ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable C. Victor Pyle, Jr., Circuit Court Judge
Appellate Case No. 2012-212057

THE STATE,

Respondent,

vs.

DOMINQUE J. SHUMATE,

Appellant.

FINAL BRIEF OF RESPONDENT

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The trial court properly denied Appellant's motion for a directed verdict for the distribution of cocaine base charge because the State presented substantial circumstantial evidence that Appellant aided, abetted, or conspired to distribute, cocaine base.

STATEMENT OF THE CASE

In February of 2012, a Greenville County Grand Jury indicted Appellant for the following offenses: 1) trafficking cocaine base; 2) possession of a weapon during the commission of a violent crime; 3) distribution of cocaine base; 4) possession of cocaine with intent to distribute; and 5) possession of a controlled substance with intent to distribute.

On May 15, 2012, Appellant and his co-defendant, Andrew Burnside,[1] proceeded to trial by jury. Susannah Ross represented Appellant at trial, and Lisa Bentley represented the State. The Honorable C. Victor Pyle, Jr., presided over the trial.

On May 16, 2012, the jury found Appellant guilty of the following offenses: 1) trafficking cocaine base; 2) possession of a weapon during the commission of a violent crime; 3) distribution of cocaine base; 4) possession of cocaine; and 5) possession of a controlled substance.

Judge Pyle sentenced Appellant to the following: 1) fifteen years of imprisonment and a fine of $50,000 for the trafficking cocaine base (second offense) conviction; 2) five years of concurrent imprisonment for the possession of a weapon during the commission of a violent crime conviction; 3) five years of concurrent imprisonment for the distribution conviction; 4) one year of concurrent imprisonment for the possession of cocaine conviction; and 5) one year of concurrent imprisonment for the possession of a controlled substance conviction.

Appellant filed a timely notice of intent to appeal. This brief follows.

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[1] This Court affirmed Burnside's convictions and sentences. State v. Burnside, 2013-UP-409 (Ct. App. filed November 6, 2013).

STATEMENT OF FACTS

At trial, the State called four officers from the Greenville County Sheriff's Office to describe the investigation and circumstances that led to Appellant's arrest. Deputy Jacob Walters testified about a November of 2010 drug investigation initiated as the result of a "crime stoppers" tip. (R. pp. 25-26.) Based on the tip, the Sheriff's Office began surveillance of a particular trailer park. (R. p. 27.) They observed heavy traffic in and out of the trailer park, including in and out of the trailer on Lot #7. (R. p. 27.) The officers stopped several of the vehicles leaving the trailer park for traffic infractions, which led to the discovery of drugs. (R. p. 28.) Deputy Walters used certain individuals from the stops as confidential informants ("CIs"), who returned to the trailer park to make controlled drug purchases for the police. (R. p. 28.)

On November 10, 2010, a CI was sent to Lot #7, and as a result, the police obtained a search warrant for the trailer on that lot. (R. p. 30.) Deputy Walters served the search warrant on the Lot #7 trailer but did not participate in the search. (R. p. 31.) On cross-examination Deputy Walters acknowledged Jerry Drummond Jr., rented the trailer. (R. pp. 42-43.)

Deputy Patrick Swift testified he participated in the execution of the search warrant on Lot #7 by first deploying a noise distraction at the back of the trailer. (R. p. 46.) Thereafter, Deputy Swift entered the front door of the trailer with the search team and conducted the search. (R. pp. 46-49.) According to Deputy Swift, the front door of the trailer had been barricaded from the inside with a 2x4; therefore, it took numerous blows from the breaching ram to get through the door. (R. pp. 46-49.) Deputy Swift went down a hallway where he encountered Appellant in the bathroom, standing over the toilet with the toilet running, as if he had just flushed something. (R. p. 49.) He handcuffed

Appellant, took Appellant outside the trailer, and returned to the bathroom, where he noticed a Uno™ playing card floating in the toilet. (R. p. 49; R. p. 52.)

