STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from York County
Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAROLD GENE WHITE III,

PETITIONER

Opinion No. 6113 (S.C. Ct. App. Filed July 2, 2025)

APPELLATE CASE NO. 2025-001765

APPENDIX

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FINAL BRIEF OF APPELLANT

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A. Where the text messages were inadmissible propensity evidence under Rule 404(b), SCRE, since the bad acts lacked logical relevancy, were not proven by clear and convincing evidence, and any probative value was substantially outweighed by the danger of unfair prejudice?

B. Where the text messages were inadmissible hearsay?

STATEMENT OF THE CASE

On October 11, 2018, a York County Grand Jury indicted Harold Gene White, III, Appellant, for possession with intent to distribute oxycodone, possession with intent to distribute marijuana, and possession of cocaine. On January 20, 2022, Appellant was indicted for possession with intent to distribute hydrocodone. Appellant was tried before the Honorable Brian M. Gibbons, from April 20 – 21, 2022, in a bench trial. Christopher Wellborn represented Appellant. Erin Joyner and Daniel Porter prosecuted the case.[1]

The court broke to deliberate, and proceedings reconvened on April 28, 2022, when the court announced its verdicts. As to possession with intent to distribute hydrocodone, Appellant was convicted, and he was sentenced to 7 years' imprisonment for a second offense. As to possession with intent to distribute oxycodone, Appellant was convicted of the lesser offense of possession of oxycodone, and he was sentenced to serve 2 years' imprisonment for a second offense. As to possession of cocaine, Appellant was convicted, and he was sentenced to 3 years' imprisonment for a second offense. As to possession with intent to distribute marijuana, Appellant was convicted as indicted, and he was sentenced to 2 years' imprisonment for a first offense. All sentences were run concurrently.[2]

This appeal follows.

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[1] R. 498; R. 1.

[2] R. 283; R. 284, l. 1 – 3, l. 17; R. 292, l. 23 – 13, l. 8; R. 506.

STATEMENT OF FACTS

Just before 6:00 pm on March 29, 2017, Appellant's nine-month-old daughter (Child) was found dead at the home of his mother, Yolanda Adams, on Simpson Street in Rock Hill. Earlier in the day, Child and her twin brother (Brother) were at Appellant's home on Amanda Lane. However, either Adams or her neighbor, Jasmine Rawlinson, picked the twins up from Appellant's home and took them to Adams' home at approximately 11:00 am or 12:00 pm. (Appellant said Adams picked the children up, but Adams claimed Rawlinson picked them up.) Adams fed both children and took a nap with them in her bed. Adams woke up and left Child sleeping. Adams' friend, Williette Beard, and another resident of the Simpson Street home, Amanda Pettrey, were there. Adams asked Beard and Pettrey to watch the twins. Adams left.[3]

At some point, Appellant came by his mother's house and saw Child sleeping in bed and Brother playing with Beard. (Agent Trista Baird would later testify there was no indication Appellant had physical contact with Child at that time.) Appellant left. Adams returned. The mother of the twins, Julisa White, and another resident of the Simpson Street home, Darrell Ross, as well as Rawlinson and Pettrey, were present in the home. Adams checked on Child and found her unresponsive. 911 was called but Child could not be resuscitated. An autopsy was done, and seventeen days later, on April 15, 2017, a toxicology report revealed Child had fentanyl and norfentanyl in her system.[4]

On April 17, 2017, Agent Baird sought a search warrant for Appellant's home. On April 25, 2017, she sought a search warrant for cellular telephone data for seven mobile telephones recovered during the search of Appellant's home, including a telephone recovered from

[3] R. 26, l. 3 – 27, l. 18.

[4] R., 27, l. 18 – 28, l. 4; R. 37, ll. 2-11.

Appellant's person. The warrants were issued in error, however, since the affidavits did not contain sufficient information to give the magistrate a basis to find probable cause. The affidavit for the search of Appellant's Amanda Lane home stated the following:

> I, Special Agent Trista Baird, being duly sworn state the following:
>
> Special Agent (S/A) Trista Baird is employed with the South Carolina Law Enforcement Division (SLED) and is assigned to the Special Victim's Unit—Department of Child Fatalities. S/A Baird has worked in law enforcement since 2007. S/A Baird has been employed by SLED since May of 2013. Prior to working with SLED, S/A Baird was employed with the Rock Hill Police Department as a detective assigned to investigate child and vulnerable adult abuse.
>
> **On March 29, 2017, at approximately 5:56 pm, Piedmont Medical Center EMS and Rock Hill Police Department (RHPD) were dispatched to [redacted] Simpson Street in the city limits of Rock Hill, South Carolina, in reference to a 9-month-old female ([Child], dob [redacted]/2016; dod 3/29/2017) unconscious and not breathing**. EMS arrived on scene and found [Child] supine on the living room floor with a female performing chest compressions. She was unresponsive, not breathing, had no pulse, and had vomit coming from her mouth. She was transported to Piedmont Medical Center where she was pronounced deceased. York County Coroner's Office, RHPD, and SLED responded to the hospital.
>
> **According to [Child's] father (Harold Gene White III), his mother (Yolanda Harris Adams) picked up his twins ([Child] and [Brother]) from his residence ([redacted] Amanda Lane, Rock Hill, South Carolina) at approximately 11:00 am or 12:00 pm on March 29, 2017. Adams took the twins to her residence at [redacted] Simpson Street.** Later in the afternoon, he went to Adams' house and found [Child] asleep in Adams' bed. [Brother] was playing with Adam's [sic] friend (Williette Woodward Beard) in the living room. Adams was not home. He then left the residence.
>
> According to Adams, her neighbor (Jasmine Latasha Rawlinson) picked the twins up from Harold White and brought them to her house around lunchtime. Adams then fed the twins a bottle each with formula mixed with infant cereal. The, the three of them lay down on her bed and went to sleep. Adams and [Brother] both woke up, got out of bed, and left [Child] sleeping in the bed. Adams got her children ready for their doctor's appointment and asked Amanda Jo Pettrey (who resides at her residence) and Beard to watch [Child] and [Brother] while she took her children to the doctor. When she home [sic], Adams was told that [Child] was still asleep and went to check on her. She found her unresponsive and not breathing. Adams brought [Child] to Julisa White, who had arrived on scene at

> some point prior to Adams' arrival. Amanda Pettrey began CPR in the living room. Rawlinson, who was also on scene, called 911. Darrell Rodney Ross, who resides at the residence, was asleep in one of the bedrooms for most of the day.
>
> An autopsy was completed on March 30, 2017. **The toxicology report from NMS Labs revealed that [Child] had 17 ng/mL of Fentanyl and 5.2 ng/mL of Norfentanyl in her blood at the time of death.**
>
> It is the belief of this affiant that information gained from this search is necessary to assist investigators in determining the cause and manner of death of [Child], the individuals who were present at the time and leading up to her death, and the timeline of events surrounding her death.

The affidavit for cellular data extraction was identical, except that it contained the additional sentences, "These cellphones [sic] were obtained from a search warrant that was executed on April 18, 2017 at [redacted] Amanda Lane Rock Hill, South Carolina. Extractions of these cellphones [sic] are needed at this time."[5]

Pursuant to the search warrant of Appellant's home on April 17, 2017, authorities recovered a number of drugs: cocaine, ibuprofen, oxycodone, cyclobenzaprine, hydrocodone, alprazolam, and marijuana. Most of the drugs were found in the top drawer of a chest of drawers in the master bedroom. The same drawer contained Appellant's passport and credit cards. Authorities did not recover any fentanyl or norfentanyl. Pursuant to the search warrant executed on April 25, 2017, extraction of data from the cellular telephone seized from Appellant recovered text messages.[6]

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[5] *See* Court's Exhibit #1; Court's Exhibit #2. These exhibits are located at pp. 297-307 of the Record on Appeal; *see* State's Exhibit #37 (State's Exhibit #37 is a disc containing the cellular telephone extractions and is on file with this Court.)

