STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2015-000208

The State, Respondent,

vs.

Jo Pradubsri, Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. The trial court properly refused to require disclosure of the identity of the State's confidential informant who was a mere tipster and did not participate in the underlying crime committed by Appellant.

II. The trial court properly found reasonable suspicion supported the stop of Appellant's vehicle when the information received was corroborated and originated from a reliable informant.

III. The trial court's instruction, when viewed as a whole, did not unconstitutionally shift the burden nor is there a reasonable probability the jury applied the challenged instruction in a way that violates the constitution.

IV. The trial court properly denied Appellant's motion for directed verdict where there is evidence supporting the conclusion Appellant had or should have had knowledge he was within one half mile of Irmo Elementary School.

V. The trial court did not err in admitting the testimony regarding the drug transaction at the Kroger or Appellant's manufacturing of crack cocaine in his residence as it served as part of the res gestae of the case; demonstrated the intent to distribute within the proximity of the school; proved an element of the trafficking charge; and, even if not admitted pursuant to res gestae or to prove an element of a crime, it was properly admitted as a prior bad act.

STATEMENT OF THE CASE

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

ARGUMENT

I. The trial court properly refused to require disclosure of the identity of the State's informant who was a mere tipster and did not participate in the underlying crime committed by Appellant.

Appellant contends the trial court erred in refusing to require the State to disclose the name of the informant who provided information leading to the stop and arrest of Appellant. The informant did not materially participate in the crime and served as a mere tipster. As a result, the motion to require disclosure of the person's name or other information was properly denied.

"Generally, the State may not be compelled to disclose the names of its confidential informants." State v. Bultron, 318 S.C. 323, 330, 457 S.E.2d 616, 620 (Ct. App. 1995). "Such privilege is founded upon public policy to protect effective law enforcement, but it is not absolute and is subject to certain limitations and exceptions." State v. Wright, 322 S.C. 484, 487, 472 S.E.2d 642, 644 (Ct. App. 1996). "Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant is an active participant in a criminal transaction." State v. Burney, 294 S.C. 61, 62, 362 S.E.2d 635, 636 (1987). "[I]f the informant is an active participant in the criminal transaction and/or a material witness **on the issue of guilt or innocence**, disclosure of his identity may be required depending upon the facts and circumstances." State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003) (emphasis added). "On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere 'tipster' who supplies a lead to law enforcement." Id.

In seeking the disclosure of the identity of a confidential informant, "the burden is upon the accused to show facts and circumstances giving rise to an exception to the privilege against disclosure . . . ." State v. Batson, 261 S.C. 128, 134, 198 S.E.2d 517, 520 (1973); see also State v. Shupper, 263 S.C. 53, 57, 207 S.E.2d 799, 800 (1974) (finding "the burden is upon the accused to show facts and circumstances giving rise to an exception to the privilege"). "[T]he onus is on the defendant to 'come forward with something more than speculation as to the usefulness of such disclosure.'" United States v. Blevins, 960 F.2d 1252, 1259 (4th Cir. 1992) (citations omitted). "[T]he trial court has considerable discretion as to ordering, or refusing to require, disclosure and that in the event of refusal, the burden is upon the accused to show prejudice resulting therefrom." Batson, 261 S.C. at 134-35, 198 S.E.2d at 520.

In the instant case, the facts and circumstances demonstrate the trial court properly refused to require disclosure of the informant. Sergeant Finch and the Lexington County Sheriff's Department worked with the informant in this case on prior occasions. On those occasions, information supplied by the informant lead to multiple arrests. The informant was not set up as a formal confidential informant with the Department.