Deputy Swift described the plan for searching the residence, the role of the "scribe" to log all evidence discovered, and the actual search that was conducted room by room. (R. pp. 54-63.) In the kitchen, on top of the cabinets, the officers found a container holding two Uno™ cards and eight pieces of a rock-like substance, which field tested positive for cocaine base. (R. p. 55.) In the living room they discovered $172 in cash. (R. p. 57.) In one bedroom they found a cell phone on the floor and a coat that had a plastic bag containing a white rock-like substance in the pocket, which also field tested positive for cocaine base. (R. pp. 57-60.) The officers found two digital scales in the trailer – one in a small room in the hallway and one in the kitchen. (R. p. 60-62; R. p. 113.) Deputy Swift testified they did not discover any drug paraphernalia, like crack pipes or rolling papers, that indicated drug use. (R. pp. 64-65.) On cross-examination Deputy Swift acknowledged no drugs were found around or near Appellant and Burnside, and they were not near the scales or the coat when they were arrested. (R. p. 72; R. p. 74.)

Deputy Brandon Brown, an expert in street-level narcotic sales, participated in the entry of the trailer and Appellant's arrest but did not participate in the actual search. (R. pp. 89-90; R. p. 93.) Deputy Brown described the barricade on the front door and the difficulty they had entering the residence. (R. pp. 90-91.) He then offered an opinion that based on a variety of factors he believed the trailer was used primarily for the distribution of narcotics. (R. p. 96.) The factors he used to form his opinion included the following: 1) various amounts of cocaine base, cocaine, and prescription pills discovered in the house; 2) plastic bags, a razor blade, and other items suggesting packaging for sale; 3) the barricade on the front door; and 4) security cameras pointing down the front steps. (R. p.

96-101.) Deputy Brown testified it was not typical for narcotics dealers to leave drugs and money unattended in a house with buyers. (R. pp. 100-101.) On cross-examination Deputy Brown noted that Appellant and Burnside had access to everything inside the trailer because they were barricaded inside the trailer with all of the items. (R. p. 103.)

Deputy Justin Lanford participated in the search and served as the scribe. (R. p. 107.) He found a Glock 40 caliber handgun on the kitchen counter, which was readily accessible, various pills in the kitchen cabinets, and a bag of cocaine in an oven mitt above the stove. (R. pp. 109-111.) Deputy Lanford described field testing the microwave, which tested positive for cocaine base. (R. p. 111.) According to Deputy Lanford, the search team did not find any kind of paraphernalia to indicate personal drug use. (R. p. 118.)

The State then called Drummond to the stand. (R. p. 120.) According to Drummond, he and Appellant were "like cousins," and he had known Appellant his whole life. (R. p. 122.) Drummond said he did not really "live" in the trailer because it was more like a bachelor pad. (R. p. 123.) In fact, no one really lived in the trailer. (R. p. 123.) The water bill was in Drummond's name, and he rented the trailer from his landlord, Billy Rhodes. (R. pp. 123-124.) Additionally, Drummond testified that although Appellant did not live in the trailer, he visited two to three times a week. (R. pp. 124-125.) Drummond explained that he, Appellant, Burnside, and a few others would chip in and pay the bills for the trailer because "everybody came and chilled." (R. pp. 125-126.) Notably, Drummond said he was incarcerated on November 3, 2010; therefore, he was not at the trailer when the CI went to the trailer or when the search warrant was executed. (R. p. 126.) According to Drummond, the security cameras were installed after he moved

out of the trailer, and he did not leave any money or anything of value in the trailer. (R. p. 129.)

Thereafter, the State called chemist James Armstrong and forensic investigator David Gambell, both of the Greenville County Department of Public Safety, to describe the process of testing and weighing the various drugs and prescription pills. (R. p. 136; R. p. 151.) They described the process used for testing for fingerprints on the gun, microwave, and the plastic bag. Finally, Investigator Steven Perron testified regarding the cash confiscated from the trailer and later returned to Appellant and Burnside. (R. p. 157; R. pp. 159-160.)