[6] R. 89, l. 3 – 101, l. 18; R. 111, l. 9 – 124, l. 6.

As seen, Appellant was indicted and tried in a bench trial for possession with intent to distribute oxycodone, possession with intent to distribute hydrocodone, possession with intent to distribute marijuana, and possession of cocaine.[7]

Appellant objected to the admission of the fruits of the search warrants (i.e., the drugs and text messages) pursuant to the Fourth Amendment and South Carolina's parallel constitutional provision. However, the court deemed them admissible.[8]

Appellant separately objected to the admission of the text messages on multiple additional grounds. The messages spanned the time period of February 6, 2017 – April 15, 2017. Given the context of the case, it is important to remember that Appellant was not tried for possessing drugs on the date of his child's death. Instead, he was tried for drugs found in his home several weeks later, on April 17, 2017.

The State posited some of the text messages contained slang terms which showed Appellant was a drug dealer. The State presented expert testimony from Officer Dana Gatti of the York County Sheriff's Office that texts from the telephone recovered from Appellant's person and texts from contacts in the telephone contained references to seeking and obtaining drugs. Regarding the admitted messages, Officer Gatti claimed that references to "smoke," "pine," and "strong" could mean marijuana, references to "pains" or "white ones" could be pain medication, references to "perky" could mean percocet, references to "blues" and "blue boys" could mean roxicodone. She opined that "28p" could refer to the price of marijuana.[9]

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[7] R. 5, ll. 3-15.

[8] R. 19, l. 10 – 22, l. 22; R. 50, l. 5 – 71, l. 11.

[9] R. 102, ll. 7-16; R. 78, l. 18 – 79, l. 10; R. 131, ll. 15-20; R. 141, l. 22 – 143, l. 1; R. 143, l. 20 – 144, l. 6; R. 156, l. 22 – 173, l. 17; *see* State's Exhibit #37.

The court would ultimately admit texts between Appellant's phone and contacts identified as "Kiesha," "Tatta," "Nadeen," "Geter," "Nuk," and "Malikkk." The messages admitted by the court were as follows.

- The messages between Appellant's phone and "Tatta" were from February 23 – 24, 2017. Messages reference "blue bois," "blues," and "white ones."
- The messages between Appellant's phone and "Kiesha" were from February 19, 2017. Messages reference hydrocodone.
- The messages between Appellant's phone and "Malikkk" from March 11 and 17, 2017. Messages reference "perkys" and "pine."
- The messages between Appellant's phone and "Nadeen" were from March 1 – March 14, 2017. Messages reference a "refill," "pain pills," and "pains."
- The messages between Appellant's phone and "Geter" were from March 1 and 7, 2017. Messages reference "smoke" and "pine."
- The messages between Appellant's phone and "Nuk" were from March 6, 2017. The messages reference "pine," "strong," and "28p." [10]

Appellant objected to the admission of the text messages on the bases of hearsay, foundation, Rule 404(b), SCRE, and Rule 403, SCRE. The court ruled the above-referenced messages were admissible.[11]

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[10] R. 219, l. 2 – 223, l. 10; R. 232, ll. 19.

[11] R. 144, l. 24 – 154, l. 6; R. 206, l. 22 – 234, l. 10.

ARGUMENT

I.

The court erred where it failed to suppress evidence seized pursuant to search warrants, where the affidavits were insufficient to support a finding that there was a fair probability contraband or evidence of a crime would be found, since the evidence should have been excluded pursuant to the Fourth Amendment of the United States Constitution and article I, section 10 of the South Carolina Constitution.

A magistrate issued warrants to search Appellant's Amanda Lane home and the cellular telephone in his possession several weeks after his child's death. However, the magistrate only knew that the child had fentanyl in her system and was found dead at Appellant's mother's Simpson Street home six or seven hours after being taken from Appellant's home. This was after another person had driven Child, fed Child, and napped with her, and after she was around six other adults. Under the totality of the circumstances, this information was insufficient to support a finding of probable cause to search Appellant's home and electronic devices.

A. Standard of review

"Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion is a question of law subject to de novo review." *State v. German*, Op. No. 2849 (S.C. Sup. Ct. filed Apr. 5, 2023) (Howard Adv. Sh. No. 13 at 67, 71) (quoting *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022)) (cleaned up).

B. The evidence was obtained in violation of federal and state constitutional provisions

"All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment." *Nathanson v. United States*, 290 U.S. 41, 46 (1933). "At the very core of the Fourth Amendment is a person's right to retreat into his own home and there be free from unreasonable government intrusions." *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (quoting *Kyllo v. United States*, 533 U.S. 27, 31 (2001)) (cleaned up). "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Nathanson*, 290 U.S. at 47.

"Under both the United States and South Carolina constitutions, search warrants may not be issued except 'upon probable cause, supported by Oath or affirmation.' U.S. Const. amend. IV; S.C. Const. art. I, § 10. Following these constitutional requirements, § 17-13-140 requires a sworn affidavit for a search warrant be issued." *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).

"A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) (citing *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221; *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause." *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (citing *State v. Viard*, 276 S.C. 147, 276 S.E.2d 531 (1981)). "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are

insufficient. His action cannot be a mere ratification of the bare conclusions of others." *Id.* (citing *Illinois v. Gates*, 462 U.S. at 239 (cleaned up)).

"The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. *Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). "If no supplemental oral testimony is taken, an issuing judge's probable cause determination is limited to the four corners of the search warrant affidavit." *State v. Thompson*, 419 S.C. 250, 257, 797 S.E.2d 716, 719 (2017). "In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." *State v. Thompson*, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

"[T]he Fourth Amendment does protect digital information stored on a cell phone." *State v. Warner*, 436 S.C. 395, 401, 872 S.E.2d 638, 640 (2022) (citing *Riley v. California*, 573 U.S. 373 (2014); *State v. Brown*, 423 S.C. 519, 523-24, 815 S.E.2d 761. 763-64 (2018)).

In this case, there was no substantial basis upon which to find probable cause. "In reviewing a magistrate's probable cause determination, circuit judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *Kinloch*, 410 S.C. at 617, 767 S.E.2d at 155. The April 17 and April 25, 2017, affidavits stated that on March 29, 2017, Child was found dead at Appellant's mother's house from toxic drug exposure, after being at Appellant's house six or seven hours earlier, and that Appellant checked on the child while she was sleeping at his mother's house. It set forth no facts as to why police believed Appellant was the person who exposed the child to toxic drugs or why they believed exposure happened at Appellant's home.

The affidavits listed six other individuals who could have had a hand in the child's death, and listed other places and circumstances where the child could have been exposed to drugs. The affidavits stated that another person, not Appellant, had fed the child and the other was the last person known to have contact with the child before she was found unresponsive. The affidavits did not have a sufficient basis upon which to find probable cause. *See State v. Smith*, 301 S.C. at 373, 392 S.E.2d at 183 (affidavit defective on its face where it set forth no facts as to why police believed Smith robbed the Master Host Inn); *State v. Baccus*, 367 S.C. at 52, 625 S.E.2d at 222 (trial court erred in admitting evidence seized pursuant to search warrant where affidavit fails to set forth any facts as to why police believed defendant committed the crime; the "language in the affidavit lacks specificity and contains conclusory statements.").

