Juror #33 said "Yes." Judge Newman thanked him and asked him to have a seat. (Tr.p.63, lines 9-11; p.68, lines 15-21) (emphasis added).

The trial judge then asked: (1) whether any venire member would be more likely to believe a law enforcement officer simply because they are in law enforcement and (2) whether

any venire member had already formed an opinion on the guilt or innocence of Appellant. (Tr.p.69, line 5-16). Neither Juror #33 nor Juror #27 stood or answered in the affirmative. Next, the trial judge asked if any venire member or their close family or friends ever had a drug addiction. Juror #27, Russell Childers responded as follows:

Judge Newman: In the plaid, your name and jury number?

Juror No. 27: Rusty, 27 (inaudible).

Judge Newman: Yes, Mr. Childers?

Juror No. 27: Yes, ma'am.

Judge Newman: Okay.

Juror No. 27: My best friend OD'd (inaudible).

Judge Newman: Would that affect your ability to be fair and impartial in this trial?

Juror No. 27: (Inaudible).

Judge Newman: Okay, thank you, *you may have a seat.*

(Tr.p.69, lines 16-21; p. 72, line 19-p.73, line 5) (emphasis added). The trial judge followed-up by asking if there was any member of the jury panel who had such strong feelings about drugs that they could not be fair and impartial in the trial of this case. One juror—Juror #182—stood. Juror #27 did not. (Tr.p.74, line 25-p.75, line 7). Following a brief bench conference, the trial judge announced as follows:

Judge Newman: All right folks. I have one additional question. As I was reading - - or explaining what Mr. Goad is charged with, that being trafficking cocaine 200 to 400 grams, someone whistled, who was that? Tell me your juror number.

Juror No. 27: Russell Childers, 27.

Judge Newman: Twenty-seven. Thank you, sir.

(Tr.p.77, lines 2-12). After another bench conference, the parties proceeded with jury selection.

During the course of the selection, Appellant exercised his five peremptory strikes by striking: (1) Juror #174 and Juror #27 after two jurors were seated; (2) Juror #33 after three jurors were seated; (3) Juror #181 after six jurors were seated, and (4) Juror #163 after eleven jurors were seated. (Tr.p.77-p.82). The jury panel was then excused and the parties placed additional information on the record regarding Appellant's two off-the-record requests to strike for cause and the trial court's denial of those requests.

As to Juror #33, Appellant explained he had asked that *all* members of the panel who had a relationship to the KCSO be excused for cause, but the trial court overruled the request.¹ The solicitor advised: "The State objected to it *because all of the jurors said that they could be fair and impartial regardless of their family's relationship with law enforcement.*" The trial judge noted: "And for that reason I declined that request." Appellant did not object to or otherwise challenge this description of the statements given by the jurors. (Tr.p.86, lines 1-12) (emphasis added).² As to Juror #27, the trial judge said: "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, line 13-p.88, line 4).

After the jury was sworn, during his opening statement, Appellant's counsel opined:

[W]e have a jury that *all of us agree are fair and impartial*, the best people we could go ahead and have decide the outcome of this case. I was satisfied when y'all were talking - - when we finally empaneled 12 of you, and then the 13th juror, who's the alternate juror, *and I still believe that, and I will believe that until the end of the case that everybody understands what their oath was,*

¹ Presumably this request encompassed Juror #190, Juror #180, and Juror #181, in addition to Juror #33 where each of these four venire members had a relationship to the KCSO.

² Notably, Chelsea Cockrill, the person with whom Juror #33 had a relationship, was not called as a witness at trial.

understands that you gave the true answers to the case that was being propounded to you by the Court, *and that you are fair and impartial jurors, and you will render a fair and impartial verdict to speak the truth.*

(Tr.p.104, lines 10-23) (emphasis added). Counsel later said:

I've always found throughout my career that *Camden people give a fair and impartial trial* and a - - are not prejudiced when they come in, didn't have an opinion when they come in and when they say they can sit on a jury fairly and impartially they do. So, *I believe at the end of this case you will render a fair and impartial verdict. That's what I believe.*

(Tr.p.111, lines 9-16) (emphasis added).

Discussion / Analysis

All criminal defendants have the right to a trial by an impartial jury, a right guaranteed by our state and federal constitutions. U.S. Const. amends. VI, XIV; S.C. Const. art. I, § 14; *State v. Rowell*, 444 S.C. 109, 113, 906 S.E.2d 554, 556 (2024); *State v. Coaxum*, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014); *State v. Eubanks*, 437 S.C. 458, 484, 878 S.E.2d 335, 349 (Ct. App. 2022). The trial court has the solemn duty to ensure “that every juror is unbiased, fair and impartial.” *Rowell*, 444 S.C. at 113, 906 S.E.2d at 556; *see also State v. Britt*, 237 S.C. 293, 305, 117 S.E.2d 379, 385 (1960). Thus, “*voir dire* can be an essential means of protecting this right.” *Warger v. Shauers*, 574 U.S. 40, 50 (2014). Indeed, the trial court must conduct *voir dire* of the prospective jurors to determine whether the jurors are aware of any bias or prejudice against a party, as well as to elicit such facts as will enable the parties intelligently to exercise their right of peremptory challenge. *Eubanks*, 437 S.C. at 484, 878 S.E.2d at 349. Challenges for cause are provided by statute. If a party challenges a juror for cause, the circuit court must examine the juror to determine if the juror “is sensible of any bias or prejudice” about the case. S.C. Code Ann. § 14-7-1020 (2016). The challenging party may also present supporting evidence, and the

juror must be excused if “the juror is not indifferent to the cause.” *Id.*; *Rowell*, 444 S.C. at 114, 906 S.E.2d at 556.

“The law does not require that a juror should be perfectly free from all impressions and opinions as to the issue. Whether these jurors were indifferent in the cause was for the determination of the circuit judge. The opinion of the court . . . is decisive of all questions here made as to the impartiality of the jury.” *State v. Gantt*, 223 S.C. 431, 437, 76 S.E.2d 674, 677 (1953) (quoting *State v. Hayes*, 69 S.C. 295, 48 S.E. 251 (1904)). As noted by our supreme court in *Faries*, “The words of the statute, ‘If it appears to the court,’ etc., are peculiarly significant and expressive of freedom in the exercise of conscience and judgment and of the unrestricted liberty of decision and action, which have been intrusted by the Legislature, in the legitimate exercise of its constitutional powers, to the circuit judge.” *Faries*, 125 S.C. at ____, 118 S.E. at 620. This phrase—if it appears to the court—was also in the statute at the time of Appellant’s crime and remains there today. S.C. Code Ann. § 14-7-1020 (2016).

In considering a challenge for cause, much of the trial court’s discretion concerns assessing credibility of the prospective jurors and “[d]eference must be paid to the trial court who saw and heard the juror.” *State v. Jenkins*, 436 S.C. 362, 388, 872 S.E.2d 620, 633–34 (2022) (quoting *State v. Woods*, 382 S.C. 153, 159, 676 S.E.2d 128, 132 (2009)); *Faries*, 125 S.C. 281, 118 S.E. at 622 (“The manner and bearing of the juror, nature’s stamp of character on form and countenance, are evidential exhibits for the consideration of the circuit judge, which may be more indicative of the juror’s real attitude than his words.”) (relying upon *Reynolds v. United States*, 98 U.S. 145, 156-57 (1878)). Because a trial judge has the benefit of observing first hand the character and demeanor of the jurors, our appellate courts rely on the wisdom and judgment of the trial judge, unless the record firmly establishes an abuse of discretion. *State v.*

Thompson, 278 S.C. 1, 8, 292 S.E.2d 581, 585 (1982); *State v. Thomas*, 268 S.C. 343, 348, 234 S.E.2d 16, 18 (1977); *DeLee v. Knight*, 266 S.C. 103, 111-12, 221 S.E.2d 844, 847 (1975).