At the conclusion of the State's case, Appellant moved for a directed verdict. (R. p. 163.) The trial judge denied Appellant's motion for a directed verdict and stated: "I think that's an issue for the jury." (R. p. 163.) Neither Appellant nor Burnside testified or offered evidence in defense.

ARGUMENT

I.

The trial judge properly denied Appellant's motion to suppress because the issuing magistrate's failure to sign the return to the search warrant was a ministerial error that did not prejudice Appellant. Further, the search warrant affidavit provided a sufficient probable cause basis for the issuance of the search warrant.

Appellant's argument on appeal regarding the search warrant fails for two reasons: First, the issuing magistrate's failure to sign the return to the search warrant was merely a ministerial error that did not prejudice Appellant. Second, the search warrant affidavit provided a sufficient probable cause basis for the issuance of the search warrant. Accordingly, this Court should affirm Appellant's sentences and convictions.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). When reviewing a decision to issue a search warrant, the reviewing court should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the magistrate, the court should base its determination on the totality of circumstances. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The magistrate's probable cause determination should be afforded great deference on appeal. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007). The appellate court is limited to considering only the information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2001).

Discussion

A. Ministerial Requirements of S.C. Code Ann. §17-13-140

First, Appellant's argument on appeal fails because the issuing magistrate's failure to sign the return was a ministerial error that did not prejudice Appellant.

Section 17-13-140 of the South Carolina Code states a warrant shall be "issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant." The statute further provides:

> In the case of a warrant issued by a magistrate or a judge of a court of record, it shall be directed to any peace officer having jurisdiction in the county where issued, including members of the South Carolina Law Enforcement Division, and shall be returnable to the issuing magistrate. In case of a warrant issued by a judge of a court of record, it shall be returnable to a magistrate having jurisdiction of the area where the property is located or the person to be searched is found. If any warrant is issued by any municipal judicial officer to municipal police officers, the return shall be made to the issuing municipal judicial officer. Any warrant issued shall command the officer to whom it is directed to forthwith search the person or place named for the property specified.

S.C. Code Ann. § 17-13-140.

The failure to observe the requirement for the return to be signed by the issuing magistrate under section 17-13-140 did not invalidate the search warrant. It is well-settled that the statute's return requirement is ministerial in nature, and any purported noncompliance of the return requirement only provides grounds for exclusion upon a showing of prejudice. See State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004), *affirmed as modified*, 374 S.C. 313, 649 S.E.2d 479 (2007); State v. Wise, 272 S.C. 384,

386, 252 S.E.2d 294, 295 (1979) (noting that failure to comply with the statute's return requirement was merely an administrative error, and the defendant failed to show prejudice); State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995) (refusing to suppress the evidence found pursuant to a search warrant where the State failed to return the search warrant because it was merely a ministerial error that did not prejudice the defendant); State v. Corns, 310 S.C. 546, 426 S.E.2d 324, 326 (Ct. App. 1992) (failure to list marijuana seized on return of search warrant was a ministerial requirement and did not, by itself, invalidate the warrant where the defendant failed to show he was prejudiced).

Here, the trial judge properly refused to suppress the evidence found in the trailer because the issuing magistrate's failure to sign the return was merely a ministerial error. Contrary to Appellant's assertion, this ministerial error, which occurred after the issuance and execution of the warrant, did not prejudice him. Appellant claims that the error prejudiced him because the issuing magistrate "fulfills his role as a detached and neutral judge in accepting the return and verifying that the items seized were seized in compliance with the search warrant issued." (App. Br. p. 15.) But Appellant's argument misinterprets the purpose of the return requirement. The purpose of the return and inventory requirement is twofold: First, it provides defense counsel with access to the warrant and all corresponding documents supporting the issuance of the warrant, see, e.g., Fitez v. State, 262 A.2d 765, 768 (Md. App. 1970). Second, it protects the searched party from having his or her seized property stolen or misplaced by the police. See State v. Cortman, 446 P.2d 681, 683 (Or. 1968). In other words, the issuing magistrate's failure to sign the return plays no bearing on whether he or she fulfilled his or her role in being a

detached and neutral judge. Accordingly, Appellant suffered no prejudice due to the ministerial error.