The informant in this case made multiple phone calls to Sergeant Finch with information regarding Appellant and his co-defendant. The informant provided very specific information about the vehicle they drove—a 2001 Chevy Monte Carlo, silver, with a dent on the right front quarter panel. (T.78-79; R.47-48). The informant also provided information about the types of drugs involved and where Appellant and his co-defendant would sell the drugs. (T.79; R. 48). The informant indicated Appellant and

the co-defendant would have crack cocaine in the vehicle as well as two handguns, a black 9mm Hi-Point that belonged to Appellant and a silver .25 caliber pistol belonging to his co-defendant. (T.81-82; R.50-51). Sergeant Finch indicated the informant was not involved in the distribution or trafficking for which Appellant was charged. (T.86; 105; R.55; 74). Sergeant Finch specifically testified he had no information indicating the informant was "involved with this crack cocaine in this case." (T.105; R.74).

Accordingly, the trial court did not err in refusing to require disclosure of the informant's identity when the informant was a mere tipster and when Appellant could not offer anything more than mere speculation regarding how the identity would assist in his defense or any testimony the informant could provide relevant to his guilt or innocence.

II. The trial court properly found reasonable suspicion supported the stop of Appellant's vehicle when the information received was corroborated and originated from a reliable informant.

Appellant maintains the trial court erred in suppressing the evidence seized as a result of an investigatory stop of Appellant. The State demonstrated the officers had reasonable suspicion to justify the stop of Appellant based on the known reliability of the informant and corroboration of details provided. Therefore, the trial court did not err in denying the motion to suppress.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. State v. Groome, 378 S.C. 615, 618, 664 S.E.2d 460, 461 (2008). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..." U.S. Const. amend. IV. The ultimate touchstone of the Fourth Amendment is "reasonableness," and the warrant requirement is subject to certain exceptions. State v.

Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). "A warrantless search withstands constitutional scrutiny under the Fourth Amendment if it meets the requirements of one of several exceptions, including the automobile exception." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. The police, however, may also stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity." State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000) (internal citations omitted).

"'Reasonable suspicion' requires a 'particularized and objective basis that would lead one to suspect another of criminal activity.'" State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981)). "Reasonableness is measured in objective terms by examining the totality of circumstances. A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity." State v. Vinson, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012) (internal citations omitted). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." Willard, 374 S.C. at 134, 647 S.E.2d at 255.

An anonymous tip lacks sufficient indicia of reliability to support a reasonable suspicion to conduct a stop. See e.g., Florida v. J.L., 529 U.S. 266 (2000). However, where sufficient indicia of reliability are present, a stop may be properly conducted based on reasonable suspicion. See e.g., State v. Rogers, 368 S.C. 529, 535, 629 S.E.2d 679,

682 (Ct. App. 2006) (finding reasonable suspicion existed where specific information provided by a known informant who could be held accountable and whose reputation could be assessed). In J.L., the United States Supreme Court (USSC) noted the distinction between an anonymous tip and one from a known informant: "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." J.L., 529 U.S. at 270.

In Alabama v. White, 496 U.S. 325 (1990), the USSC determined reasonable suspicion existed to stop a vehicle after various facts were confirmed as true prior to stopping the vehicle. The tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would be transporting cocaine. Id. at 327. After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. Id., at 331. The USSC held corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. The USSC found "because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." Id.

Recently, in Navarette v. California, 134 S. Ct. 1683 (2014), the USSC determined a 911 call provided sufficient indicia of reliability for reasonable suspicion to stop a vehicle for drunk driving. The Court found "[b]y reporting that she had been run off the road by a specific vehicle—a silver Ford F–150 pickup, license plate 8D94925—

the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." Id. at 1689. Additionally, details such as the vehicles location were corroborated by the police prior to the stop. Id. Further, the Court found the 911 system provided a means for identifying the informant and holding her accountable for any false information. Id. at 1689-1690.

In the instant case, the informant was an individual known to Sergeant Finch and the Lexington County Sheriff's Department. The informant provided significant information in the past which lead to multiple arrests. (T.74-77; R.43-46). Further, the informant gave specific details about the area of town in which Appellant dealt drugs; who he would be with; the vehicle they would be driving, including a dent on the vehicle; and the type of drugs and weapons they would have in their possession. (T.78-82; R.47-51). Significantly, Sergeant Finch corroborated the details of the car and the area of town it was located in prior to making the stop. (T.83; R.52). He also knew both Appellant and his co-defendant. (T.82; R. 51). Finally, because the informant was known to Sergeant Finch, the informant could be held accountable for any false information provided. (T.77; R. 46).