Here, the trial court's refusal to strike either Juror #33 or Juror #27 for cause is not reversible on appeal because each decision was clearly supported by evidence in the record. As to Juror #33, despite the court reporter noting his specific response to the question of whether, given his relationship with potential witness Cockrill, he believed he could "still be a fair and impartial juror" as "Inaudible," the response was clearly *not* inaudible to the trial judge who responded by asking Juror #33 to "have a seat" rather than removing him for cause or asking any additional questions. (Tr.p.61, lines 8-12). In the context of the entire exchange about Cockrill, the answer "yes" must be inferred.³ This inferred answer became abundantly clear when Juror #33 later told the trial judge that "yes," despite his father having worked at CCI, he could "still be a fair and impartial juror in this trial." (Tr.p.68, lines 15-21). Finally, it became unquestionably clear when Juror #33 even later affirmed he had *not* already formed an opinion on the guilt or innocence of Appellant. (Tr.p.69, lines 5-16). Thus, there is ample evidence to support the trial judge's findings that Juror #33 could be fair and impartial.

As to Juror #27, *after* he whistled, he affirmed he had *not* already formed an opinion on the guilt or innocence of Appellant. (Tr.p.69, lines 5-16). Then, despite the court reporter noting his specific response to the question of whether, given that his best friend overdosed on drugs, he believed it would not affect his "ability to be fair and impartial in this trial" as "Inaudible," the response was clearly *not* inaudible to the trial judge who responded by telling Juror #27 "you may have a seat" rather than removing him for cause or asking any additional questions. (Tr.p.72, line 19-p.73, line 5). In the context of the entire exchange about drug addition, the

³ As apparently recognized by Appellant, testimony may be inferred where responses or follow-up steps would otherwise be rendered "non-sensical." (Brief of Appellant, p.11, fn3).

answer “yes” must be inferred. Finally, this inferred answer became unquestionably clear when Juror #27 affirmed he did *not* have such strong feelings about drugs that he could not be fair and impartial in the trial of the case. (Tr.p.74, line 25-p.75, line 7). To the extent a whistle might arguably indicate a strong feeling about drugs, Juror #27’s failure to stand in response was a clear “statement” that he could be fair and impartial. Thus, there is ample evidence to support the trial judge’s finding that Juror #27 “said he can be fair and impartial.” (Tr.p.87, lines 1-5).

Even if this Court disagrees and finds one or both jurors should have been struck for cause, Appellant is not entitled to relief because he has failed to prove prejudice. Although done in the context of a juror concealment case and not a case about rejecting a pretrial request to strike for cause, our supreme court recently established useful guidelines for evaluating prejudice involving juror issues. *Rowell*, 444 S.C. at 115-16, 906 S.E.2d at 557. In *Rowell*, the court stated: “We therefore hold today that when a juror untruthfully answers or fails to answer a material voir dire question, the juror’s bias may not be presumed, and a new trial may be ordered only when prejudice is proven by showing the concealed information reveals a potential for bias and would have made an objectively material difference in the moving party’s use of a peremptory strike or resulted in a successful challenge for cause.” *Id.*

Here, Appellant has simply failed to carry his burden of showing any material difference under the *Rowell* standard, particularly where he was able to strike the two jurors about which he complains, and he has failed to identify any specific juror who served on his jury that was somehow unfair or impartial. *See State v. Wilkins*, 310 S.C. 81, 88, 425 S.E.2d 68, 72 (Ct. App. 1992) (finding no prejudice where the record contained no evidence that any member of the venire was so affected by an alleged error that they could not render a just verdict based on the evidence adduced at trial, without regard to preconceived ideas); *see also State v. Tucker*, 423

S.C. at 413, 815 S.E.2d at 472 (“Tucker has not shown Juror A's failure to respond prejudiced him: he does not demonstrate how Juror A was potentially biased against him due to her tie to Jones, nor how the tie would have been material to his peremptory strike choices.”).

Finally, Appellant arguably waived any complaint he may have previously had about the trial court's failure to strike Juror #27 or Juror #33 for cause when, after other jurors were selected, Counsel went out of his way to deem those jurors fair and impartial during his opening statement. (Tr.p.104, lines 10-23; p.111, lines 9-16). *Cf. Southern Coal Co. v. Rice*, 122 S.C. 484, 115 S.E. 815, 817 (1923) (“By an acceptance of goods a purchaser waives the right to allege inferiority of quality which is obvious to him.”). In conclusion, there was no error in the trial judge's refusal to strike Juror #27 or Juror #33 for cause and no prejudice resulting from those rulings; therefore, the rulings and Appellant's conviction and sentence should be affirmed.

II.

Even if it had otherwise been inadmissible, the trial court properly admitted testimony about Appellant's prior history of dealing marijuana as an invited response to Appellant's opening statement. In any event, the prior bad acts evidence was properly admitted under Rule 404(b), SCRE, because: (1) the trial court's implied conclusion that it was proven by clear and convincing evidence has support in the record; (2) the prior bad acts were logically relevant to show a common scheme or plan and to show intent; and (3) the trial court's finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice has support in the record. Finally, any possible error in admitting the evidence was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

Appellant argues the trial court committed reversible error in admitting testimony of Joshua Parnell concerning Parnell's prior history of alleged drug dealing with Appellant. He complains that the testimony constituted inadmissible character evidence under Rule 404(a), SCRE, which was improperly introduced to prove his actions in conformity therewith, and that

the testimony did not qualify for admission under the Rule 404(b), SCRE exception allowing evidence of prior crimes, wrongs or other acts to establish motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Appellant argues the prior acts were not within any of the 404(b) exceptions, did not have the requisite logical relevancy or logical connection to the crime with which he was charged, and did not reasonably tend to prove any material fact in issue or an element of the crime charged. He further argues that even if logically relevant, the testimony was inadmissible because proof of the prior drug dealing was not clear and convincing where it came exclusively through Parnell—a biased witness who he alleges gave inconsistent and spotty testimony. Appellant then argues that even if the evidence was clear and convincing, it should have been excluded under Rule 403, SCRE, because the probative force of the evidence was substantially outweighed by the danger of unfair prejudice given the inherent tendency to show Appellant’s propensity to commit similar crimes. Finally, Appellant contends that because the evidence at trial did not conclusively prove his guilt such that no other rational conclusion could have been reached, any error in the admission of this propensity evidence could not be harmless beyond a reasonable doubt. (Brief of Appellant, p.14-p.23). The State disagrees and submits each of these arguments is without merit.

First, this Court could conclude that regardless of whether the prior bad acts evidence would otherwise be admissible, it was properly admitted as an invited response. Second, the evidence was properly admitted under Rule 404(b), SCRE, because: (1) the trial court’s implied conclusion that it was proven by clear and convincing evidence has support in the record; (2) the prior bad acts were logically relevant to show a common scheme or plan and to show intent; and (3) the trial court’s finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice has support in the record. Finally, any possible

error in admitting the prior bad acts evidence was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt. For all of these reasons, these arguments should be rejected and Appellant's conviction and sentence should be affirmed.

Standard of Review

Our appellate courts give great deference when reviewing the evidentiary ruling of the trial court. *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019); *State v. Davis*, 437 S.C. 93, 96, 876 S.E.2d 321, 322 (Ct. App. 2022). Indeed, the admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Wallace*, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023); *State v. Phillips*, 430 S.C. 319, 340, 844 S.E.2d 651, 662 (2020); *State v. Swaringen*, 446 S.C. 16, 26, 916 S.E.2d 343, 349 (Ct. App. 2025); *State v. Edwards*, 373 S.C. 230, 234, 644 S.E.2d 66, 68 (Ct. App. 2007). The trial court's ruling on the admissibility of evidence will not be reversed on appeal absent abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); *State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *McDonald*, 343 S.C. at 325, 540 S.E.2d at 467.