B. Probable Cause

Second, Appellant's argument on appeal fails because the search warrant affidavit provided a sufficient probable cause basis for the issuance of the search warrant.

In order for a magistrate to issue a search warrant, an officer must present a sworn affidavit establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). A search warrant must contain sufficient underlying facts upon which the magistrate can base a probable cause determination. State v. Smith, 301 S.C. 371, 373, 393 S.E.2d 182, 183 (1990). The facts contained in the affidavit must be so closely related to the time of the issuance of the warrant to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979).

A search warrant may only be issued upon a finding of probable cause. Bellamy, 336 S.C. at 143, 519 S.E.2d at 348. Under section 17-13-140 of the South Carolina Code, a magistrate shall only issue a search warrant if satisfied "the grounds for the application exist or that there is probable cause to believe that they exist." In State v. Williams, our Supreme Court explained probable cause as it relates to the issuance of a search warrant:

> In order to justify the issuance of a search warrant, probable cause must be shown, but the term 'probable cause' does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set

> forth exist, or as would lead a man of prudence to believe that the offense has been committed.

State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-38 (1974).

In deciding whether to issue a search warrant, the magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). In making a probable cause determination, "magistrates are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976).

Consideration should be given to the fact search warrant affidavits are typically prepared by non-lawyers in the haste of criminal investigations, and they must be viewed in a common sense and realistic fashion. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). "Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause." Id. Moreover, "[s]uppression is appropriate in only 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) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

Notably, in Dupree, this Court held "that if a controlled buy is properly conducted, the *controlled buy alone* can provide facts sufficient to establish probable cause for a search warrant." Dupree, 354 S.C. at 691, 583 S.E.2d at 445 (italics in

original). Further, this Court held that "[t]he controlled buy was evidence of the credibility and trustworthiness of the informant." Id.

Here, the properly conducted controlled buy provided sufficient facts to established probable cause for the search warrant. See Id. The warrant in this case was clearly not "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Weston, 329 S.C. at 293 (quoting Leon, 468 U.S. at 923). The logical and common sense interpretation of the warrant in this case along with the deference that must be given to the magistrate's decision overcomes any asserted deficiency. See Keith, 356 S.C. at 225, 588 S.E.2d at 148 ("We find a common sense and logical interpretation of the affidavit accompanying the search warrant in this case and the deference, which must be accorded the magistrate, overcomes any asserted deficiency."). Recognizing warrants are typically prepared by non-lawyers, the magistrate properly viewed the warrant in a realistic and common sense manner without applying an overly rigid analysis and found probable cause based on the totality of the circumstances.

Further, the CI's statement said the following: "I went to the second trailer on the left when coming off of Edwards St. I was turned down by a black male named 'Blue.' He told me he didn't have any and to move the car. **[The investigator] then moved the vehicle. I then went to the first trailer on the left. This trailer is in the middle of the complex.**" (R. p. 225) (emphasis added). The CI's statement is unclear as to where the investigator moved the vehicle. Potentially, the investigator could have turned the vehicle around. Thus, it is unclear whether the CI's statement that he "then went to the first trailer on the left" was the same left coming from Edwards Street. Moreover, the CI's statement that the trailer was in in the middle of complex was consistent with the description of the

residence described in the search warrant. (R. p. 227.) Accordingly, the CI's statement is not dispositive of this issue.