The information in the affidavit was also stale. "The appellate courts of this state have routinely held that the information contained in an affidavit providing a timely and direct nexus between the contraband sought and the location to be searched . . . is sufficient to support a search warrant." *Thompson*, 419 S.C. at 257, 797 S.E.2d at 719. "[A]n affidavit in support of a search warrant 'must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.'" *State v. Simmons*, 430 S.C. 1, 13, 841 S.E.2d 845, 851 (2020) (quoting *State v. Winborne*, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979)). "Moreover, 'the reason for this rule is that probable cause, with time, dissipates.'" *Id.*

The search warrants were issued 19 and 27 days after the child's death. The affidavits provided no timely and direct nexus between the contraband sought and Appellant's home and his cellular telephone. The affidavit for cellular data extraction stated that the telephones were obtained during the execution of the April 17, 2017, search warrant, but it did not state how the telephones were relevant to the case. Notably, the affidavit for cellular data did not state that

there were drugs found during the execution of the prior warrant, and the signatures on the warrants show that a different judge signed each warrant. *See* Court's Exhibit #1; Court's Exhibit #2. R. 297.

"In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." *State v. Counts*, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015) (citing *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10). "[T]he South Carolina Constitution provides citizens an express right to privacy. *Counts*, 413 S.C. at 167, 776 S.E.2d at 67. "[T]he South Carolina Constitution affords a higher level of privacy protection than the Fourth Amendment." *Counts*, 413 S.C. at 170, 776 S.E.2d at 68 (citing *State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007)). *See State v. German*, Op. No. 2849 (S.C. Sup. Ct. filed Apr. 5, 2023) (Howard Adv. Sh. No. 13 at 67, 82) (the "drafters of our constitutional provision were concerned with the emergence of new technology enabling more invasive searches"); *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 330, 882 S.E.2d 770, 846 (2023) (James, J., dissenting) (the "privacy provision in article I, section 10 provides citizens with heightened Fourth Amendment protections, especially protection from unreasonable law enforcement use of electronic devices to search and seize information and communications.").

The search warrants in this case violated the South Carolina Constitution, which provides heightened privacy protection in the context of search and seizure. While article I, section 10 protects Appellant's privacy in his home, it is also of particular import here, where the authorities used Cellebrite[12] to extract data from personal communication devices. *Counts*, 413

[12] Cellebrite is a third-party Israeli digital intelligence company that develops digital intelligence platforms. Law enforcement agencies use the company's Universal Forensic Extraction Device tool to download data from cellular telephones and to organize that data so it can be reviewed.

S.C. at 170, 776 S.E.2d at 68. *See Riley v. California*, 573 U.S. at 395 ("more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.").

C. The evidence should have been excluded

Generally, evidence derived from an illegal search or seizure is deemed fruit of the poisonous tree and is inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). "Evidence seized in violation of the Fourth Amendment must be excluded from trial." *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). *See State v. Forrester*, 343 S.C. at 648, 541 S.E.2d at 843 (applying exclusionary rule to evidence taken in violation of state constitutional right to privacy provision).

However, given the good faith exception to the exclusionary rule, "suppression is only appropriate in a few situations, including when an affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *State v. Weston*, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (citing *United States v. Leon*, 468 U.S. 897, 923 (1984); *State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990) (cleaned up)). As discussed above, the affidavits did not state why police thought Appellant exposed Child to drugs or why they believed drugs would be found at Appellant's home given the amount of time that had passed since the child's death. In this case, the affidavits so lacked indicia of probable cause that the exclusionary rule would apply. *Weston*, *supra*.[13]

Cellebrite is ordinarily used as a software program, which can be installed onto a law enforcement computer, but Cellebrite also has devices that can be utilized without a computer. *United States v. Smith*, No. 21-CR-30003-DWD, 2022 WL 17741100, at *2 (S.D. Ill. Dec. 16, 2022).

[13] It is unclear whether a *Leon* exception applies to article I, section 10 violations, given that the provision provides heightened protections in the search and seizure context. *See State v.*

Finally, the error was not harmless. "When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result." *Baccus*, 367 S.C. at 55, 625 S.E.2d at 223 (citing *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984)). All of the evidence in the case was seized pursuant to the search warrants. Without it, Appellant could not have been convicted. He would not have even been indicted, and if he had been, he would have been entitled to a directed verdict of acquittal.

McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987) ("The *Leon* rule applies only when a search warrant is defective on Fourth Amendment grounds."); *but see State v. German*, Op. No. 2849 (S.C. Sup. Ct. filed Apr. 5, 2023) (Howard Adv. Sh. No. 13 at 67, 85) (applying good faith exception where police violated defendant's rights under both the Fourth Amendment and South Carolina's Constitution, without discussing whether *Leon* applies in the context of state constitution). Regardless, however, the affidavits in this case were so lacking in indicia of probable cause that the evidence should have been suppressed.

II.

The court erred where it admitted text messages generated between Appellant's phone and the phones of others, which the State contended showed Appellant was involved in the illegal drug trade.

A. Where the text messages were inadmissible propensity evidence under Rule 404(b), SCRE, since the bad acts were not proven by clear and convincing evidence, lacked logical relevancy, and any probative value was substantially outweighed by the danger of unfair prejudice.

i. Standard of review[14]

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "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." *Whitner*, 399 S.C. at 557, 732 S.E.2d at 866.

ii. The evidence was inadmissible under Rules 404(b) and 403

The messages regarded prior bad acts and their admissibility was subject to the limitations of Rule 404(b), SCRE. "Our courts view a defendant's previous distribution of drugs as a past bad act." *State v. King*, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002).

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "as a threshold matter, determine whether the proffered evidence is relevant . . ." *State v. Clasby*, 385 S.C. at 154, 682 S.E.2d at 895 (cleaned up). "If the trial judge finds the evidence to be relevant,

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[14] The same standard of review governs both Issue II(a) and Issue II(b).

the judge must then determine whether the bad act evidence fits within an exception of Rule 404(b)," to show, *inter alia*, intent. *Id.* "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." *Id.* (quoting *State v. Gaines,* 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)).

"The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *State v. Perry*, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020) (quoting *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923)). "The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden 'should be subjected by the courts to rigid scrutiny,' considering the individual facts of and circumstances of each case." *Id*.

"[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *State v. Lyle*, 125 S.C. at 406, 118 S.E. at 807. "[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. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing *State v. Gore*, 299 S.C. 368, 384 S.E.2d 750 (1989)).

Appellant was not on trial for the drug transactions referenced in his text messages. The bad acts referred to in the messages lacked logical relevancy. Facts such as Appellant's phone responding that he did not have the drugs requested or the drug-seeking messages which elicited

no response from Appellant's phone undercut a claim of logical relevance. The bad acts were also too remote in time to establish intent, they merely went to propensity. *See State v. Wilson*, 345 S.C. at 7, 545 S.E.2d at 830 (prior drug sale only "a couple of days" earlier was relevant on issue of intent).

As seen, Appellant was on trial for drugs found in his home on April 17, 2017. The messages from "Tatta" were from February 23 – 24, 2017, and the messages from "Kiesha" were from February 19, 2017, roughly two months before the drugs in this case were found. The messages between Appellant's phone and "Nuk" were from March 6, 2017—over a month before the drugs in this case were seized. The messages between Appellant's phone and "Geter" were from March 1 and 7, 2017, five to six weeks before the drugs in this case were found. These messages were too remote in time to meet an exception to Rule 404(b).

The messages between Appellant's phone and "Malikkk" from March 11, 2017, where "Malikkk" asks, "You still got them perkys," and Appellant's phone's response, "Nah," were too remote in time, and were not logically relevant to the charges, due to the "Nah" response. The March 17, 2017 message from "Malikkk" asking, "Where the pine," and Appellant's response were also too remote in time for logical relevancy—that was a month before the charges in this case.