The trial court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it. *Wallace*, 440 S.C. at 541-43, 892 S.E.2d at 312-13; *Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023). If the record reflects the trial court

“exercise[ed] its discretion according to law,” the appellate court will almost always affirm the ruling. *Wallace*, 440 S.C. at 543, 892 S.E.2d at 313; *Morris*, 438 S.C. at 585-86, 885 S.E.2d at 396; *see also State v. Gibbs*, 438 S.C. 542, 551-53, 885 S.E.2d 378, 383-84 (2023) (discussing in detail a trial court's exercise of discretion in ruling on the admissibility of evidence).

Relevant Facts

As noted above, KCSO Investigator Sellers first explained the origin of the investigation which ultimately led to Appellant's arrest. (Tr.p.112-p.117). After describing the investigation, several controlled buys from Parnell, and the surveillance of Parnell's residence, Sellers described Appellant's arrival and departure from that residence and the subsequent search of the residence pursuant to a search warrant. That search produced, among other things, (1) two large bags of suspected cocaine, one on a chair and another in a camouflage bag, with the two bags having a combined weight of 281.7 grams, or approximately 10 ounces, and (2) a “drug ledger” with a list of names of people who owed Parnell money. (Tr.p.135-p.143). Sellers testified that after Parnell was arrested and read his *Miranda* rights, he made a statement describing where he got the drugs that were discovered in the search. Over Appellant's objection, Sellers testified Parnell said “Ethan” brought the drugs to him and then explained “Ethan” was actually Appellant. The State asked whether Parnell indicated he had any sort of history with Appellant. Appellant objected and following a bench conference, the trial court announced: “That objection was sustained.” (Tr.p.143, line 11-p.145, line 15).

Later during trial, prior to Parnell taking the stand, Appellant moved under Rules 404(b) & 403 of the Rules of Evidence to exclude any testimony the State might seek to elicit about Appellant's and Parnell's history of trafficking or dealing marijuana. Appellant explained that during Parnell's debriefing with police after his arrest, he described a multi-year relationship

with Appellant during which he regularly sold marijuana for Appellant. Appellant argued the evidence should be excluded because it neither met the clear and convincing standard nor showed any of the issues for which prior bad acts evidence could be admitted under Rule 404(b). He also argued it should be excluded as too prejudicial under Rule 403. The State responded by noting that Parnell would be providing a first-hand account of his prior relationship with Appellant and would be subject to full cross-examination. The State then argued the testimony was being offered because it would tend to show Parnell's credibility as a witness in the face of Appellant's constant attacks on that credibility throughout trial (rather than as propensity evidence), and that it was admissible under Rule 404(b) as evidence of a common scheme or plan because it would demonstrate their ongoing business relationship. (Tr.p.333-p.336). The trial court ruled as follows:

All right. I find that *the testimony is admissible*. It - - it's - - I understand *it is not being offered to prove the defendant's character or to show action in conformity therewith*, which is what is prohibited by 404(b). *And the probative value outweighs the danger of unfair prejudice*, in that *it is being offered to really explain the relationship and the closeness of the relationship between the defendant and the witness, and explain their course of dealing*, and when I don't know, some - - I can't think of the words right now, but enhances credibility or proof in credibility, touch on his credibility as a witness. So, for all those reasons it'll be admitted over the Defendant's objection.

(Tr.p.336, lines 4-18) (emphasis added). Appellant asked that his arguments be incorporated by reference when he lodged an objection to Parnell's testimony later during trial. (Tr.p.336-p.337).

Near the beginning of Parnell's testimony, Parnell identified Appellant in the courtroom and testified that after meeting through a mutual friend the two began working together in the business of selling drugs. Appellant objected based on the reasons argued before, and the objection was overruled. He asked that his objection run throughout Parnell's testimony and the

trial court agreed to the request. Parnell went on to explain that when he said they were in business, he meant Appellant was supplying him with drugs. He said Appellant would front the drugs, which Parnell would distribute to other buyers, and Parnell would then pay Appellant back with the proceeds of those sales. Parnell testified the business relationship started around 2015 and continued until his arrest. He said it started with them dealing marijuana and later transitioned to the two men dealing cocaine. (Tr.p.376-p.379). Later, in describing the particular drug deal they made in this case, Parnell explained (1) Appellant's delivery of the nearly ten ounces of cocaine in question (which was "fronted," prior to payment), (2) how it was packaged upon delivery, (3) how Parnell broke it down and weighed the two ounces he intended to sell to his buyer José after Appellant left, and (4) how he put the remaining eight ounces of cocaine into his camouflage fanny pack so it would be easier to hide later if needed. (Tr.p.389-p.391).

On cross-examination, Appellant asked Parnell when he started dealing cocaine. Parnell said it was about six months before his arrest and explained he and Appellant dealt marijuana in all the previous years of their relationship. (Tr.p.407, lines 4-16). Parnell also clarified that when Appellant delivered the brick of cocaine it was transferred to him inside the house and was only placed in Parnell's camouflage bag *after* the exchange. (Tr.p.432-p.433). Later during cross, Parnell explained that the two larger scales found at his house during the search were for weighing pounds of marijuana while the two small scales were for weighing cocaine. He acknowledged making lots of money selling both marijuana and cocaine for Appellant. (Tr.p.442-p.443).

Next, DEA Special Agent Hardin testified about the investigation and search of Parnell's house. Hardin confirmed that after his arrest, Parnell told them Appellant was his source of supply. He testified that during the investigation law enforcement learned Appellant was dealing

to other suppliers but not directly to drug users, and that Parnell and Appellant went way back and had an established relationship. (Tr.p.498-p.504).

At the end of trial, during its closing argument, the State never mentioned Appellant's prior history of dealing marijuana with Parnell. (Tr.p.559-p.569). By contrast, during his own closing argument, Appellant did. In trying to explain Appellant's close relationship with Parnell, Counsel said: "And Mr. Parnell actually worked for him, so there's a relationship there *besides the drug business.*" (Tr.p.588-p.589) (emphasis added).

Discussion / Analysis

Generally, all relevant evidence is admissible. Rule 402, SCORE; *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCORE; *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCORE; *Saltz* 346 S.C. at 127, 551 S.E.2d at 247; *State v. Cooley*, 342 S.C. 63, 536 S.E.2d 666 (2000). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." *Id.* at 529, 732 S.E.2d at 229.

Although evidence of other criminal acts by a defendant is generally not admissible to prove the defendant's propensity to commit the crime with which he has been charged, such evidence may be admitted to prove motive, intent, identity of the perpetrator, lack of accident or

mistake, or common scheme or plan. Rule 404(b), SCRE; *State v. Perry*, 430 S.C. 24, 30-31, 842 S.E.2d 654, 657 (2020); *State v. Ford*, 334 S.C. 444, 451, 513 S.E.2d 385, 388 (Ct. App. 1999). There must be a logical relevancy or connection between the crime charged and the other bad acts for evidence of the prior bad acts to be admissible under the *Lyle* exceptions. *Perry*, 430 S.C. at 31, 842 S.E.2d at 658; *Ford*, 334 S.C. at 451, 513 S.E.2d at 388. The trial judge must clearly perceive the connection between the other crimes and the crimes charged. Further, other crimes which are not the subject of conviction must be proven by clear and convincing evidence. *State v. Cutro*, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998) (citations omitted).

Invited Response

The State did not offer Parnell's testimony about his history of marijuana dealing with Appellant as proof of Appellant's prior drug transactions, but rather as proof of Appellant's intent in the charged transaction and their ongoing common scheme or plan to deal drugs. Appellant invited a response and opened the door for the State to admit such testimony based on the implications in his opening statement and throughout trial that Parnell was lying about the current drug deal because he had a motive or interest to implicate Appellant in the crime, and that Appellant was therefore not guilty. (Tr.p.102-p.111).

When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. *State v. Foster*, 354 S.C. 614, 582 S.E.2d 426 (2003); *State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. *State v. Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the

sound discretion of the trial judge.” *State v. Heyward*, 426 S.C. 630, 636, 828 S.E.2d 592, 594 (2019); *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008).