Additionally, the Description of Premises to be Searched section of the search warrant was sufficiently sufficient despite the fact that it did not list the lot number. The search warrant stated the address of the trailer park, the location of the residence to be searched with specific coordinates, and a detailed description of the siding of the trailer and color of the porch. (R. p. 227); see Steele v. United States, 267 U.S. 498, 503 (1925) ("It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended."). At trial, Deputy Walters explained that he did not list the lot number of the trailer in the search warrant because the lot number was not displayed in the trailer "so rather than put[ting] that in the search warrant not knowing, [he] described the trailer and gave the GPS [coordinates] for it." (R. p. 38.)

Moreover, the affidavit in support of the search warrant was sufficiently specific. The address listed in the affidavit is consistent with the address listed in the search warrant. Although the specific coordinates and description of the trailer is not mentioned in the affidavit, the affidavit does state that the "informant was under audio and **physical surveillance** during the entire operation. . . ." (R. p. 225; R. p. 227) (emphasis added). As a result, the officer clearly knew which residence the CI entered for purposes of conducting the drug transaction. The magistrate can infer the residence listed in the search warrant is the same residence the CI entered while under physical surveillance. See Gates, 462 U.S. at 240 ("Nothing in our opinion in any way lessens the authority of the magistrate to draw such reasonable inferences as he will from the material supplied to

him by applicants for a warrant; indeed, he is freer than under the regime of Aguilar and Spinelli to draw such inferences, or to refuse to draw them if he is so minded.").

Warrants are not required to be perfect. The search warrant in this case meets a realistic standard of probable cause. Sufficient facts were presented for a prudent magistrate to believe the offense had been committed and the evidence sought would be recovered based on the totality of the circumstances. The trial judge properly afforded great deference to the magistrate's determinations.

In summary, the search warrant affidavit provided a sufficient probable cause basis for the issuance of the search warrant.

II.

The trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find that Appellant had constructive possession of the controlled substances and the weapon, which were the basis of his charges.

The State presented substantial circumstantial evidence that Appellant had constructive possession of the controlled substances and weapon. Accordingly, this Court should affirm Appellant's sentences and convictions.

Standard of Review

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Further, an appellate court must affirm the trial judge's ruling "[i]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused[.]" State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004).

When an appellate court is reviewing the denial of a directed verdict motion in a case solely involving circumstantial evidence, our Supreme Court has instructed:

> When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.**

Id. at 594, 606 S.E.2d at 478 (citations omitted) (emphasis in original).

Thus, an analysis of the trial judge's ruling hinges on whether all of the circumstantial evidence taken together was sufficient for the jury to reasonably infer the defendant's guilt beyond a reasonable doubt. Id. at 595, 606 S.E.2d at 478. Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). **"[U]nless there is a total failure of evidence** tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

Discussion

Each indictment in Appellant's case involved a charge containing an element of possession: either of a controlled substance (cocaine base, cocaine, or hydrocodone) or a handgun. In order to prove possession, the State must prove the defendant had actual or constructive possession of the contraband and knowledge of its presence. See State v. Muhammed, 338 S.C. 22, 26, 524 S.E.2d 637, 639 (Ct. App. 1999); State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774 (1981).

A. Constructive Possession

First, Appellant had constructive possession of the controlled substances and handgun.

In Hudson, our Supreme Court explained the difference between actual and constructive possession:

> Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the

> right to exercise dominion and control, over the [drugs]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.

Id. at 202, 284 S.E.2d at 774-775.

Possession requires more than mere presence. State v. Tabory, 260 S.C. 355, 365, 196 S.E.2d 111, 113 (1973). However, "[w]hen contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Hudson, 277 S.C. at 203, 284 S.E.2d at 775. A person has possession of a controlled substance within the meaning of the law when he has both the power and the intent to control its disposition or use. State v. Brownlee, 318 S.C. 34, 38, 455 S.E.2d 704, 706 (1995). Indeed, possession of a controlled substance can be inferred from the circumstances of a particular case and can be imputed to a person with both the power and intent to control the disposition and use of the drugs. State v. Brown, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995). "Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." Id.; see also Hudson, 277 S.C. at 200, 284 S.E.2d at 773; State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976).