Accordingly, this case is similar to the cases of White, Navarette, and Rogers and this Court should find Sergeant Finch's stop of Appellant's vehicle was properly made and supported by reasonable suspicion.

III. The trial court's instruction, when viewed as a whole, did not unconstitutionally shift the burden nor is there a reasonable probability the jury applied the challenged instruction in a way that violates the constitution.

Appellant contends the trial court erred in giving a reasonable doubt instruction which included a definition of reasonable doubt that included it "is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." He contends using the language "search for the truth" is error and is an incorrect explanation of the burden of proof of reasonable doubt. The court's instructions when read as a whole properly charged the jury on the State's burden of proof and would not have confused the jury or caused its verdict to be rendered on an incorrect standard.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted).

Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a

jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

Regarding a jury charge on reasonable doubt, "[t]he beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 511 U.S. 1, 5 (1994). In a criminal case, a trial judge is only required to instruct the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, and no specific language or wording is required to be used to advise the jury of that burden of proof. Id. In order to meet the requirements of the Constitution, jury instructions as a whole must only correctly convey to the jury the concept of reasonable doubt. Id.

Significantly, the South Carolina Supreme Court has repeatedly recognized trial judges are not required to specifically define reasonable doubt when instructing the jury in criminal cases. See State v. Adams, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) (finding no error in the trial judge's refusal to define reasonable doubt during the jury instructions). "Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). "The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the

Constitution." Id. (citing Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

Appellant objects to three statements by the trial court. In the instant case, the trial court charged the jury regarding its role as fact finder and stated: "As jurors then, it is your duty to determine the effect, the value, weight, and truth of the evidence presented during this trial." (T.413; R. 325). Further, in continuing to define the jury's role as fact finder and in judging credibility, the court stated: "It becomes your duty as jurors to evaluate the evidence and determine that evidence which convinces you of its truth." (T.414; R. 326).[1] Finally, in defining reasonable doubt, the court stated in part: "A reasonable doubt is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." (T.418; R. 330). None of these charges, however, alter the burden of proof, shift the burden of proof to Appellant, or create a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution.

None of these charges used the "seek the truth" language which was found to be disfavored by the Court in Needs. Instead, they merely indicated the jury's role and the type of jurors involved in the trial. The first two charges objected to by Appellant are not in the reasonable doubt or circumstantial evidence charges where other courts have had trouble. In the instant case, the charges are similar to those in Aleksey in which the South Carolina Supreme Court found: "There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof

[1] Any objection to the first two statements raised by Appellant in his brief are not preserved as the only objection raised at trial was to the reasonable doubt charge given by the court. (T.427; R. 339). See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

beyond a reasonable doubt." Aleksey, 343 S.C. at 28-29, 538 S.E.2d at 252 (2000).[2] The jurors were not told to make their decision based on a quest for the truth, but were clearly instructed their decision would be based on whether the State met its burden beyond a reasonable doubt.

Additionally, the objected to statements found in the reasonable doubt charge was not error, especially when considering the instructions as a whole. In State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994), the South Carolina Supreme Court considered a remarkably similar charge to the one given in this case. In that case the judge charged: "so the State must satisfy you, what, beyond a reasonable doubt, a doubt for you, as a conscientious juror, in seeking the truth, will stop and hesitate, and consider the guilt or innocence of a particular person." Id. at 395, 440 S.E.2d at 874. Counsel in Hoffman argued the language violated his due process rights. The Court found the language was similar to the "hesitate to act" language approved by the Court and when read as a whole did not place the burden on the defendant.