Here, Appellant asserted in his opening statement that Parnell was a liar and that the cocaine found in the search of Parnell’s house belonged exclusively to Parnell, not Appellant, who had merely been present at some point at the scene. (Tr.p.102-p.111). The State was therefore entitled to rebut Appellant’s assertion with testimony from Parnell demonstrating they had an ongoing scheme or plan to deal drugs and that Appellant was not merely present and instead had the intent to traffic the cocaine found at Parnell’s house.

In regard to opening the door, the facts in Appellant’s case are similar to the factual scenario in *State v. Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003), and unlike the scenario described in *State v. Ostrowski*, 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021). In *Dunlap*, the defendant was charged with distribution of crack cocaine based on the testimony of a witness who claimed to have bought the drugs at issue from the defendant. *Dunlap*, 346 S.C. 312, 315, 550 S.E.2d 889, 891 (2003), *aff’d as modified*, *Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003). The State was permitted to try to rebut the claim that the defendant did not try to sell drugs as a course of business, because the charge was based on Dunlap’s alleged sale of drugs. *Dunlap*, 353 S.C. at 541, 579 S.E.2d at 319. In *Ostrowski*, unlike in *Dunlap*, Ostrowski was not charged with trafficking because of a third party’s testimony that he had actively trafficked the drugs. Rather, Ostrowski was charged because he was allegedly in possession of a large enough quantity of the drugs to constitute trafficking. Therefore, whether Ostrowski was regularly involved in the sale or distribution of drugs was not crucial to the State’s case, as it was in *Dunlap*.

Here, as in *Dunlap*, Appellant was charged with trafficking cocaine based on the testimony of a witness who claimed to have received a delivery of the drugs at issue from

Appellant. Like *Dunlap*, whether Appellant was regularly involved in the trafficking of drugs was crucial to the State's case in proving either delivery of the cocaine at issue, a conspiracy to deliver and sell the cocaine at issue, or knowing possession or attempted possession of the cocaine at issue. Under these circumstances, Appellant opened the door and the State was entitled to introduce Parnell's testimony to prove Appellant had an ongoing scheme or plan to deal drugs with Parnell and that Appellant had the criminal intent to traffic the cocaine found at Parnell's house rather than being merely present. Even if this Court finds Appellant did not open the door to the State's invited response, evidence of Appellant's prior marijuana dealing with Parnell was properly admitted under Rule 404(b), SCRE.

Clear and Convincing Evidence

When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). *State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 895–96 (2009). The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (analyzing prior bad act evidence and finding the appellate court committed error by basing its ruling on its own view of the witness's credibility); *State v. Scott*, 405 S.C. 489, 499, 748 S.E.2d 236, 241–42 (Ct. App. 2013).

Here, Appellant argued in part that the bad acts evidence did not meet the clear and convincing standard. In admitting it the trial court determined otherwise, even if that finding was not explicit. Furthermore, where the evidence itself consisted of Parnell's testimony, the trial court necessarily based its determination on a finding Parnell was credible. Appellant urges this Court to reach a different conclusion based upon its own view of Parnell's credibility. (Brief

of Appellant, p.20-p.21). Doing so would constitute clear error under this Court's standard of review and where the record is replete with evidence supporting Parnell's general credibility about the details of the drug transaction at issue. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829; *State v. Tutton*, 354 S.C. 319, 325–26, 580 S.E.2d 186, 189–90 (Ct. App. 2003). Additionally, Parnell testified that he had direct knowledge of the prior bad acts because he and Appellant committed them together. This direct knowledge further supports the trial court's determination. *See State v. Gilchrist*, 329 S.C. 621, 626–27, 496 S.E.2d 424, 427 (Ct. App. 1998) (finding prior bad acts were established by clear and convincing evidence where Ethridge had direct knowledge of Gilchrist's distribution of crack because Gilchrist gave the crack to him); *State v. Aiken*, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996) (concluding a defendant's prior bad acts were established by clear and convincing evidence where a witness testified he had direct knowledge because he and the defendant committed the prior bad acts together). Similarly, the trial court's determination that Appellant's prior drug dealing was established by clear and convincing evidence should be affirmed.

**Rule 404(b), SCRE – Logical Relevancy, Common
Scheme or Plan, and Intent**

The trial court specifically found Parnell's testimony about prior marijuana dealing admissible under the common scheme or plan exception, which was one valid basis for admission under Rule 404(b), SCRE; however, the evidence was also properly admitted to prove Appellant's intent. As to common scheme or plan, it is generally recognized that where the principal offense charged in a narcotic sales prosecution involves a particular plan, scheme, or device on the part of the accused, evidence of other similar sales of narcotics has frequently been recognized as admissible in order to demonstrate the common scheme or plan, and so

characterized the particular sale charged as part of the same scheme. 93 A.L.R.2d 1097 (1964 & Supp. 2025).

In accord with this general recognition, our supreme court addressed the common plan or scheme exception within the context of a drug trafficking prosecution in *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995). The *Raffaldt* court reviewed the admission of testimony about the defendant's prior drug dealing as it related to the charged offense of trafficking in cocaine. The cocaine at issue came to the defendant from New York via a series of transactions which began when Mr. Jiminez brought the cocaine into South Carolina and gave it to Mr. Kelly, who, along with Mr. Burchett, then delivered the cocaine to the defendant, who paid Kelly for the drugs. *Id.* at 112, 456 S.E.2d at 391-92. After retaining a portion of the money, Kelly then paid Jiminez. *Id.* At trial, Burchett testified he had purchased marijuana and cocaine from the defendant on several occasions in the year preceding the commission of the charged offense. *Id.* at 112-13, 456 S.E.2d at 392. Burchett also testified that he had set up other cocaine deals between Kelly and the defendant prior to the charged offense. *Id.* The trial court held that the testimony concerning the defendant's prior drug dealing was admissible under the common plan or scheme exception because it was not only "quite similar to" the charged offense, but it also "gave rise to" his connection with Kelly and Burchett, who facilitated the transaction between the defendant and Jiminez. *Raffaldt*, 318 S.C. at 114, 456 S.E.2d at 392. Because the prior trafficking was the genesis of the charged offense, the court found sufficient similarity and connection to employ the common plan or scheme exception. *Id.*

In a similar case, this Court concluded that, where the defendant was charged with possession of marijuana with intent to distribute, testimony that the defendant had a practice of selling drugs from a bag which he kept either under his car or in the woods near his house, was

admissible under the *Lyle* common plan or scheme exception to prove the existence and nature of the defendant's drug trafficking scheme and was probative of his conduct with respect to the crime for which he was on trial. *State v. Moultrie*, 316 S.C. 547, 554-55, 451 S.E.2d 34, 39 (Ct. App. 1994). In so holding, the Court stated, the defendant's "mode of operation" in previous drug deals "bore an extraordinary similarity to the evidence [the police] discovered on the night of [the defendant's] arrest and tended to show the nature and content of [the defendant's] previous drug dealing." *Id.*

Though acknowledging the logical relevancy recognized in *Raffaldt* and *Moultrie* in drug trafficking prosecutions, our courts have been reluctant to employ the common plan or scheme exception for prior drug transactions which were similar to the charged offense and involved the same actors but were *otherwise* unconnected. For example, in *State v. Barroso*, the State asserted marijuana evidence was admissible as "other bad acts" under *Lyle*. Our supreme court disagreed, noting the evidence adduced at trial showed isolated purchases of marijuana in amounts indicating petitioners were merely personal users and finding it failed to see how this evidence of isolated marijuana transactions was probative of petitioners' participation in the marijuana conspiracy, much less how it was probative of petitioners' alleged roles as dealers in the cocaine trafficking conspiracy. *State v. Barroso*, 328 S.C. 268, 271-72, 493 S.E.2d 854, 855-56 (1997). Here, by comparison, the prior marijuana transactions were anything but isolated and were not in amounts typical for personal use. Instead, Appellant and Parnell were in an ongoing business, dealing large quantities of marijuana and later cocaine. (Tr.p.376-p.379).