Here, substantial evidence was presented establishing Appellant had constructive possession of the controlled substances and the weapon discovered in the trailer. Viewing the evidence in a light most favorable to the State, the State presented testimony establishing Appellant and Burnside were the only two individuals inside the trailer when the police entered to execute the search warrant. They were not simply just inside the trailer: they were barricaded inside the trailer. Behind the barricade with Appellant and

Burnside, the police discovered the following items: (1) a container holding two Uno™ cards and eight pieces of cocaine base on top of the kitchen cabinets; (2) a Glock 40 caliber handgun on the kitchen counter; (3) plastic baggies containing Diazepam, Alprazolam, and Hyrdocodone in the kitchen cabinets; (4) baggies of cocaine and cocaine base inside an oven mitt above the stove; (5) a microwave plate that tested positive for cocaine base residue; (6) $172 in cash on the floor of the living room; (7) a cell phone on the floor of a bedroom; (8) a plastic bag containing cocaine base in the pocket of a coat in the same bedroom; (9) a digital scale typically used to weigh narcotics in a hallway closet; (10) a digital scale typically used to weigh narcotics in the kitchen; and (11) ammunition for an assault rifle in a second bedroom.

In addition, Deputy Swift saw Appellant in the bathroom, standing over the toilet with the toilet running, as if he had just flushed something. Deputy Swift noticed a Uno™ card floating in the toilet. Notably, in the kitchen, the officers found a Tupperware container with Uno™ cards and cocaine base in the container.

Further, Drummond testified he and Appellant were "like cousins." Drummond also testified that they used the trailer like a bachelor pad rather than a residence, and although Appellant did not live in the trailer, he visited two or three times a week. Moreover, Appellant and Burnside helped pay the bills for the trailer.

In summary, the evidence supported an inference that Appellant and Burnside had dominion and control of the drugs and weapon found inside the trailer. The trailer was just as much Appellant's trailer as it was Drummond's trailer. Appellant and Burnside's presence inside the barricaded trailer, along with the installation of security cameras after Drummond moved out of the trailer, demonstrated the trailer was under their control. This fact in and of itself gives rise to an inference of knowledge and possession which

was sufficient to submit the case to the jury. See Hudson, 277 S.C. at 203, 284 S.E.2d at 775. Further, the fact the handgun and most of the drugs were found in a common area of the residence helps establish constructive possession. Thus, the issue of Appellant's constructive possession of the controlled substances and weapon was a matter properly left to the jury.

B. Knowledge

Second, Appellant had knowledge of the controlled substances and handgun.

In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially. State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975). "The knowledge element may be proved circumstantially by evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that the accused knew of the existence of the prohibited substance. Possession gives rise to an inference of the possessor's knowledge of the character of the substance." Mollison, 319 S.C. at 45, 459 S.E.2d at 91. Knowledge is generally a question for the jury. Attardo, 263 S.C. at 550, 211 S.E.2d at 869.

Our Supreme Court has also stated that a defendant has possession of drugs when he or she "has both the power and intent to control its disposition or use." State v. Kimbrell, 294 S.C. 51, 54, 362 S.E.2d 630, 631 (1987). "[A]ctual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use[;]" therefore, knowledge may be substituted for the intent element. Id.

Further, our Supreme Court has noted that the knowledge element of possession is usually proven by circumstantial evidence, which includes evidence of "acts, declarations, or conduct of the accused form which the inference may be drawn that the

accused knew of the existence of the prohibited substances." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).