The reasonable doubt charge in the instant case did not shift the burden to Appellant, especially when the charge is considered as a whole. Throughout his jury instructions, the trial court reminded the jury that the State had the burden of proof and had to establish guilt beyond a reasonable doubt. (T.414; 415; 416; 417; 418; 419; 420; 421; 422; R. 326; 327; 328; 329; 330; 331; 332; 333; 334). Before trial began the court explained to the jury that Appellant "cannot be found guilty unless **the State presents evidence which convinces a jury of his guilt beyond a reasonable doubt**." (T.6; R. 3)

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[2] In footnote 2 to the opinion, the Supreme Court in Aleksey also noted many consistent opinions finding truth language not error and not causing burden shifting when it appears in the portion of the charge related to the jury's role or their determination of credibility.

(emphasis added). Additionally, his charge on reasonable doubt was a complete and correct statement of the law. He charged:

> The Defendant has pled not guilty to the charges alleged against him. **The burden is on the State to prove the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent.** I charge you that it is an important rule of the law that the defendant in a criminal trial, no matter the seriousness of the charges, will always be presumed to be innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.
>
> This presumption of innocence does not end when you begin your deliberations, but it accompanies the Defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. **The presumption of innocence is like a robe of righteousness placed about the shoulders of the Defendant which remains with the Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt.** The presumption of innocence is not a mere legal theory, it's not just a legal phrase. **It is a substantial right to which every defendant is entitled unless you, the jury, is satisfied from the evidence of the guilt of the Defendant beyond a reasonable doubt.**
>
> **The State must prove the Defendant guilty beyond a reasonable doubt.** What is a reasonable doubt in the law? A reasonable doubt is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act. **Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. Proof beyond a reasonable doubt can also be described as proof that leaves you firmly convinced of the Defendant's guilt.** Now there are they few things in this world that we know with absolute certainty. In a criminal case, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence you are firmly convinced that the Defendant is guilty, then you must find him guilty. If, on the other hand,

> you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt then and find him not guilty.

(T.417-418; R. 329-330) The jury charge, when read as a whole, did not create a reasonable likelihood the jury applied the instruction in an unconstitutional manner. Nothing in this charge shifted the burden to Appellant, and instead the court's charge, when read as a whole, made it perfectly clear the burden of proof was on the State beyond a reasonable doubt. As in Hoffman and Aleksey this Court should find the charges as given were proper statements of the law and did not create a reasonable likelihood the jurors applied the instructions in an unconstitutional manner.

IV. The trial court properly denied Appellant's motion for directed verdict where there is evidence supporting the conclusion Appellant had or should have had knowledge he was within one half mile of Irmo Elementary School.

Appellant contends the trial court erred in denying his motion for a directed verdict on the possession with intent to distribute crack cocaine within the proximity of a school. First, the issue as raised is not preserved for review on appeal. Appellant never contested the State's evidence he had knowledge he was within proximity of the school. Further, the State presented ample evidence of every element required for conviction of the proximity charge.

Preservation

Initially, the issue as raised in Appellant's brief is blatantly not preserved for review on appeal. Appellant made his motion for a directed verdict related to the trafficking charge and it is highly questionable whether he even moved for a directed verdict as to the proximity charge. Even if the directed verdict motion covered the proximity charge, he never raised any issue related to his knowledge of being in the proximity of a school.

Appellant's directed verdict motion stated: "under In Re: Winship, the State has to prove every element of the offense and part of our directed verdict motion would be the State hasn't provided evidence to the element of Mr. Pradubsri's **knowledge as to the possession of the drugs or his intent to distribute**." (T.367; R. 284) (emphasis added).[3] His general statement that the State must prove every element is not sufficient to raise an

[3] It is noteworthy that Appellant does not contest on appeal the sufficiency of the State's evidence establishing either his knowledge of the drugs or his intent to distribute the drugs.

issue related to his knowledge of being in proximity to a school. See State v. Sterling, 396 S.C. 599, 612, 723 S.E.2d 176, 183 (2012) ("A general directed verdict motion . . . does not preserve any issue for appeal."); Roberts v. State, 408 S.C. 123, 130, 757 S.E.2d 744, 748 (Ct. App. 2014) (finding general directed verdict motion failed to preserve issue raised on appeal because the precise appellate issue was never raised to or ruled upon by the trial judge). Additionally, his arguments for directed verdict referenced knowledge of possession of the drugs and intent to distribute. Again, he made no argument regarding the failure to provide evidence he had knowledge of being in the proximity of a school. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an issue not properly preserved for appeal where one ground was raised below and another ground was raised on appeal).

