STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LANCE L. MILES,

APPELLANT

APPELLATE CASE NO. 2015-000308

INITIAL REPLY BRIEF OF APPELLANT

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I.

The State's contention, that requiring prosecutors to prove that Appellant knowingly trafficked in opiates would lead to an "absurd result" effectively making it impossible to prosecute trafficking cases absent a confession, is without merit. Numerous other states with similar trafficking statutes require prosecutors to prove that a defendant knowingly trafficked in a specific drug.

The State contends that requiring prosecutors to prove that Appellant knew he was trafficking in heroin in order to be convicted of trafficking in heroin "would lead to the absurd result where the State would be essentially unable to prosecute a defendant for trafficking in illegal drugs unless the defendant gave a statement implicating himself as knowing the particular drug." Resp't Br. p. 16.

This hypothetical is completely divorced from the reality of drug prosecutions and it ignores the role of permissive inferences in criminal cases. *State v. Mollison*, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) ("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."). The State also appears to have forgotten that jurors are not required to believe a defendant's claims or accept his evidence at face value. *State v. Marshall*, 250 S.C. 448, 450, 158 S.E.2d 650, 651 (1968) ("The credibility of the witnesses, including the appellant himself, was for the jury. If the jury had believed his testimony a finding of not guilty would have been warranted.").

Tellingly, the State's hyperbolic predictions ignore the long history of successful trafficking prosecutions in the many states' that do require prosecutors to prove a defendant knowingly trafficked or possessed a specific drug. Ala. Code § 13A-12-231; Fla. Stat. Ann. § 893.135 (West); Ga. Code Ann., § 16-13-31; Idaho Code Ann. § 37-2732B (West); Ky. Rev. Stat. Ann. § 218A.1412

et seq. (West); Mo. Ann. Stat. § 195.222 *et seq.* (West); N.C. Gen. Stat. Ann. § 90-95(h); Va. Code Ann. § 18.2-248 (West); Vt. Stat. Ann. tit. 18, § 4201 *et seq.* (West); W. Va. Code Ann. § 60A-4-401 *et seq.* (West).

Comparison: S.C. Code Ann. § 44-53-370(e) and N.C. Gen. Stat. Ann. § 90-95(h).

A particularly relevant example is that of our sister state of North Carolina where drug trafficking convictions continue, despite prosecutors having to prove (1) knowing possession, either actual or constructive, of (2) a specified amount of a specific drug. *State v. Keys*, 361 S.E.2d 286, 288 (N.C. Ct. App. 1987) (trafficking in heroin).

North Carolina's trafficking statute is substantially similar to ours. Like S.C. Code Ann. § 44-53-370(e), N.C. Gen. Stat. Ann. § 90-95(h) is divided by the kind of drug being trafficked with punishments further subdivided by the amount trafficked.[1] Like our courts, North Carolina courts have held that the amount of drug being trafficked is a strict liability element. *State v. Shelman*, 584 S.E.2d 88, 93 (N.C. Ct. App. 2003) ("[T]o convict an individual of drug trafficking the State is not required to prove that defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed or transported.").

The only difference between § 44-53-370(e) and N.C. Gen Stat. Ann. § 90-95(h) is that our statute includes the word "knowingly" three times while the North Carolina statute does not. In addition, N.C. Gen Stat. Ann. § 90-95(h) repeats the wide variety of conduct that can constitute

[1] By comparison, states that only require prosecutors to prove that a defendant knew that he was in possession of a controlled substance, as opposed to the specific identity of the substance, have drug trafficking or possession statutes that are organized by drug schedules instead of specific drugs. 720 Ill. Comp. Stat. Ann. § 570/401.1(a); Mass. Gen. Laws Ann. ch. 94C, § 32A; Me. Rev. Stat. tit. 17-A, § 1103(1-A); Tenn. Code Ann. § 39-17-417 (West); Wash. Rev. Code Ann. § 69.50.401 (West); Wis. Stat. Ann. § 961.41.

trafficking each time it delineates a separate drug-based trafficking offense. For example North Carolina defines trafficking in opium or heroin as:

> Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved . . . .

N.C. Gen. Stat. Ann. § 90-95(h)(4). Similarly, South Carolina defines trafficking in heroin as:

> Any person who ***knowingly*** sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is ***knowingly*** in actual or constructive possession or who ***knowingly*** attempts to become in actual or constructive possession of:
>
> (3) four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as "trafficking in illegal drugs" and, upon conviction, must be punished as follows if the quantity involved is . . . .

S.C. Code Ann. § 44-53-370(e)(3) (*emphasis added*).

Despite N.C. Gen. Stat. Ann. § 90-95(h) not specifying a mental state, North Carolina courts have consistently held that a defendant must knowingly possess the controlled substance. *State v. Weldon,* 333 S.E.2d 701, 702 (N.C. 1985) ("To convict defendant of trafficking in heroin ... the state was required to prove that defendant knowingly possessed the [heroin]"); *State v. Rogers*, 231 S.E.2d 919, 922 (N.C. Ct. App. 1977) ("Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be 'knowingly' possessed.")

Comparison of Jury Instructions: North and South Carolina.

Mirroring the similarities in their respective statutes, the two states' model or recommended jury instructions for drug trafficking are also very similar. The South Carolina Judicial Department's suggested jury charges state that, "[t]he Defendant is charged with trafficking in _____ [*drug*]. The State must prove beyond a reasonable doubt that the Defendant knowingly sold . . . was knowingly in actual or constructive possession, [or] knowingly attempted to become in actual or constructive possession of _____ [*drug*]."

The North Carolina Pattern Jury Instructions for Criminal Cases explains to jurors that:

> For you to find the defendant guilty of [trafficking] the State must prove two things beyond a reasonable doubt: First, that the defendant knowingly[4] possessed [name controlled substance]. A person possesses (name controlled substance) if the person is aware of its presence and has (either by oneself or together with others) both the power and intent to control the disposition or use of that substance.
>
> And Second, that the amount of (name controlled substance) which the defendant possessed was (state amount).

N.C.P.I. - Crim. 260.30. Footnote 4 in the instructions states, "[i]f the defendant contends that he did not know the true identity of what he transported, add this language to the first sentence: 'and the defendant knew what he possessed was (name substance).'" *Id.* at n. 4.

Thus, the proper instruction when a defendant contests lack of knowledge as to the true identity of the drug possessed is: "First, that the defendant knowingly possessed [name controlled substance] and the defendant knew what he possessed was [name controlled substance]." N.C.P.I. - Crim. 260.30 amended.

A straightforward reading of both states' instructions makes clear that prosecutors must prove beyond a reasonable doubt that a defendant knowingly trafficked in a specific drug. The North Carolina instructions expressly command, that if the there was evidence at trial that the

defendant did not know the specific drug he was trafficking, the jury must receive additional instruction that the State must prove the defendant knew what drug he was trafficking.

Application of North Carolina's requirement that the State prove a defendant knew what drug he was trafficking.

In *State v. Lopez*, 626 S.E.2d 736 (N.C. Ct. App. 2006), the North Carolina Court of Appeals affirmed one defendant's conviction for trafficking in heroin while reversing his co-defendant's conviction. Like Appellant's case, Lopez and his co-defendant Sanchez were arrested following the controlled delivery of a refrigerator from California that police had intercepted after discovering it contained 2,000 grams of heroin. 626 S.E.2d at 738-739.

Lopez and Sanchez were arrested approximately ten minutes after the refrigerator was delivered to a house. *Id.* They were standing outside the house near a vehicle containing a secret compartment. Lopez's prints were found on the left side of the refrigerator. *Id.* Lopez testified at trial that he did not know the refrigerator contained heroin and that he had simply been hired by a man named "Eric" to insure that the refrigerator was delivered to the house. *Id.* Sanchez did not testify. Both men were convicted.