In this case, substantial evidence was also presented establishing Appellant had knowledge of the controlled substances and the weapon discovered in the trailer on Lot #7. An expert in street-level narcotic sales testified that based on a variety of factors he believed Lot #7 was used primarily for the distribution of narcotics. He based his opinion on the following factors: 1) the various amounts of cocaine base, cocaine, and prescription pills discovered in the house; 2) plastic bags, a razor blade and other items suggesting packaging for sale; 3) the barricade on the front door; and 4) the presence of security cameras pointing down the front steps. The expert testified it was not typical for narcotics dealers to leave drugs and money in a house unattended with individuals who were simply buyers. Further, Deputy Swift testified he found Appellant standing over a toilet that had just been flushed and saw a Uno™ card, which matched the cards discovered with the cocaine base in the kitchen, floating in the basin. Thus, the issue of Appellant's knowledge of the controlled substances and weapon was a matter properly left to the jury.

Based on the trial testimony and evidence, a finder of fact could reasonably conclude Appellant had constructive possession and knowledge of the controlled substances and the handgun found in the trailer and was therefore guilty of the indicted offenses. This case did not present a complete failure of evidence requiring the grant of a directed verdict motion. See Nix, 288 S.C. at 496, 343 S.E.2d at 629 ("[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law."). To the contrary, Appellant's arguments merely go to the weight of the evidence against

him rather than the sufficiency of the evidence. Accordingly, based on the existence of substantial circumstantial evidence establishing the "possession" element of the convicted offenses, the trial court properly denied Appellant's directed verdict motion.

III.

The trial court properly denied Appellant's motion for a directed verdict for the distribution of cocaine base charge because the State presented substantial circumstantial evidence that Appellant aided, abetted, or conspired to distribute, cocaine base.

Appellant's argument on appeal fails for two reasons: First, Appellant waited until after the jury returned its verdict to object to the "redundancy" of the trafficking and distribution charges. Appellant did not make the argument during the directed verdict phase; therefore, the issue is not preserved for appellate review. Second, the State presented substantial circumstantial evidence that Appellant aided, abetted, or conspired to distribute cocaine base. Accordingly, Appellant's conviction for distribution of cocaine base should be affirmed.

A. Not Preserved

First, Appellant's argument on appeal fails because he did not object until after the jury convicted Appellant.

Under South Carolina law, an issue must be raised and ruled upon in order for an appellate court to consider the issue on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Also, in order for an appellate court to consider an issue on appeal, the objecting party must make a specific objection to the admission of the evidence. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). The objection should be specific enough so that the trial judge can reasonably understand the alleged error. Id. Further, the objecting party must argue the same ground on appeal as he or she did at the trial level. Id. In other words, the objecting party cannot change his or her argument once he or she reaches the appellate level. See Id.

In this case, Appellant did not raise the argument he asserts on appeal until after the jury returned its verdict. (R. p. 205.) Appellant did not make this argument at the directed verdict stage. (R. p. 163.) After the State closed its case, Appellant moved for a directed verdict. (R. p. 163.) Appellant's trial counsel argued: "Mere suspicion is not enough. The charges here are trafficking with intent to distribute. What you've heard is evidence that these young men were in a house where drugs also were. There is evidence that they were actually distributing or selling drugs or manufacturing." (R. p. 163.). After the jury returned its verdict, Appellant's trial counsel argued:

> Judge, I will renew my motion for directed verdict and all my prior motions and objections. **And I will also ask** for a judgment notwithstanding the verdict in this case on the trafficking charge. [Appellant] was charged with felony trafficking and also possession with intent to distribute crack cocaine, I would argue those charges were redundant and encompass the same action, and therefore, I will particular make a motion for those charges.

(R. p. 205) (emphasis added).

Thus, Appellant is attempting to improperly bootstrap an argument his defense counsel made after the jury returned its verdict to his directed verdict motion. The fact defense counsel renewed her motion for a directed verdict and stated "[a]nd I will also ask for a judgment notwithstanding the verdict in this case on the trafficking charge" demonstrates that her original directed verdict argument did not encompass the argument Appellant now asserts on appeal. Further, after the verdict, Appellant asked for a judgment notwithstanding the verdict[2] for the trafficking charge. On appeal, Appellant uses defense counsel's judgment notwithstanding the verdict argument regarding trafficking in support of his directed verdict argument regarding distribution.