More recently, in *State v. Humphries*, our supreme court agreed with this Court's conclusion that prior bad acts evidence was not sufficiently connected to an earlier trafficking scheme to warrant its introduction at trial pursuant to the common scheme or plan exception.

State v. Humphries, 346 S.C. 435, 442–43, 551 S.E.2d 286, 290 (Ct. App. 2001), *rev'd on other grounds*, 354 S.C. 87, 579 S.E.2d 613 (2003). In so holding, this Court explained:

The Humphries were convicted of a single act of drug trafficking because a package of marijuana of sufficient weight to satisfy the statutory definition of trafficking, *addressed to C & J*, was mailed from California *and delivered to C & J*. To the extent that Seruya testified about the arrival of other, similar packages from California during the tenure of his employment with C & J, that testimony would appear to fall within the ambit of the common plan or scheme exception. However, Seruya's testimony concerning *the delivery of marijuana to his home on Claude's behalf without other identifying similarities to the C & J deliveries* is not sufficiently relevant or probative to warrant its admission into evidence under the common plan or scheme exception.

Id. at 445, 551 S.E.2d at 292 (emphasis added). In this case, by contrast, Appellant and Parnell had exactly the same trafficking scheme, the only difference being that they were trafficking a different drug. They were in an ongoing business together with Appellant fronting drugs to Parnell, which Parnell would distribute to other buyers and would then pay Appellant back with the proceeds of those sales. The marijuana dealing started around 2015, continued until Parnell's arrest, and transitioned to dealing cocaine in precisely the same fashion they dealt marijuana. (Tr.p.376-p.379).

Thus, under the guideposts established by *Raffaldt*, *Moultrie*, *Barosso*, and *Humphries*, the trial court properly found Appellant's prior marijuana trafficking was admissible as a common scheme or plan under South Carolina law. Notably, the basis of that ruling is widely supported by other jurisdictions.⁴

⁴ See, e.g., *United States v. Edmonds*, 69 F.3d 1172, 1175–76 (D.C. Cir. 1995) (finding that where the government introduced Harrison's "one hundred times" testimony to show that Harrison expected to receive payment from Appellant for acting as a middleman, that testimony was properly admitted because Appellant attempted to establish that Harrison (not Appellant) supplied the drugs and the government sought to prove instead that Appellant was the supplier); *People v. Rodriguez*, 288 P.2d 147, 149 (Cal. 1955) (finding it was not error to admit statements of the defendant to the investigating officers relative to his previous activities in selling narcotics because, where the defendant denied making the sale in question, evidence which tended to show his scheme and plan or pattern of operation in habitually selling narcotics tended to establish a fact material to the case of the prosecution); *Miles v.*

Additionally, the evidence was properly admitted to show Appellant's intent. Rule 404(b), SCRE (stating that evidence of other crimes, wrongs, or acts "may ... be admissible to show ... intent"); *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("[E]vidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute."); *State v. King*, 349 S.C. 142, 153, 561 S.E.2d 640, 645–46 (Ct. App. 2002) ("Testimony relating to a defendant's past drug distribution activities is admissible to establish the element of intent."); *id.* at 146, 155, 561 S.E.2d at 642, 646 (affirming the admission of testimony of the defendant's forty prior drug transactions dating back *one year*); *see also State v. Gore*, 299 S.C. 368, 370, 384 S.E.2d 750, 751 (1989) ("The evidence that Appellant sold cocaine from [a] trailer on two occasions only *one month* earlier tends to establish his intent regarding the cocaine in his possession at the time in question." (emphasis added)).

State, 650 So. 2d 583, 585 (Ala. Crim. App. 1994) (concluding evidence that a witness made four purchases of crack cocaine, followed the same routine in making each buy, made each buy at the same location, and made each buy from the same person, was admissible under the common plan or scheme exception because it tended to prove Appellant was guilty of distributing crack cocaine rather than simply to show her bad character—because the facts surrounding the collateral offenses were identical to the facts of the charged offenses, the offenses were logically connected and evidenced a common plan, scheme, or system by Appellant to deal in crack cocaine); *Duque v. State*, 491 S.E.2d 841, 843 (Georgia 1997) (finding that, in focusing on the similarities in the occurrences, where Appellant was on trial for trafficking in cocaine and possession of cocaine with intent to distribute, proof of another sale four months later that also involved cocaine, packaged and in amounts significant enough to support distribution charges, which occurred in the same general vicinity, was evidence of a plan, scheme or system and could be considered by the jury in determining Appellant's guilt or innocence of the crime with which he was charged); *State v. Crockett*, 801 S.W.2d 712, 715–16 (Mo. Ct. App. 1990) (holding testimony that the defendant sold the witness cocaine earlier on the day of the arrest and that the witness had been in the defendant's apartment prior to the incident date to purchase cocaine was admissible as evidence of a common scheme of sales from the defendant's apartment and allowed the jury to reasonably infer that the sale was occurring when the police arrived); *People v. Jackson*, 346 N.E.2d 537, 539 (N.Y. 1976) (finding testimony of uncharged sales was properly admitted on the ground that it tended to prove that the appellant and the witness were acting in concert because testimony as to their method of operation was relevant to point up the connection between the two); *State v. Rosario*, 379 S.E.2d 434, 440–41 (N.C. 1989) (holding testimony that a witness had previously sold cocaine for the defendant was properly admitted because it was not offered to show action in conformity but instead demonstrated a plan to distribute cocaine and was probative of that issue); *Wehr v. State*, 841 P.2d 104, 109 (Wyo. 1992) (finding testimony about a prior drug transaction was properly admitted as evidence of a "course of conduct" that was relevant to the charge of conspiracy where it related to the issue of whether she and Wehr were partners in the criminal activity and also addressed the question of whether Wehr obtained the methamphetamine for resale).

Here, it is clear the evidence was offered *not* to show that Appellant had committed another crime, but to establish his common scheme or plan to traffic drugs with Parnell, and his intent to traffic those drugs, an intent he disputed by contending he was merely present. It corroborated Parnell's description of the crime with his and Appellant's common methods, which undermined Appellant's repeated insinuation that Appellant was not a supplier, that Appellant did not deliver the cocaine on the day in question, and that Parnell was acting without Appellant's help. As explained above, the evidence helped prove necessary elements of the crime by explaining Appellant's arrival and departure from Parnell's house on the day in question and his intent. Evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime. *State v. Green*, 261 S.C. 366, 200 S.E.2d 74 (1973). The trial court clearly perceived the logical connection between the marijuana dealing and the crime charged. That perception supports admitting the evidence and should be affirmed.

Rule 403, SCRE – Probative Value

The trial court did not err in determining the probative value was not substantially outweighed by the prejudicial effect of admitting the evidence. Evidence of other crimes, even if logically relevant to prove a Rule 404(b) exception, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403(b), SCRE; *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *Id.* Evidence of prior bad acts to show a defendant's motive and intent to commit the crime charged becomes significantly more probative when the defendant directly disputes his or her motive or intent. *See Ford*, 334 S.C. at 452, 513 S.E.2d at 389 (finding evidence that the defendants twice

previously robbed the victim was highly probative of the defendants' guilt because the defendants directly disputed the State's allegations about their motive and intent in accosting the victim a third time).

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The appellate courts review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. *State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." *State v. Martucci*, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Our supreme court has explained that when balancing the danger of unfair prejudice against the probative value of evidence, the determination must be based on the entire record and will turn on the facts of each case. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014). Considering the record in this case, the probative value of this evidence was not substantially outweighed by its prejudicial effect. As noted, the evidence was probative of Appellant's intent and to show a common scheme or plan. Appellant disputed the plan, scheme, or conspiracy to deal drugs with Parnell and his intent to participate by repeatedly implying he

had no knowledge of the crime and focusing on Parnell as the only guilty party. The trial court aptly recognized these issues were all central in the case. Consequently, the trial court did not err in finding the probative value of Appellant's prior drug dealing was not substantially outweighed by the danger of unfair prejudice. Appellant also advanced the theory that he was merely present where the cocaine was found, thus further challenging his criminal intent.