Merits

On the merits, the State presented ample evidence of Appellant's knowledge he was within the proximity of a school, and if the motion actually had been made by Appellant's counsel, it would have been properly denied. "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state." Id. A directed verdict motion should be denied if there is any direct or substantial circumstantial evidence

reasonably tending to prove the guilt of the accused. State v. Latimore, 397 S.C. 9, 12, 723 S.E.2d 589, 591 (2012).

The USSC recently explained:

> On sufficiency review, a reviewing court makes a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a "meaningful opportunity to defend" against the charge against him and a jury finding of guilt "beyond a reasonable doubt." The reviewing court considers only the "legal" question "whether, after viewing the evidence in the light most favorable to the prosecution, ***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." That limited review does not intrude on the jury's role "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."

Musacchio v. United States, 577 U.S. ___, ___ (2016) (emphasis in original) (quoting Jackson v. Virginia, 443 U.S. 307, 314–315 (1979)).

Appellant was charged with distribution of a controlled substance within the proximity of a school. Specifically, he was charged under section 44-53-335 which states: "It is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school . . . ." S.C. Code Ann. § 44-53-445(A) (Supp. 2008).[4]

Appellant contends the state failed to prove he knew or was willfully ignorant of the fact he was within one-half mile of a school. No such knowledge requirement is present in the statute in effect at the time of Appellant's crime. The Supreme Court in

[4] The statute in effect at the time of Appellant's crime is cited. The statute was amended by the 2010 Omnibus Act as will be discussed below.

analyzing section 44-53-445 placed a knowing requirement on the distribution or possession with intent to distribute element of the offense, but did not read a knowledge requirement into the proximity element requiring the offense occur within one-half mile of a school. See Brown v. State, 343 S.C. 342, 347-48, 540 S.E.2d 846, 849 (2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (defining the elements of the offense as: "(1) the defendant had actual control, or the right to exercise control over the crack cocaine; (2) he knowingly distributed or delivered the crack cocaine; (3) the substance upon analysis was, in fact, crack cocaine; and (4) the distribution occurred within a one-half mile radius of the grounds of an elementary, middle, secondary or vocational school; public playground or park; or college or university"); see also, State v. Watts, 321 S.C. 158, 168, 467 S.E.2d 272, 278 (Ct. App. 1996).

Further, the current statute was amended by the Omnibus Act of 2010, and the new statute **added** a knowledge requirement for the proximity element of the offense. See S.C. Code Ann. § 44-53-445(B)(1) (Supp. 2014) ("For a person to be convicted of an offense pursuant to subsection (A), the person must: (1) have knowledge that he is in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university"). The fact the legislature added the requirement the individual have knowledge of his proximity to the school indicates knowledge of the same was not required in the 2008 statute under which Appellant was charged. See Cannon v. S.C. Dep't of Prob., Parole & Pardon Servs., 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007) ("It is presumed the Legislature, in adopting

an amendment to a statute, intended to make some change in the existing law."); Kerr v. State, 345 S.C. 183, 547 S.E.2d 494 (2001) (adoption of amendment which materially changes statute's terminology raises presumption that departure from original law was intended); see also, Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (it must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something). Accordingly, under the version of the statute in effect at the time of the crime committed by Appellant, there is no requirement the State prove Appellant knew or should have known he was within one-half mile of the school.

In the instant case even if knowledge is required, the facts presented provide substantial circumstantial evidence indicating Appellant knew or should have known he was within one-half mile of Irmo Elementary School. "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused . . . ." Id.; see also State v. Jackson, 395 S.C. 250, 255, 717 S.E.2d 609, 612 (Ct. App. 2011) (same).