[2] "A motion for a JNOV is a civil trial motion, and this it is improper for a party to move for JNOV in a criminal trial." State v. Follin, 352 S.C. 235, 258, 573 S.E.2d 812, 824 (Ct. App. 2002).

Accordingly, Appellant's argument on appeal is different than the one he made post-trial. See McKissick, 325 S.C. at 344, 479 S.E.2d at 75 ("The same ground argued on appeal must have been argued to the trial judge."); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Appellant may not raise one ground for directed verdict at trial and another ground on appeal. See State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (directed verdict argument was not preserved where the defendant raised different arguments below and did not raise the issue argued on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (where defendant objected to certain testimony on one ground at trial and raised another ground on appeal, the issue raised on appeal was not preserved); In re Richard D., 388 S.C. 95, 100-101, 693 S.E.2d 447, 450 (Ct. App. 2010) (particular argument in support of directed verdict was not preserved for appellate review where defendant raised different argument below); Freiburger, 366 S.C. 125, 620 S.E.2d 737 (defendant failed to preserve chain of custody issue for appellate review where he raised a different objection to the evidence below); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (arguments not raised to or ruled upon by the trial court are not preserved for appellate review, and a defendant may not argue one ground below and another on appeal).

In summary, the argument Appellant asserts on appeal is not preserved for review.

B. Sufficient Evidence

Second, the State presented substantial circumstantial that Appellant aided, abetted, or conspired to distribute cocaine base.

Section 44-53-375 (B) of the South Carolina Code provides the following:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony and, upon conviction:

S.C. Code Ann. § 44-53-375 (B).

Criminal conspiracy is "a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410. "The substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope." State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 868 (1993). Notably, the State does not need to prove an express agreement or have direct evidence in order to establish conspiracy. See State v. Cope, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013). Although not necessary for a conspiracy conviction, the State often proves criminal conspiracy by presenting evidence of an overt act in furtherance of the conspiracy. See State v. Crawford, 362 S.C. 627, 637, 608 S.E.2d 886, 891 (Ct. App. 2005). There must be at least two members of a conspiracy, but the conspirators do not need to be indicted or named. Id. at 638, 608 S.E.2d at 892. In fact, the other conspirators can be unknown. See Id.

The distribution of cocaine base indictment states the following:

> That [Appellant] . . . on or about the 18th day of November, 2010, distribute, dispense, deliver, or aid, abet, or conspire to distribute, dispense, or deliver . . . a quantity of Cocaine Base . . . This is in violation of §44-53-375 of the South Carolina Code of Laws (1976) as amended.

(R. p. 217.)

Viewing the evidence in the light most favorable to the State, the State presented substantial circumstantial evidence that Appellant aided, abetted, or conspired to distribute cocaine base. The officers found digital scales, razorblades, and packaged cocaine base in the trailer. Further, the microwave tested positive for cocaine base. Additionally, in Officer Brown's expert opinion, this trailer was being used primarily for the distribution of drugs. According to Officer Brown, the barricade on the front door and the security cameras were common in residences used primarily for the distribution of drugs. The State presented evidence that Appellant was involved in the manufacturing of cocaine base, which was the overt act in furtherance of the conspiracy to distribute the cocaine base. Simply put, the manufacturing of the cocaine base was the first step in the conspiracy to distribute the cocaine base.

Accordingly, this Court should affirm Appellant's distribution sentence and conviction.

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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February 26, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable C. Victor Pyle, Jr., Circuit Court Judge
Appellate Case No. 2012-212057

THE STATE,

Respondent,

vs.

DOMINQUE J. SHUMATE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 26th day of February, 2014.

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