Finally, the "Nadeen" messages were too remote in time. The "Nadeen" messages about a "refill" were from March 1, 2017, over six weeks before the drugs that Appellant was on trial for were found. The messages asking for "pain pills" were also too remote—from March 8, 2017, and, in them, the person responding from Appellant's phone replied that they did not have any. A third message from "Nadeen" seeking "pains" was also too remote—March 14, 2017—

and it elicited no response from Appellant's phone. The negative responses and lack of responses undercuts logical relevancy.

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895 (quoting *Gaines,* 380 S.C. at 29, 667 S.E.2d at 731). "*Lyle* concerns bad acts and other crimes of a defendant, not statements of intent to commit crimes." *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000). The State did not show the drug transactions referenced in the text messages actually occurred—in fact, under the State's view of the evidence, some of the messages facially stated that Appellant did not have the drugs that others were seeking. It was unclear whether other transactions were ever completed. Because these bad acts were not subject to a conviction, the acts had to be proven by clear and convincing evidence, and the State did not meet its burden here. *King,* 349 S.C. At 153, 561 S.E.2d at 645.

Next, the messages should have been excluded based on their relative probative value and unfair prejudice potential. Where evidence is logically relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403. Where the evidence's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); Rule 403, SCRE (evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). To the extent bad act evidence serves a legitimate purpose that is not prohibited by Rule 404(b), the trial court "must determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper purpose." *Perry*, 430 S.C. at 31, 842 S.E.2d at 657-58.

The probative value of the messages was minimal—they went largely to propensity. Their remoteness in time and lack of logical relevancy cuts against probative value on the issue of intent. *See State v. Ostrowski*, 435 S.C. 364, 397, 867 S.E.2d 269, 286 (Ct. App. 2021) (erroneous admission of text messages from up to six weeks prior to defendant's arrest where many of messages were "completely extraneous to the events that were the subject of the trial, and the State made no real effort to link the text messages to the specific drugs at issue in this case."). Like this case, the appellant in *Ostrowski* "was not on trial for any of the drug transactions recorded in his text messages." *Id.*, 435 S.C. at 403, 867 S.E.2d at 289. Moreover, the State alleged Appellant possessed over sixteen ounces of marijuana—well past the inference weight of one ounce, so text messages about marijuana had a particularly low probative value. However, the evidence carried a high danger of prejudice. "When the prior bad acts are 'strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.'" *State v. Campbell*, 317 S.C. 449, 451, 454 S.E.2d 899 (Ct. App. 1994) (quoting *State v. Gore*, 283 S.C. 118, 121, 3222 S.E.2d 12, 13 (1984)).

The error was not harmless. The State's case rested on two pillars—the physical drugs found in Appellant's home and the drug-related text messages on his telephone. The text messages were central to the State's case. The testimony by Officer Gatti about the messages was extensive. *See Ostrowski*, 435 S.C. at 401, 867 S.E.2d at 288 (error in admission of text messages was not harmless "because of the degree to which the phone evidence became a central aspect of the State's case"); *State v. Tuffour*, 364 S.C. 497, 507, 613 S.E.2d 814, 820 (Ct. App. 2005), vacated, 371 S.C. 511, 641 S.E.2d 24 (2007) (finding prejudice from admission of alleged prior drug sales is "manifest.").

II.

The court erred where it admitted text messages generated between Appellant's phone and the phones of others, which the State contended showed Appellant was involved in the illegal drug trade.

B. Where the text messages were inadmissible hearsay.

"'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(c), SCRE. "Evidence is not hearsay unless it is offered to show the truth of the matter asserted." *State v. Sims*, 304 S.C. 409, 420, 405 S.E.2d 377, 383 (1991). A Statement is not hearsay if it is offered against a party and is the party's own statement. Rule 801(d)(2), SCRE.

The incoming messages from unknown declarants ("Tatta," "Kiesha," "Nuk," "Geter," "Malikkk," "Nadeen") were hearsay. These declarants were never identified and did not testify at trial. The State argued the messages were not offered for their truth but to show an effect on the listener, Appellant. However, the messages did not explain why Appellant took any subsequent actions. As discussed above, it is unclear whether drug transactions referenced in the messages ever took place. Some messages explicitly stated there were no drugs to sell.

The messages were offered to show Appellant was selling drugs. "THE COURT: They're offering it to prove that he's a drug dealer." The State used the testimony of Officer Dana Gatti about drug slang terms to show that the messages were about drug transactions. The State used the messages for the truth of the matter asserted.[15]

The outgoing messages the State alleged were sent by Appellant were also hearsay. The State did not show Appellant sent or received the text messages. It did not show the phone was in

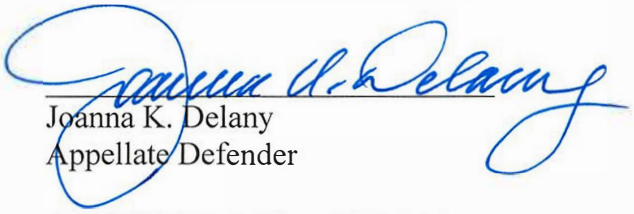
[15] R. 211, ll. 2-3; R. 156, l. 22 – 173, l. 16.

his possession during the times the messages were sent or received. Therefore, the State did not show that the messages qualified as non-hearsay under 801(d)(2), the exception for a party's own statement.

The error in admitting the messages was not harmless. The messages were central to the State's case and the testimony by Officer Gatti about the messages was extensive. *See Ostrowski*, 435 S.C. at 401, 867 S.E.2d at 288 (error in admission of text messages was not harmless "because of the degree to which the phone evidence became a central aspect of the State's case"); *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006) (improper admission of hearsay is reversible error only when the admission causes prejudice); *State v. Tuffour*, 364 S.C. 497, 507, 613 S.E.2d 814, 820 (Ct. App. 2005), vacated, 371 S.C. 511, 641 S.E.2d 24 (2007) (finding prejudice from admission of alleged prior drug sales is "manifest.").

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of April, 2024.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

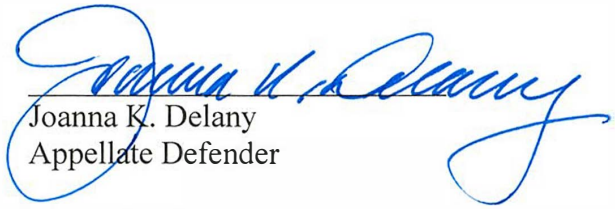
HAROLD GENE WHITE III,

APPELLANT

APPELLATE CASE NO. 2022-000579

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 2nd day of April, 2024.



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CERTIFICATE OF COUNSEL

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

This 2nd day of April, 2024.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State, Respondent,

v.

Harold Gene White, III,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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

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

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

Validity of Search Warrant

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

Admission of Evidence

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 26, 2024

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State,

Respondent,

v.

Harold Gene White, III,

Appellant.

CERTIFICATE OF COUNSEL

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

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The State, Respondent,

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Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify I served the Final Brief of Respondent on Appellant via the email address reflected in the AIS system:

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I further certify that all parties required by Rule to be served have been served.

This 26th day of March 2024.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Harold Gene White, III, Appellant.

Appellate Case No. 2022-000579

Appeal From York County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 6113
Submitted May 1, 2025 – Filed July 2, 2025

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, and Solicitor Kevin Scott Brackett, of York, for Respondent.

GEATHERS, J.: Appellant Harold Gene White, III challenges his convictions for possession with intent to distribute hydrocodone, possession of oxycodone, possession of cocaine, and possession with intent to distribute marijuana. White argues the circuit court erred by declining to suppress evidence seized during searches of his home and his cell phone because the information in the search warrant affidavits was insufficient to show probable cause. White also argues the

text messages extracted from his cell phone should have been excluded from evidence because they contained inadmissible hearsay and constituted propensity evidence prohibited by Rule 404(b), SCRE. We affirm.