The State presented testimony Appellant was seen at the Kroger grocery off Lake Murray Boulevard in Irmo, South Carolina. (T.168; R. 137). The State presented testimony by Sergeant Finch Appellant was found within one-half mile of the school. (T.186-187; R. 155-156). Further, the State presented a map of the area in which Appellant was located and ultimately stopped by Sergeant Finch. (State's Exhibit 1). Sergeant Finch specifically testified as to the location of the school on the map, which was across Lake Murray Boulevard from the Kroger where Appellant was initially

located. In addition, Sergeant Finch specifically testified he measured the distance to the location where Appellant was stopped and it was "well under" one-half mile. (T.189; R. 158). Finally, Melissa Martin, Appellant's co-defendant, testified she lived with Appellant on Lord Howe in Irmo.[5] (T.288; R. 227). The jury could consider the information presented, the closeness of the school to the location where Appellant was located, as well as the very significant fact he lived in the same area, to reasonably infer he knew he was operating within a one-half mile proximity of Irmo Elementary School. Additionally, Martin testified Appellant bought cocaine and brought it back to their residence to "cook" it into crack cocaine. (T.289-290; R. 228-229). This Court can take judicial notice that the residence on Lord Howe Road is directly across the street from H.E. Corley Elementary school. See Rule 201, SCRE. As a result, based on his manufacture of crack cocaine at a location clearly within one-half mile of a school there was evidence of his knowledge of being within proximity of a school. The jury, therefore, had ample evidence on which it could reasonably determine Appellant knew or should have known he was within one-half mile of a school.

[5] This Court can take judicial notice of the fact Lord Howe Road is in the New Friarsgate subdivision in the same area of Irmo, South Carolina as the Kroger and Irmo Elementary School.

V. The trial court did not err in admitting the testimony regarding the drug transaction at the Kroger or Appellant's manufacturing of crack cocaine in his residence as the testimony served as part of the res gestae of the case; demonstrated the intent to distribute within the proximity of the school; proved an element of the trafficking charge as well as the distribution charge; and, even if not admitted pursuant to res gestae or to prove an element of a crime, it was properly admitted as a prior bad act.

Appellant contends the trial court erred in allowing testimony from Melissa Martin, Appellant's former co-defendant, regarding a drug transaction which took place at the Kroger which occurred immediately prior to their being stopped by Sergeant Finch. Further, he contends her testimony regarding Appellant's manufacturing of crack cocaine at his residence was admitted in error. The trial court properly admitted the testimony as both res gestae of the crimes for which Appellant was charged as well as substantive evidence to prove elements of the crimes. Additionally, even if not properly admitted as res gestae or to prove elements of the crimes, the testimony was properly admitted as a prior bad act to prove intent.

In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." 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. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

Proving an Element of the Crime

First, the testimony regarding Appellant manufacturing crack cocaine at his home as well as the testimony about the drug transaction at Kroger are evidence supporting

elements of the charged offenses of trafficking crack cocaine and distribution of crack cocaine within proximity of a school. "Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted." State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004). Further, "relevant evidence admissible for [purposes other than to attack a defendant's character] need not be excluded merely because it incidentally reflects upon the defendant's reputation." State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980).

In order to prove trafficking, even as indicted based solely on possession, the State had to establish Appellant actually or constructively possessed the large quantity of drugs. The testimony that he purchased cocaine, brought it back to his home to use to manufacture crack cocaine, and directed the sale of the crack cocaine certainly is relevant evidence tending to prove the element that Appellant knowingly possessed the drugs even though they were physically found on his former co-defendant, Martin.[6] The trial court's ruling made it clear he was admitting the testimony in order to establish the element of possession for the trafficking charge. (T.284; R. 223).

To establish the proximity charge, the State had to prove Appellant distributed, manufactured, sold, or possessed with the intent to distribute the crack cocaine within one-half mile of the school. The testimony indicated Appellant manufactured the crack cocaine at his residence in the Irmo area, transported the crack cocaine to the Kroger a short distance away, directed his former co-defendant to sell the crack cocaine at the

[6] The relevance is highlighted by the fact in his motion for a directed verdict Appellant contested the sufficiency of proof by the State of his possession of the drugs, and highlighted his former co-defendant's original claim the drugs were hers. (T.200; R.169).