Whatever prejudicial effect the evidence may have had was outweighed by its probative value, since it helped to prove the common scheme or plan, intent, and motive. This is particularly true where it was corroborated by Appellant's actions in the present case and where Appellant was able to fully cross-examine Parnell and the investigators who identified him as the person who showed up at Parnell's house just before the search.

Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Only errors so substantial that they result in a verdict which would not otherwise have been rendered require reversal. *State v. Jolly*, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991). "A harmless error analysis is contextual and specific to the circumstances of the case." *State v. Byers*, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011). "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *Id.* at 447-48, 710 S.E.2d at 60 (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)). A defendant seeking reversal based on error in admission of evidence has the burden of showing that evidence was prejudicial. *State v. McElveen*, 280 S.C. 325, 327, 313 S.E.2d 298, 299 (1984).

Here, any error in the admission of evidence regarding the prior marijuana dealing was harmless in view of the overwhelming evidence presented of guilt, such that it could not reasonably have affected the result of the trial. Considering Parnell's detailed testimony, the recorded phone calls, the fact of Appellant's arrival at the scene and quick departure just before the drugs were found in the search, the discovery of Parnell's phone number on Appellant's contact list, the drug dog alerting to an empty container at Appellant's house, and drug packaging materials discovered at Appellant's house, Parnell's testimony about prior marijuana dealing did not reasonably affect the result at trial. Indeed, the remaining evidence is overwhelming where the jury found Parnell credible, as they clearly did. If the jurors did not believe Parnell, they would not have been able to convict under the law charged by the trial court, regardless of the prior drug deals. Thus, the prior marijuana dealing was inconsequential to the ultimate decision. For all of these reasons, the State submits this argument should be denied and dismissed, and Appellant's conviction and sentence should be affirmed.

III.

The trial court properly admitted Sellers' testimony that Appellant was known as a large scale marijuana dealer in the area where that testimony was not hearsay as defined by Rule 801, SCRE. Furthermore, even if the testimony would have otherwise constituted inadmissible hearsay or character evidence, it was properly admitted by the trial court in rebuttal after Appellant opened the door to the testimony by placing the particular fact or transaction in issue. Finally, even if the trial court erred in determining Appellant opened the door to the introduction of otherwise inadmissible evidence, any error was harmless in light of: (1) the overwhelming evidence of guilt, (2) the minimal effect of the challenged testimony on the remaining evidence as a whole, and (3) the cumulative nature of the testimony, such that, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

Appellant argues the trial court committed reversible error in admitting testimony of lead investigator Sellers that, prior to this investigation, Appellant was familiar to him as "a large-

scale marijuana dealer in this area.” He contends it was inadmissible prior bad acts evidence under Rule 404(b), SCRE, which was introduced as a thinly-veiled attempt to show propensity by way of the open-door doctrine. In making this argument, Appellant attempts to draw a distinction between Sellers’ own personal familiarity with Appellant’s prior bad acts versus “other people’s familiarity” with Appellant’s drug dealing—arguing Sellers’ initial testimony that he had no knowledge of Appellant until September 22, 2016, rendered his subsequent testimony inadmissible hearsay because it only could have been learned through other people. Appellant argues his limited cross-examination of Sellers did *not* open the door to Sellers providing this hearsay testimony and even if it did, under the “invited response” doctrine it far exceeded the bounds allowed because it was not proportional and confined to the topics to which he had opened the door. Finally, Appellant contends that against the backdrop of Parnell’s “far from credible” testimony implicating him in the crime, Sellers’ propensity testimony that Appellant was a large-scale marijuana dealer could not be deemed harmless beyond a reasonable doubt. (Brief of Appellant, p.23-p.30). The State submits Appellant’s arguments are without merit.

First, Sellers’ testimony was not hearsay as defined by Rule 801, SCRE. Second, even if the testimony would have otherwise constituted inadmissible hearsay under Rule 802 or character evidence under Rule 404(a), it was properly admitted by the trial court in rebuttal after Appellant opened the door to the testimony by placing the particular fact or transaction in issue during his cross-examination of Sellers. Finally, even if the trial court erred in determining Appellant opened the door to the introduction of otherwise inadmissible evidence, any error was harmless in light of: (1) the overwhelming evidence of guilt, (2) the minimal effect of the challenged testimony on the remaining evidence as a whole, and (3) the cumulative nature of the

testimony, all of which demonstrates, beyond a reasonable doubt, that it did not contribute to the jury's verdict. Appellant's arguments should be rejected and his conviction should be affirmed.

Standard of Review

The standard of review regarding the admission of evidence, described in Argument II above, is hereby incorporated by reference. In addition, a trial court's determination that a party has opened the door to the introduction of otherwise inadmissible evidence is within the sound discretion of the trial judge and is reviewed for abuse. *Heyward*, 426 S.C. at 636, 828 S.E.2d at 594; *Page*, 378 S.C. at 483, 663 S.E.2d at 360. This occurs when a trial court's conclusions lack evidentiary support or are controlled by an error of law. *Heyward*, 426 S.C. at 636, 828 S.E.2d at 594; *State v. Collins*, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014). A party may introduce admissible evidence in rebuttal when the opponent introduces evidence as to a particular fact or transaction. *Heyward*, 426 S.C. at 636-37, 828 S.E.2d at 595; *State v. Simmons*, 430 S.C. 1, 14, 841 S.E.2d 845, 852 (2020). Further, once the defendant opens the door, the prosecutor's invited response is appropriate so long as it does not unfairly prejudice the defendant. *Simmons*, 430 S.C. at 14, 841 S.E.2d at 852. Thus, testimony in response must be proportional and confined to the topics to which counsel has opened the door. *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595; *Simmons*, 430 S.C. at 14-15, 841 S.E.2d at 852.

Relevant Facts

After explaining the origin of the investigation which ultimately led to Appellant's arrest, KCSO Investigator Sellers generally described how various law enforcement agencies cooperate and use confidential informants, controlled buys, surveillance, and recorded phone calls to build cases against suspected drug dealers. He then explained the purpose of *this particular investigation* was to build a case on Parnell and then possibly go above Parnell to determine his

source of supply. (Tr.p.117-p.121). Before getting into the details of the controlled buys from Parnell, the following testimony was elicited:

- Q. And just to be clear Joshua Parnell is not in the courtroom right now, right?
- A. No, he is not.
- Q. Okay. And so at this point do you know of the defendant, Mr. Walter Goad?
- A. I do not.
- Q. Okay. And so *what is your investigation into at this point?*
- A. My investigation is buying drugs from Joshua Parnell, building a case on him.

(Tr.p.121, lines 2-11) (emphasis added). Sellers went on to describe the three controlled buys from Parnell, obtaining a search warrant for Parnell's residence, the transaction for which Appellant was charged, the search of Parnell's residence and a description of the drugs and other evidence seized, the post-arrest statements from Parnell implicating Appellant, the recorded phone calls concerning the transaction, and the subsequent search of Appellant's house and a description of the evidence seized. (Tr.p.121-p.168).

The following day, Appellant began a lengthy cross-examination of Sellers. At the outset, Appellant went beyond the specific drug transaction at issue and attempted to establish that, prior to the first controlled buy, *Parnell was already known to Kershaw County law enforcement as a person who was selling drugs.* (Tr.p.179-p.180). Later during cross, Appellant sought to distinguish Parnell's status as a known drug dealer from his own by questioning Sellers as follows:

- Q. Okay. 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.197, line 22-p.198, line 18).

On redirect examination, the State sought to clarify Sellers' testimony as follows:

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. Okay. What was your familiarity with him prior to this investigation?