FACTS/PROCEDURAL HISTORY

This case was precipitated by the death of White's infant daughter. During the investigation of her death, law enforcement obtained a warrant to search the only two places where she had been on the day of her death, White's home and the home of White's mother. During the search of White's home, law enforcement discovered and seized evidence of the crimes with which he was charged in this case, i.e., possession with intent to distribute oxycodone, possession with intent to distribute marijuana, possession of cocaine, and possession with intent to distribute hydrocodone.

Specifically, on March 29, 2017, the Rock Hill Police Department and Piedmont Medical Center EMS personnel responded to a 911 call from the home of White's mother, Yolanda Adams, concerning White's nine-month-old daughter (Infant), who was unconscious and not breathing. First responders took Infant to Piedmont Medical Center, where she was pronounced dead. Special Agent Trista Baird, with the South Carolina Law Enforcement Division (SLED), learned of Infant's death and began an investigation the same day. She interviewed White and Adams and received the results of Infant's autopsy approximately seventeen days later, circa April 15, 2017. The results revealed that Infant had fentanyl and norfentanyl in her blood at the time of her death.

On April 17, 2017, Special Agent Baird submitted to the local magistrate affidavits to support her request for a warrant to search Adams's and White's respective residences for

> [a]ny and all evidence related to the death of [Infant]: to include Fentanyl (a DEA Schedule II synthetic morphine substitute anesthetic/analgesic), any substances suspected to be Fentanyl, and any paraphernalia or items associated with the use of Fentanyl; state issued identification card and/or driver's license of any and all individuals at the residence; any and all cellphones belonging to: [White, Adams, and other individuals present in Adams's home].

In her affidavit, Special Agent Baird gave the following reasons for her belief that the property sought was on the subject premises:

> On March 29, 2017, at approximately 5:56 pm, Piedmont Medical Center EMS and Rock Hill Police Department (RHPD) were dispatched to [redacted] Simpson Street in the city limits of Rock Hill, South Carolina, in reference to a 9-month-old female ([Infant] dob [redacted] 2016; dod 3/29/2017) unconscious and not breathing. EMS arrived on scene and found [Infant] supine on the living room floor with a female performing chest compressions. She was unresponsive, not breathing, had no pulse, and had vomit coming from her mouth. She was transported to Piedmont Medical Center[,] where she was pronounced deceased. York County Coroner's Office, RHPD, and SLED responded to the hospital.
>
> According to [Infant]'s father (Harold Gene White III), his mother (Yolanda Harris Adams) picked up his twins ([Infant] and [Infant 2]) from his residence ([redacted] Amanda Lane, Rock Hill, South Carolina) at approximately 11:00 am or 12:00 pm on March 29, 2017. Adams took the twins to her residence at [redacted] Simpson Street. Later in the afternoon, [White] went to Adams'[s] house and found [Infant] asleep in Adams'[s] bed. [Infant 2] was playing with Adam[s]'s friend (Williette Woodard Beard) in the living room. Adams was not home. [White] then left the residence.
>
> According to Adams, her neighbor (Jasmine Latasha Rawlinson) picked the twins up from [White] and brought them to [Adams's] house around lunchtime. Adams fed the twins each a bottle with formula mixed with infant cereal. Then, the three of them lay down on her bed and went to sleep. Adams and [Infant 2] both woke up, got out of bed, and left [Infant] sleeping in the bed. Adams got her children ready for their doctor's appointment and asked Amanda Jo Pettrey (who resides at her residence) and Beard to watch [Infant] and [Infant 2] while she took her children to the doctor. When she [got] home, Adams was

> told that [Infant] was still asleep and went to check on her. She found her unresponsive and not breathing. Adams brought [Infant] to Julisa White, who had arrived on scene at some point prior to Adams'[s] arrival. Amanda Pettrey began CPR in the living room. Rawlinson, who was also on scene, called 911. Darrell Rodney Ross, who resides at the residence, was asleep in one of the bedrooms for most of the day.
>
> An autopsy was completed on March 30, 2017. The toxicology report from NMS Labs revealed that [Infant] had 17 ng/mL of Fentanyl and 5.2 ng/mL of Norfentanyl in her blood at the time of her death.
>
> It is the belief of this affiant that information gained from this search is necessary to assist investigators in determining the cause and manner of death of [Infant], the individuals who were present at the time and leading up to her death, and the timeline of events surrounding her death.

Without taking any additional testimony, the magistrate issued warrants to search the residences, and Special Agents Jason Wells and M. Skipper Wallace executed the warrants on that same day.[1] Special Agents Wells and Wallace seized from White's residence ten cell phones, multiple bags of suspected marijuana, a scale, several firearms, multiple pills of various shapes and colors, a small brown envelope containing white powder, and a hand-tied plastic bag containing white powder.

On April 25, 2017, SLED issued a laboratory report analyzing the substances found in White's home and identified them as hydrocodone and acetaminophen in one sample, alprazolam in another sample, prescription ibuprofen, oxycodone, cyclobenzaprine, cocaine, and marijuana. On that same day, Special Agent Baird submitted to the magistrate another affidavit to support her request for a warrant to search the cell phones seized from White's residence, seeking: "Any and all data, to include but not limited to records, images, call logs, phone numbers, text messages, videos, voice messages, internet history, GPS location information, wireless

[1] Neither the search warrant for Adams's home nor the corresponding return appear in the record.

networks, passwords, user accounts, and emails. All information pertaining to the investigation regarding the death of [Infant.]"

In her affidavit, Special Agent Baird's stated reasons for her belief that the data sought was on the subject cell phones were virtually identical to those reasons stated in her April 17 affidavit, with the addition of the following language: "These cellphones were obtained from a search warrant that was executed on April 18,[2] 2017 at [redacted] Amanda Lane[,] Rock Hill, South Carolina. Extractions of these cellphones are needed at this time." The magistrate issued the warrant, and Special Agent Baird and Detective Brooks Felmet, of the Rock Hill Police Department, extracted data from four of the phones.[3] The data extracted from White's phone consisted of text messages exchanged between White and other individuals in late February, March, and April 2017 that included illegal-drug-trade parlance, e.g., "smoke" (marijuana); "pine" (marijuana); "blues" (oxycodone or "clandestinely manufacture[d] Fentanyl pills"); "perkies" (prescription Percocet, a combination of oxycodone and acetaminophen); "yaps" (MDMA, a/k/a/ ecstasy, or hydrocodone); "white" (hydrocodone or oxycodone); and "little snow" (cocaine).[4]

A grand jury indicted White for possession with intent to distribute oxycodone, possession with intent to distribute marijuana, possession of cocaine, and possession with intent to distribute hydrocodone. The circuit court conducted a bench trial in April 2022 and found White guilty of possession with intent to distribute marijuana, possession of cocaine, possession of oxycodone, and possession with intent to distribute hydrocodone.[5] The court sentenced White to two years for the marijuana conviction, three years for the cocaine conviction (second offense), two years for the oxycodone conviction (second offense), and seven years for the hydrocodone conviction (second offense), to run concurrently. This appeal followed.

ISSUES ON APPEAL

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[2] This appears to be a typographical error as the return to the search warrant is dated April 17, 2017.

[3] They were unable to extract any data from the remainder.

[4] The earliest text was dated February 19, 2017, and the latest text was dated April 12, 2017.

[5] A bench trial was initially conducted in 2019 but ended in a mistrial as defense counsel admitted he was reading a novel during the first day of trial.

1. Did the circuit court err by denying White's motion to suppress the evidence seized from his home and cell phone when the information in the search warrant affidavits was insufficient to establish probable cause?