Kroger, and reaped the benefit of the distribution. As the trial court concluded, the testimony establishes the necessary element of intent to distribute within one-half mile of the school for the proximity charge. Accordingly, because the trial court properly found both pieces of testimony were relevant to proving a material fact or element of the crimes for which Appellant was charged, there was no need to even conduct analysis under Rule 404(b), SCRE.

Res Gestae

Even if the evidence did not tend to prove the elements of the crime, it formed part of the *res gestae* of the crimes and, therefore, was admissible. Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). "The *res gestae* theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004).

This evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...

> '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "*res gestae*."

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)). The story in the instant case is Appellant's involvement with a significant quantity of drugs when stopped during an investigatory stop. In order to properly tell that story to the jury, the testimony regarding how he acquired the drugs, manufactured the drugs, and what he was doing with the drugs is necessary for a full presentation because it is intimately connected with the underlying charges.

Rule 404(b), SCRE

Even if the Court found the evidence was not properly admitted as relevant evidence of an element of multiple offenses for which Appellant was charged, nor as *res gestae*, the evidence would still be properly admitted under Rule 404(b). Appellant maintains the trial court erred "by refusing to rule whether the State had proved these alleged prior bad acts by clear and convincing evidence, and whether her testimony's probative value was outweighed by its prejudicial effect." Appellant's claims are either not preserved or without merit.

First, Appellant never asked the court to conduct further analysis regarding whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. As a result, any claimed error regarding the trial court's failure to conduct the balancing test is not preserved for review on appeal. See

State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court.").

Next, he alleges the court erred in failing to rule on whether the prior bad acts were established by clear and convincing evidence. The trial court did rule on the issue. The court specifically stated: "I don't believe it's a prior bad act, but to the extent that it is, I believe her testimony meets that it may be considered by someone as being relevant to this analysis. **I find the testimony to be clear and convincing** and uncontradicted based on what I heard." (T.283; R. 222) (emphasis added). Appellant's statement of issue only contests the lack of a finding and the record clearly demonstrates a finding was made by the trial court. As a result, the issue should not be considered by this Court. See Rule 208(b)(1)(B), SCACR.

On the merits, the testimony was properly admitted pursuant to Rule 404(b). Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278-279 (2009).

The trial court properly concluded the testimony of Appellant's former co-defendant was clear and convincing. She explained why they were at the Kroger location where they were later found, to conduct a drug transaction. The information was corroborated by the informant's tip to Sergeant Finch regarding what Appellant and

Martin would be doing. Appellant was found with drugs, money, and a gun in his possession. The trial court did not abuse its discretion in finding the evidence clear and convincing.

Additionally, the evidence was properly admitted to prove intent, a required element of the proximity charge. The fact Appellant bought cocaine, used it to manufacture crack cocaine, and previously sold crack cocaine from the same batch of drugs he was found with shortly later definitely shows an intent to distribute those drugs as required to prove the proximity charge. Accordingly, the trial court did not err in allowing the testimony as a prior bad act.

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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Attorney General

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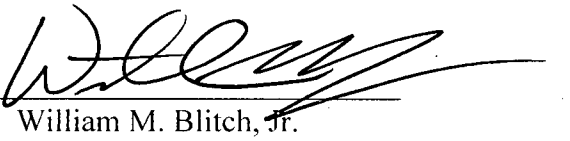
BY: 
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ATTORNEYS FOR RESPONDENT

March 14, 2016

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2015-000208

The State, Respondent,

vs.

Jo Pradubsri, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that 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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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 14th day of March 2016.

Sally Ellison

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ALAN WILSON
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March 14, 2016

John H. Strom, Esquire
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RE: State v. Jo Pradubsri
Appellate Case Tracking No. 2015-000208

Dear Mr. Strom:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services