A. He was - -

MR. SWERLING: Objection, hearsay.

JUDGE NEWMAN: Overruled.

MR. SWERLING: I'm just going to move this up here.

JUDGE NEWMAN: Yes, sir.

THE WITNESS:

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's going into?

JUDGE NEWMAN: Yes, sir.

BY MS. GATTE:

Q. So as it related to this investigation, which was initiated in July of 2016, were you familiar with Walter Goad being involved in this investigation?

A. Not until the day the drugs were delivered to the house.

Q. Okay, thank you.

MR. SWERLING: Move to be struck.

JUDGE NEWMAN: Overruled.

(Tr.p.258, line 12-p.260, line 4) (emphasis added). After the isolated comment that Sellers and law enforcement were familiar with Appellant as a large-scale marijuana dealer in the area, the State did not elicit any further testimony on the matter.

Later, as promised, the trial court gave Appellant an opportunity to put his objection to Sellers' testimony on the record. Appellant argued Sellers' claim that he was familiar with Appellant as a large-scale marijuana dealer should have been struck where the trial court had previously ruled it would not be admissible. The State argued Appellant had opened the door to the testimony on cross-examination and therefore the matter was fair game on redirect.

(Tr.p.308, line 20-p.309, line 15). The trial court then ruled as follows:

JUDGE NEWMAN: Absolutely. And as I understand from the bench conference, Ms. Gatte 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.

MR. SWERLING: Judge, if I could just respond. I think I only asked one question about how long have you known him. As far as his knowledge of who he was.

JUDGE NEWMAN: Oh, the record will speak for itself but - -

MR. SWERLING: Okay.

JUDGE NEWMAN: - - my recollection is that it was - -

MR. SWERLING: I understand, whatever your ruled.

JUDGE NEWMAN: - - far more detailed than that, and that was, you know, in part - - the basis for my ruling.

(Tr.p.309, line 16-p.310, line 17). At the end of trial, during its closing argument, the State did not mention Sellers' testimony that Appellant was known as a large-scale marijuana dealer. (Tr.p.559-p.569).

Discussion / Analysis

Generally, hearsay is not admissible except as provided by the rules of evidence. Rule 802, SCRE. A "statement" is an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion; and "hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. As an initial matter, where Sellers did not testify as to any particular statement his testimony did not constitute hearsay; therefore, it was not subject to exclusion on that basis.

In any event, even if this Court finds the testimony would have otherwise constituted inadmissible hearsay evidence under Rule 802 or inadmissible character evidence under Rule 404(a), it was properly admitted by the trial court in rebuttal after Appellant opened the door to the testimony by placing the particular fact or transaction in issue during his cross-examination of Sellers. The testimony elicited on redirect was proportional and confined to the topic to which Appellant had opened the door; therefore, it was properly admitted under the open-door doctrine. A comparison with key factors from the recent decisions in *Heyward* and *Simmons* is illustrative.

In *Heyward*, our supreme court held the trial court erred in allowing the State to introduce, under the open-door doctrine, testimony about Heyward's alleged prior physical abuse of a cooperating codefendant that was previously deemed inadmissible. *Heyward*, 426 S.C. at

637-38, 828 S.E.2d at 595. In so holding, the court noted that none of the issues addressed on cross—whether the codefendant had attempted suicide, struggled with mental health issues, or accused the witness’s husband of sexual assault—arose out of the same fact or transaction as past incidents of physical abuse. *Id.* The *Heyward* court further noted that where the State was allowed to question the witness about incidents that did not arise out of the same fact or transaction, the response was simply not proportional or confined to the doors that had been opened. Here, the opposite is true. The issue specifically addressed on cross—whether Sellers knew about Appellant or knew Appellant’s name prior to the day of the incident—was precisely the same fact the State asked him about on redirect. The State certainly should have been allowed to drill down on this fact on redirect, and the trial court appropriately allowed it to do so.

In *Simmons*, our supreme court held the trial court abused its discretion in ruling that the door had been opened to certain evidence. *Simmons*, 430 S.C. at 16-17; 841 S.E.2d at 853. In so holding the court noted trial counsel “carefully tailored his questions to track the State’s direct examination” and rejected the contention that “the sequence of questioning” on cross-examination created an implication about the evidence that would permit the State to introduce evidence on re-direct that was previously deemed inadmissible. *Simmons*, 426 S.C. at 15-16, 841 S.E.2d at 852-53. Here, while Appellant initially seemed to tailor his questions to track the testimony given on direct, rather than simply acknowledging Sellers’ clarification that he “knew about [Appellant] prior to [the incident],” Appellant continued to dig into that response in an attempt to get Sellers to agree that his direct testimony meant Appellant, unlike Parnell, was *not* known to Sellers as a drug dealer. (Tr.p.197-p.198). This line of questioning matched the theme of Appellant’s entire defense which, as explained in Appellant’s closing argument and as elicited from various witnesses on cross, was clearly meant to create the implication that Parnell was a

drug dealer, known to police and the focus of their investigation, while Appellant was *not* a drug dealer and was *unknown* to police until the charge for which he was on trial. Thus, in direct contrast to the circumstances in *Simmons*, it was entirely proportional for the State to rebut that implication by eliciting the limited testimony that Appellant, like Parnell was also known or suspected by law enforcement as a drug dealer. Under the “generous standard of review” recognized by our supreme court, *See Simmons*, 430 S.C. at 16, 841 S.E.2d at 852, the trial court’s determination that Appellant opened the door to Sellers’ testimony and invited the State’s response to his cross-examination, should be affirmed.

Harmless Error

Finally, even if this Court finds the trial court erred in determining Appellant opened the door to the introduction of otherwise inadmissible evidence, any error was harmless in light of: (1) the overwhelming evidence of guilt, (2) the minimal effect of the challenged testimony on the remaining evidence as a whole, and (3) the cumulative nature of the testimony, all of which demonstrates, beyond a reasonable doubt, that it did not contribute to the jury’s verdict. For the same reasons discussed in Argument II above, any possible error in the admission of Sellers’ testimony was harmless given the overwhelming evidence of guilt and the jury’s necessary determination Parnell was credible. His knowledge of Appellant as a large-scale marijuana dealer in the area pales in comparison to the direct evidence that he trafficked the cocaine at issue. Furthermore, the admission of Sellers’ testimony was harmless because it was merely cumulative to the properly admitted prior bad acts testimony from Parnell about Appellant’s history of marijuana dealing. Thus, Sellers’ testimony was inconsequential to the ultimate decision. For all of these reasons, the State submits these arguments should be denied and dismissed, and Appellant’s conviction and sentence should be affirmed.

IV.

The trial court did not err in declining to instruct the jury with the lesser included offense requested because no testimony or evidence was presented to establish the elements of only that lesser charge and because the charge given adequately covered the law applicable to the case. Furthermore, any possible error in the jury charge was entirely harmless because, beyond a reasonable doubt, it did not affect the jury's deliberations or contribute to the verdict.

Appellant argues the trial court committed reversible error in refusing his request for a jury charge on a lesser quantity of cocaine than the 200 to 400 grams charged in the indictment. He contends 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 he argued to the trial court, either of which would have allowed the jury to rationally infer he was guilty only of the lesser offense. Consequently, Appellant argues, the trial court erred in refusing to charge the jury on the lesser amount. Finally, Appellant argues the error was not harmless because it contributed to the verdict rendered. (Brief of Appellant, p.30-p.35). The State disagrees and submits Appellant's arguments are without merit.

The only testimony and evidence presented during trial established Appellant was either guilty of trafficking 200 to 400 grams of cocaine, or he was not guilty at all. Because no testimony or evidence was presented to establish *only* the required elements of trafficking any lesser amount of cocaine, the trial judge properly declined to instruct the jury on the lesser included offense. Furthermore, any possible error in the decision was harmless because it was not prejudicial to Appellant. Appellant's conviction and sentence should be affirmed.