2. Did the text messages extracted from White's cell phone constitute inadmissible propensity evidence?

3. Did the admission of the text messages into evidence violate Rule 403, SCRE?

4. Did the text messages contain inadmissible hearsay?

STANDARD OF REVIEW

Motion to Suppress

In evaluating the circuit court's ruling on a motion to suppress, this court reviews the factual findings for any evidentiary support, "but the ultimate legal conclusion . . . is a question of law subject to de novo review." *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

Admission of Evidence

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Further, "[t]o warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Moreover, in the present case, this court's assessment of prejudice "must be viewed from the posture of a bench trial as opposed to a jury trial." *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011). "It is well-established that it is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or inadmissible evidence." *Id.* *See also Cole v. Commonwealth*, 428 S.E.2d 303, 305 (Va. Ct. App. 1993) (reviewing an evidentiary ruling in a bench trial and stating, "'A judge, unlike a juror, is uniquely suited by training, experience[,] and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both.' Consequently, we presume that a trial judge disregards prejudicial or inadmissible evidence. Finally, 'this presumption will control in the absence of clear evidence to

the contrary.'" (citations omitted) (first quoting *Eckhart v. Commonwealth*, 279 S.E.2d 155, 157 (Va. 1981), then quoting *Hall v. Commonwealth*, 421 S.E.2d 455, 462 (Va. Ct. App. 1992))); *id.* ("This is not to say that the admission of improper evidence in a bench trial may never result in reversible error. Where the record makes clear that the judge considered such inadmissible evidence in adjudicating the merits of the case, reversal would be appropriate.").

LAW/ANALYSIS

I. Motion to Suppress

White asserts the circuit court should have granted his motion to exclude from evidence the items seized from his home and cell phone because the information in the search warrant affidavits was insufficient to establish probable cause. *See State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) ("Evidence seized in violation of the Fourth Amendment must be excluded from trial."). Specifically, White argues, "the affidavits did not state why police thought [White] exposed [Infant] to drugs or why they believed drugs would be found at [White's] home given the amount of time that had passed since [Infant's] death." We disagree.

The totality of the circumstances set forth in Special Agent Baird's April 17 affidavit established a fair probability that incriminating evidence related to the cause of Infant's death, including evidence of the unlawful possession of fentanyl, would be found in either White's or Adams's home despite the passage of nineteen days since Infant's death. Likewise, the totality of the circumstances set forth in Special Agent Baird's April 25 affidavit established a fair probability that incriminating evidence related to the cause of Infant's death would be found in data extracted from the cell phones seized in the April 17 search of White's home. Therefore, the April 17 and 25 warrants were supported by probable cause. *See State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) ("A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place."); *State v. Bennett*, 256 S.C. 234, 240, 182 S.E.2d 291, 294 (1971) ("To justify issuance of a search warrant[,] probable cause must be shown[,] but the term 'probable cause' does not import absolute certainty."); *see also Texas v. Brown*, 460 U.S. 730, 742 (1983) ("[P]robable cause . . . does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required.").

II. Admission of Text Messages

A. Propensity Evidence

White contends the text messages on his phone revealing drug transactions conducted in late February through April 2017 should have been excluded from evidence pursuant to Rule 404(b), SCRE, which prohibits the admission of evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith." White argues (1) he was not on trial for these drug transactions, and thus, they lacked logical relevance; (2) these transactions were too remote in time to April 17, 2017, the date of the offenses for which he was being tried, citing *State v. Ostrowski*, 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021); and (3) the State did not prove the transactions by clear and convincing evidence.

Here, the circuit court ruled that the text messages *not* involving the types of drugs for which White was indicted were inadmissible. As to the other texts, the State offered them to show White's intent to distribute the drugs, which was necessary to prove the charges of possession with intent to distribute hydrocodone and oxycodone, respectively,[6] unlike the circumstances in *Ostrowski*. Additionally, the presiding judge stated that he would give these texts the credibility he believed they deserved whenever he weighed the evidence at the trial's conclusion. As we explain below, these texts were admissible.

Prior drug transactions may be admitted into evidence to show 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)).

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[6] SLED agents seized enough marijuana from White's home to meet the statutory presumption of intent to distribute. *See* S.C. Code Ann. § 44-53-370(d)(5) (Supp. 2024) (twenty-eight grams).

Further, when the amount seized by law enforcement is not enough to meet a statutory presumption of intent to distribute or there exists no such presumption for a particular drug, the probative value of prior drug transactions showing intent to distribute is high. *Compare Wilson*, 345 S.C. at 7–8, 545 S.E.2d at 830 (noting the State was required to rely on evidence of prior drug transactions and other circumstantial evidence to prove intent because the amount of crack seized was less than the amount that triggered the statutory presumption of intent and concluding, "[i]n light of the State's reliance on circumstantial evidence to prove intent, the evidence of a prior drug transaction only two days earlier at the same location was especially probative"), *with Ostrowski*, 435 S.C. at 394–96, 867 S.E.2d at 284–85 (concluding the evidence of the defendant's prior drug transactions was unnecessary because the amount of methamphetamine found in a pair of men's pants in the defendant's residence was enough to trigger the statutory presumption of trafficking and distinguishing the case from *Wilson* and *Gore*).

We acknowledge our statement in *Ostrowski* that text messages dating back three weeks before the date of the defendant's arrest were too remote in time to have logical relevance to the defendant's *identity* as the owner of the methamphetamine found by law enforcement. 435 S.C. at 394, 867 S.E.2d at 284. However, the court's analysis as to proof of *intent* measured the probative value of the evidence by its necessity to the State's case. *Id.* at 394–96, 867 S.E.2d at 284–85. The court did not purport to overrule *Wilson* or *Gore*, which are controlling on the issue of White's intent to distribute.

Further, we are not persuaded by White's argument that the State failed to meet its burden of showing clear and convincing evidence of the drug transactions referenced in the text messages. Specifically, White contends that the State did not show the transactions referenced in the text messages actually occurred. However, we do not view the completion of the transactions as necessary to show clear and convincing evidence of White's intent. The testimony of Officer Dana Gatti, who was qualified as an expert in "drug slang" assisted the circuit court in determining the meaning of certain language used in the texts.[7] Viewing the texts in light of this testimony, we conclude the State showed clear and convincing evidence of White's intent to distribute.

Moreover, any error in admitting the texts involving marijuana, oxycodone, or cocaine was harmless because law enforcement seized enough marijuana to

[7] White does not challenge the validity of this testimony or the qualification of Officer Gatti as an expert on appeal.

trigger the statutory presumption of intent to distribute, s*ee supra*, n. 6, and White was convicted of mere possession of oxycodone and cocaine, respectively.

B. Rule 403

White also contends that the admission of the text messages violated Rule 403, SCRE,[8] because its probative value was substantially outweighed by the danger of unfair prejudice. "Evidence of other crimes, even if logically relevant to prove intent, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *Wilson*, 345 S.C. at 7, 545 S.E.2d at 830. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Id.* "Evidence is unfairly prejudicial if it has an undue tendency to *suggest a decision on an improper basis, such as an emotional one*." *Id.* (emphasis added). Here, the circuit court ruled that the challenged evidence was admissible under Rule 403. We agree.

The circuit court conducted a bench trial at White's request, and nothing in the record indicates the circuit court relied on inadmissible evidence in its determination of White's guilt. To the contrary, during the trial, the presiding judge stated that his decision on guilt would not be tainted by inadmissible evidence. He also stated that he would give the evidence the weight and credibility he believed it deserved. Therefore, the danger of unfair prejudice in White's bench trial was very low and could not substantially outweigh the high probative value of the texts involving hydrocodone and oxycodone or even the somewhat lower probative value of the texts involving the marijuana charge. *See Inman*, 395 S.C. at 565, 720 S.E.2d at 45 ("[I]t is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or inadmissible evidence."); *see also Cole*, 428 S.E.2d at 305 (reviewing an evidentiary ruling in a bench trial and stating, "'A judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both.' Consequently, we presume that a trial judge disregards prejudicial or inadmissible evidence. Finally, 'this presumption will control in the absence of clear evidence to the contrary.'" (citations omitted) (first quoting *Eckhart*, 279 S.E.2d at 157, then quoting *Hall*, 421 S.E.2d at

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[8] Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

462)); *id.* ("This is not to say that the admission of improper evidence in a bench trial may never result in reversible error. Where the record makes clear that the judge considered such inadmissible evidence in adjudicating the merits of the case, reversal would be appropriate.").