Standard of Review

The law to be charged is determined from the evidence presented at trial. *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010); *State v. Holland*, 385 S.C. 159, 165, 682 S.E.2d

898, 901 (Ct. App. 2009). The appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *Brown* at 87, 736 S.E.2d at 265; *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." *State v. Weaver*, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

Relevant Facts

KCSO Investigator Sellers described the search of Parnell's residence in great detail. (Tr.p.112-p.134). While reviewing photographs taken during that search, Sellers described finding a large amount of cocaine in plain view, consisting of two large pieces—one in a large plastic bag sitting in the chair next to a yellow digital scale and another in a large plastic bag that was inside a camouflage bag that was sitting on the couch. Sellers also noted finding digital scales and small plastic sandwich baggies which would have been used to package smaller amounts of cocaine for sale; however, he did not mention seeing cocaine residue on any of those items. He then identified the BEST kit containing the actual drugs recovered from the house that day, which he believed came out to "about 280 grams or something like that." (Tr.p.134-p.137; State's Exhibits #4, #5, #6, #7, #8, and #9). Sellers later identified a photograph depicting the

two large pieces of cocaine being weighed together on Parnell's scale, which registered a combined weight of 281.7 grams. (Tr.p.143, lines 3-8; State's Exhibit #10).

On cross-examination, Sellers said he believed there was other cocaine in the house but did not know what the measurable amount was, only commenting that law enforcement generally does not leave any cocaine at a house following a search. He acknowledged his report suggested that cocaine was found in various places in the house, either a quantity of cocaine or residue, and said he was sure they took pictures of whatever was found. (Tr.p.209, line 14-p.211, line 14). Sellers later clarified that residue means it is *not* a weighable amount of cocaine. (Tr.p.213, line 14-p.214, line 21). On redirect, Sellers testified he was not surprised to find cocaine throughout Parnell's house, explaining that drug traffickers are not clean people and police often find drug residue on stuff in a dealer's house. (Tr.p.268, line 25-p.269, line 10).

Later, DEA Special Agent Hardin described everything discovered in Parnell's house that was consistent with dealing drugs which included: (1) 281 grams of cocaine, (2) four scales, (3) cocaine residue on the scales, (4) cocaine residue on a spoon, and (5) cocaine residue on some plastic baggies. He was asked if anybody determined a quantitative amount of any cocaine besides the 280 grams that was the subject of this prosecution. Hardin answered: "I think it was a cumulative amount, a total amount of the cocaine that was seized from inside that residence." (Tr.p.514, line 15-p.515, line 17). Hardin confirmed that after his arrest, Parnell told them Appellant was his source of supply. He testified that during the investigation law enforcement learned Appellant was dealing to other suppliers but not drug users, and that Parnell and Appellant went way back and had an established relationship. (Tr.p.498-p.504).

On the fourth day of trial, the trial court held a charge conference to discuss proposed jury instructions. The judge noted she would give a mere presence charge over the State's

objection; however, she was “a little more on the fence” about the lesser-included offense charge requested by Appellant and asked to hear Appellant’s theory in support of charging an amount under 200 grams. Appellant first argued that since there was testimony indicating additional cocaine, besides what Appellant allegedly delivered to Parnell, was located in Parnell’s house and testimony that all the cocaine in the house had been gathered and put into the BEST envelope, the jury could conclude the extra portion gathered from throughout the house is what caused the total weight to exceed 200 grams. The State argued Appellant was inaccurately restating Hardin’s testimony and that the only real evidence of additional cocaine came from Sellers who explained it was residue which could not be weighed or tested. Appellant contended there was contradictory evidence and that since there was at least *some* evidence of the lesser amount, it would be appropriate to charge the lesser-included offense to the jury. The trial court disagreed, ruling there was no competent evidence from which a jury could conclude that Appellant was guilty of trafficking the lesser amount. (Tr.p.541-p.548).

Appellant then argued an alternate theory in support of his request. He contended that were there were two large pieces of cocaine confiscated and weighed, the jury could conclude Appellant *only* delivered the smaller piece, which weighed 55 grams, rather than both, and therefore he could only be guilty of the lesser included offense. The trial court held: “Yeah, there’s no evidence of that though. Either they believe what Mr. Parnell said he brought this brick or they don’t. But there’s nothing nowhere, anyone - - they would have to completely speculate that, you know, make up their own story that Mr. Goad brought in this smaller piece. And frankly if that’s what they do, then he’s just not guilty. (Tr.p.548-p.549). After the parties gave closing arguments, the trial court charged the jury on the law, including trafficking in

cocaine 200-400 grams, without charging any lesser included offense of an amount under 200 grams. (Tr.p.609-p.624).

Discussion / Analysis

Trafficking is defined in the South Carolina Code as follows:

(e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:

....

(2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:

....

(d) two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars;

S.C. Code Ann. 44-53-370(e) (2016). Thus, both under the statute and as noted in the State's opening statement (Tr.p.100-p.102), as long as the amount of cocaine was ten grams or more (which was uncontested), the jury could find Appellant guilty under several alternative theories of trafficking including that he was: (1) selling or delivering cocaine; (2) conspiring to sell or deliver cocaine; (3) knowingly in possession of cocaine; or (4) knowingly attempting to become in possession of cocaine.

Here, none of the evidence and testimony presented during trial supported a conclusion that Appellant could be guilty of *only* the lesser included offense. Indeed, there was absolutely

no testimony, including from Parnell, that only the smaller, 55 gram (two ounce) bag of cocaine but not the larger, 221 gram (eight ounce) bag of cocaine was delivered by Appellant. Parnell explained that after the delivery of the entire ten ounce brick, Parnell broke off 2 ounces (55 grams) to sell to José and placed the remaining cocaine in his camouflage bag. The crucial “facts” repeated by Appellant—that the camouflage bag was owned by Parnell and was not delivered by Appellant— are entirely consistent with Parnell’s testimony. As recognized by the trial judge, if the jury believed Parnell already had the cocaine before Appellant arrived and it was not delivered by Appellant, Appellant would be *not guilty* rather than guilty of *only* the lesser included offense. *Abney v. State*, 408 S.C. 41, 45-46, 757 S.E.2d 544, 546 (Ct. App. 2014). Similarly, where the two large portions alone weighed 281.7 grams on Parnell’s scale (State’s Exhibit #10), and Sellers testified any residual cocaine found throughout Parnell’s house would not have been measurable, there is no actual evidence to support either of Appellant’s alternate theories, only speculation. As a result, the trial judge committed no error by declining to instruct the jury on a lesser included offense wholly unsupported by the evidence and testimony presented during trial. For all of these reasons, Appellants’ conviction should be affirmed.

Harmless Error

Even if this Court finds the trial court somehow erred in failing to give a charge on a lesser quantity of cocaine, any possible error was harmless beyond a reasonable doubt because it was not prejudicial to Appellant. To reverse a criminal conviction based on an erroneous jury instruction, the appellate court must find the error was a prejudicial error. *State v. Bowers*, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022). Prejudicial error in a jury instruction is an error that contributed to the jury verdict. *Id.* The question that must be addressed is not whether the error was harmless beyond a reasonable doubt because of overwhelming evidence of guilt; rather, the

question is whether the erroneous jury charge affected the jury's deliberations and, thus, contributed to the verdict. *Id.* at 646-47, 875 S.E.2d at 611. Indeed, when considering whether an error with respect to jury instructions was harmless, the appellate court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. *State v. Perry*, 440 S.C. 396, 408, 892 S.E.2d 273, 279 (2023). Here, Appellant could not possibly have suffered any prejudice because, where the jury accepted Parnell's testimony as credible, which it necessarily did, it could have reached no other conclusion but that he trafficked the approximately 276 grams of cocaine identified by SLED. (Tr.p.303, lines 6-21).


CONCLUSION

For all of the foregoing reasons, the State respectfully requests that Appellant's conviction and sentence be affirmed.

Respectfully submitted,

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