Based on the foregoing, we conclude that the probative value of the evidence "was not substantially outweighed by the danger of suggesting a decision on an emotional or other improper basis."[9]

C. Hearsay

Finally, White maintains that the content of the texts constituted inadmissible hearsay because the statements were made out-of-court and offered for the truth of the matter asserted. *See* Rule 801(c), SCRE (defining hearsay as "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"). We disagree.

As to the statements of third parties within the texts, the State did not offer them for the truth of the matter asserted but rather for the effect that the statements had on White, giving context to his responsive texts. *See* 29 Am. Jur. 2d *Evidence* § 660 (2025) ("[A]n out-of-court statement is not hearsay when offered to prove its effect *on a listener's mind* or to show why the listener subsequently acted as the listener did." (emphasis added)); *cf. Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 30–31, 609 S.E.2d 506, 511–12 (2005), *overruled on other grounds by State v. Wallace*, 440 S.C. 537, 892 S.E.2d 310 (2023) (holding that an expert's explanation for not taking a board certification test, i.e., "And the opinion of legal counsel was that there may be a conflict of interest if I will take the exam, which it was perceived that I kn[e]w[] all the answers," was not offered to prove the truth of the matter asserted); *State v. Griffin*, 277 S.C. 193, 198, 285 S.E.2d 631, 634 (1981), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (holding the circuit court erred in excluding as hearsay the defendant's testimony that "a friend had told him the deceased owned a firearm" because "[i]n attempting to prove self defense, [the defendant] offered the evidence to show he *believed* the deceased owned a firearm, not to prove the deceased in fact owned a gun"); *State v. White*, 425 S.C. 304, 310, 821 S.E.2d 523, 527 (Ct. App. 2018) ("We find the statement was not introduced to prove the truth of the matter asserted, i.e.[,] . . . [the victim] actually had a gun and knife on his moped. Instead, [the defendant] offered the statement to show *he believed* [the victim] had weapons on his moped."); *id.* at 310

[9] *Wilson*, 345 S.C. at 8, 545 S.E.2d at 830.

n.2, 821 S.E.2d at 527 n.2 (noting that other jurisdictions "have similarly held statements were not hearsay when they were offered to show the effect of the statement *on the listener's state of mind* when the listener's state of mind was relevant to the case" (emphasis added)).

White also argues that his own statements within the texts, which are admissions of a party-opponent that are not considered hearsay,[10] were inadmissible because the State failed to show White's phone was in his possession when the texts were received or sent from his phone. However, White has not cited any authority to support this conclusory argument and, therefore, he has abandoned it. *See State v. Jones*, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (holding an issue is deemed abandoned on appeal if it is argued in a short, conclusory statement without supporting authority (citing *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999))).

CONCLUSION

Based on the foregoing, we affirm.[11]

AFFIRMED.

WILLIAMS, C.J., and TURNER, J., concur.

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[10] *See* Rule 801(d)(2)(A), SCRE (excluding from the definition of hearsay a statement "offered against a party [that] is . . . the party's own statement in either an individual or a representative capacity").

[11] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 6113

THE STATE,

RESPONDENT,

V.

HAROLD GENE WHITE, III,

APPELLANT

APPELLATE CASE NO. 2022-000579

PETITION FOR REHEARING

On February 2, 2025, this Court affirmed Appellant's convictions in *State v. White*, Op. No. 6113 (S.C. Ct. App. filed July 2, 2025) (Howard Adv. Sh. No. 24 at 16). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests that this Court rehear this matter as to Issue I, based upon significant points overlooked and/or misapprehended by this Court.

I.

The court erred where it failed to suppress evidence seized pursuant to search warrants, where the affidavits were insufficient to support a finding that there was a fair probability

contraband or evidence of a crime would be recovered, since the evidence should have been excluded pursuant to the Fourth Amendment and article I, section 10.

The drugs in this case were seized pursuant to a search warrant for Appellant's home. R. 297 – 302. Law enforcement also obtained a separate warrant to search the home of Appellant's mother (Yolanda Adams). R. 340, ll. 18-20. The warrant to search Appellant's home was issued on April 17, 2017, after toxicology results indicated Appellant's infant (Child) had fentanyl in her system when she died at Adams's home on March 29, 2017. R. 299; R. 28, ll. 1-4. Child had been at Appellant's home earlier in the day, and either Adams or her friend Rawlinson picked Child up from Appellant's home and took her to Adams's home. Adams then fed Child a bottle of formula and cereal and took a nap with Child in Adams's bed. Several other people were present in Adams's home. Adams asked one of them, Pettrey, to watch Child while she took her own children to a doctor's appointment. When Adams returned, she found Child dead. R. 299.

Although no fentanyl was found during the search of Appellant's home, other drugs were recovered—marijuana, cocaine, hydrocodone, and oxycodone. R. 301. Appellant was indicted and tried for possession and possession with intent to distribute those drugs. R. 499 – 505. Appellant was convicted of possession with intent to distribute hydrocodone, second offense; possession of oxycodone, second offense; possession of cocaine, second offense; and possession with intent to distribute marijuana. R. 283; R. 284, l. 1 – 3, l. 17; R. 292, l. 23 – 13, l. 8; R. 506 – 512.

At trial, Appellant moved to suppress the evidence found pursuant to the search warrant for his home. He challenged the existence of probable cause. R. 19, l. 10 – 22, l. 22; R. 50, l. 5 – 71, l. 11. This Court concluded that the "totality of circumstances" "established a fair probability

that incriminating evidence related to the cause of Infant's death" "*would be found in either White's or Adams's home* despite the passage of nineteen days since Infant's death." *State v. White*, Op. No. 6113 (S.C. Ct. App. filed July 2, 2025) (Howard Adv. Sh. No. 24 at 22) (emphasis added). As to the search of Appellant's home, Appellant respectfully asserts this Court misapprehended Appellant's argument regarding probable cause.

Respectfully, the question of whether there was a fair probability evidence would be found in either Appellant's home or in his mother's home was not the proper framework for determining this issue. The question is whether there was a fair probability evidence of the crime would be found in Appellant's home, because probable cause must be individualized to the place to be searched. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (the task of the issuing magistrate is to determine whether "there is a fair probability that contraband or evidence of a crime will be found *in a particular place*") (emphasis added); *Maryland v. King*, 569 U.S. 435, 467 (2013) (Scalia, J., dissenting) ("the Fourth Amendment's Warrant Clause forbids a warrant to 'issue' except 'upon probable cause,' and requires that it be 'particula[r]' (*which is to say, individualized*) *to 'the place to be searched*, and the persons or things to be seized'"); *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) ("A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in *a particular place*.") (emphasis added); *State v. Thompson*, 419 S.C. 250, 256–57, 797 S.E.2d 716, 719 (2017) (the crucial question is "whether it is reasonable to believe that the items to be seized will be found *in the place to be searched*."). The affidavit did not set forth facts as to why law enforcement believed the child was exposed to fentanyl by Appellant or while at Appellant's home. Child had been at Adams's home for approximately six hours. Child had been transported to Adams's home by either

Adams or her friend Rawlinson. Adams then fed Child a bottle of formula and cereal, and Adams napped with Child in Adams's bed. These facts, as presented to the magistrate, did not support a determination there was probable cause to believe that Child was exposed to fentanyl while at Appellant's home. Whether there was probable cause to search the home of Appellant's mother was a separate question, and the existence of probable cause to search the mother's home cannot stand in for probable cause to search Appellant's home. For purposes of the warrant for Appellant's home and the suppression motion regarding that search, the place to be searched was Appellant's home, not his mother's. The probable cause determination had to be individualized to Appellant's home. There was no probable cause to search this "particular place"—*Appellant's* home. *E.g.*, *Illinois v. Gates*, 462 U.S. at 238; *State v. Kinloch*, 410 S.C. at 617, 767 S.E.2d at 155.

The affidavit for the search of Appellant's home was conclusory, and did not support a finding of probable cause. *See Gates*, 462 U.S. at 239 ("Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. His action cannot be a mere ratification of the bare bones conclusions of others.").

Law enforcement obtained a subsequent search warrant for Appellant's phone on April 25, 2017. R. 303 – 307. A search of the phone turned up text messages the State used in its trial of Appellant for the drugs found in his home during the execution of the April 17, 2017, search warrant. State's Exhibit #37. Appellant also moved to suppress the evidence found pursuant to the search of his phone. R. 50, l. 9 – 71, l. 11. As to the search of Appellant's phone pursuant to the subsequent search warrant, this Court concluded "the totality of the circumstances set forth in [the] April 25 affidavit established a fair probability that incriminating evidence related to the cause of Infant's death would be found in data extracted from the cell phone seized in the April

17 search of Appellant's home." *State v. White*, Op. No. 6113 (S.C. Ct. App. filed July 2, 2025) (Howard Adv. Sh. No. 24 at 22).

As to the search of Appellant's phone, respectfully, this Court misapprehended Appellant's argument regarding probable cause. Law enforcement got the search warrant for the telephones after it executed the search warrant on Appellant's home and after it had received the laboratory report analyzing the drugs found there—none of which were fentanyl. Moreover, the April 25 warrant for the telephones did not state there were any drugs found during the execution of the prior warrant. R. 306. The wording of the affidavits for the search of Appellant's home and for the search of his telephone was almost identical. R. 299; R. 306. For the same reasons there was no probable cause to search Appellant's home, there was no probable cause to search the telephones found in Appellant's home. No facts were provided to the magistrate to indicate a fair probability that evidence related to Child's death would be found on the telephones. There was no connection made between the telephones and Child's death. The magistrate was simply provided with conclusory statements to the effect that Child had fentanyl in her system when she died at Adams's home and the police wanted to look at the phones found during the search of Appellant's home. The affidavit was conclusory; it was not supported by probable cause. *See Gates*, 462 U.S. at 239 ("Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.").

As to the searches of both Appellant's home and his telephone, respectfully, this Court misapprehended or overlooked Appellant's arguments regarding staleness; the opinion did not address staleness beyond concluding there was probable cause to search Appellant's home "despite the passage of nineteen days since Infant's death." *State v. White*, Op. No. 6113 (S.C. Ct. App. filed July 2, 2025) (Howard Adv. Sh. No. 24 at 22). The search warrants were issued

nineteen days (home) and twenty-seven days (phones) after Child's death. Probable cause dissipates with time. There was no timely and direct nexus between the contraband sought and the location and items searched. *See Thompson*, 419 S.C. at 257, 797 S.E.2d at 719 (information contained in an affidavit providing a timely and direct nexus between the contraband sought and the location to be searched . . . is sufficient to support a search warrant); *State v. Simmons*, 430 S.C. 1, 13, 841 S.E.2d 845, 851 (2020) ("[A]n affidavit in support of a search warrant 'must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.' Moreover, 'the reason for this rule is that probable cause, with time, dissipates.'") (quoting *State v. Winborne*, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979)). The warrants did not support a finding of probable cause given the lack of a timely and direct nexus between the contraband sought (evidence of fentanyl administration to Child weeks earlier) and the place and item to be searched (Appellant's home and telephone). The information was stale. *Thompson*, 419 S.C. at 257, 797 S.E.2d at 719.

For the above reasons, the evidence should have been excluded as fruit of the poisonous tree since it was obtained in violation of the Fourth Amendment. U.S. Const. amend. IV. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963) (Generally, evidence derived from an illegal search or seizure is deemed fruit of the poisonous tree and is inadmissible.").

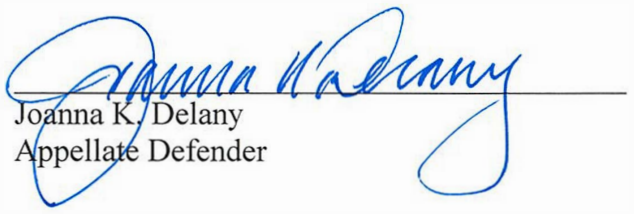
Finally, this Court, respectfully, overlooked Appellant's argument the searches violated his explicit right against unreasonable invasions of his privacy under the South Carolina Constitution. The opinion did not address this argument. The authorities used Cellebrite to extract old text messages on Appellant's phone. State's Exhibit #37. The South Carolina Constitution "affords a higher level of privacy protection than the Fourth Amendment." *State v. Counts*, 413 S.C. 153, 170, 776 S.E.2d 59, 68 (2015) (citing *State v. Weaver*, 374 S.C. 313, 322,

649 S.E.2d 479, 483 (2007)). "The drafters of our constitutional provision were concerned with the emergence of new technology enabling more invasive searches[.]" *State v. German*, 439 S.C. 449, 473, 887 S.E.2d 912, 924 (2023), cert. denied, 144 S. Ct. 1011 (2024). *See also Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 330, 882 S.E.2d 770, 846 (2023) (James, J., dissenting) (the "privacy provision in article I, section 10 provides citizens with heightened Fourth Amendment protections, especially protection from unreasonable law enforcement use of electronic devices to search and seize information and communications."). Article I, section 10 protected Appellant from unreasonable invasions of privacy in his home and his telephone. The search of Appellant's home and phone were unreasonable for the reasons explained in the Fourth Amendment analysis above. *See State v. German*, 439 S.C. at 471, 887 S.E.2d at 923 ("We have interpreted South Carolina's express right against unreasonable invasions of privacy provision to provide greater—or, a more 'heightened'—protection than that provided by the United States Constitution.").

Assuming *arguendo* that the searches did not violate the Fourth Amendment, Appellant asserted they violated article I, section 10. Thus, the evidence should have been suppressed. "[S]earches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence." *State v. Forrester*, 343 S.C. 637, 644, 541 S.E.2d 837, 841 (2001).

For the above reasons, Appellant respectfully submits rehearing should be granted.

Respectfully submitted,



Joanna K. Delany
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PO Box 11589
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ATTORNEY FOR APPELLANT

This 17th day of July, 2025.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

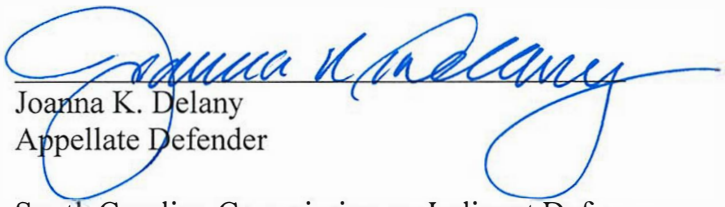
HAROLD GENE WHITE, III,

APPELLANT

APPELLATE CASE NO. 2022-000579

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Harold Gene White, #387839, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 17th day of July, 2025.



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ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Harold Gene White, III, Appellant.

Appellate Case No. 2022-000579

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____, C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Joanna Katherine Delany, Esquire
Deborah R.J. Shupe, Esquire
Kevin Scott Brackett, Esquire

FILED
Aug 04 2025