Like South Carolina, North Carolina prosecutors are aided in meeting their burden of proof by permissive inferences that the jury may adopt. Chief among them is, that "[k]knowledge that one possesses contraband is [inferred] by the act of possession unless the defendant denies knowledge of possession and contests knowledge as a disputed fact." *Lopez*, 626 S.E.2d at 741; *see also State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)(defendant's possession gives rise to an inference that defendant knows the character of the substance possessed).

On appeal, Lopez and Sanchez both alleged that the trial court erred in failing to instruct the jury that it must conclude that the men knew that they possessed heroin in order to convict them of

trafficking. *Lopez*, 626 S.E.2d at 740. On this basis, the appellate court reversed Lopez's conviction, "as he contended in his testimony that he was unaware that heroin was in the refrigerator that he had been paid to receive for a third party." *Id.* at 742. However, Sanchez's conviction was affirmed as he presented no evidence that he was unaware of the contents of the refrigerator. *Id.*

In *State v. Coleman*, 742 S.E.2d. 346 (N.C. Ct. App. 2013), the defendant was arrested during a traffic stop after admitting that he had marijuana. A search of his vehicle uncovered 45 grams of heroin in box also containing additional marijuana. *Id.* at 346-347. Throughout his interrogation, Coleman maintained that he thought the box he was transporting contained marijuana and cocaine, not heroin. *Id.* at 349. His interrogation was played at trial during the State's case-in-chief. *Id.*

On appeal, Coleman claimed the trial court erred in failing to instruct the jury that it must find that he knew that the substance he was transporting was heroin. *Id.* The Court of Appeals agreed, holding that the failure to so instruct the jury constituted plain error as Coleman's "entire defense was predicated upon a lack of knowledge that the substance he possessed was heroin" and there was "substantive evidence that [the] defendant did not know that the substance he possessed was heroin sufficient to amount to a contention that would trigger" the additional jury instruction regarding knowledge of the specific substance. *Id.*at 351; *Cf: State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("use of a deadly weapon" implied malice instruction is improper where there is evidence that would reduce, mitigate, excuse or justify the killing or attempted murder).

In *State v. Beam*, 753 S.E.2d 232 (N.C. Ct. App. 2014), the appellate court upheld the trial court's refusal to instruct jury concerning proof of the defendant's awareness that the substance he transported was heroin. Beam was arrested after he and another individual drove to an informant's

house in order to sell him heroin. 753 S.E.2d at 232. Once the two arrived, police approached the truck and watched the passenger drop two bags of heroin onto the vehicle floor. *Id.*

Beam requested the court instruct the jury that "in order to convict Defendant, the State must prove that Defendant 'knew what he transported was [heroin].'" *Id.* at 233. His conviction was affirmed as Beam "presented no evidence or argument that he was confused as to the correct identity of the illegal drugs . . . Defendant's argument at trial was that he was just driving [the passenger], and had no knowledge that [the passenger] was carrying any illegal drugs whatsoever. *Id.* The Court observed "the jury clearly did not believe Defendant's argument". *Id.*

Finally, in *State v. Galaviz-Torres*, 772 S.E.2d 434 (N.C. Ct. App. 2015), the North Carolina Supreme Court overruled the Court of Appeals and reinstated the Defendant's conviction for trafficking cocaine. The Defendant was arrested while selling cocaine to an informant in a Taco Bell parking lot. *Id.* at 435. A gift bag next to the driver's seat contained over a kilogram of cocaine. *Id.* While being interrogated, the Defendant told police that he had purchased the cocaine.

At trial, the Defendant testified that he simply borrowed the van and that he did not know that it contained cocaine. *Id.* The Court of Appeals reversed the Defendant's conviction relying on *Coleman*. The North Carolina Supreme Court disagreed, distinguishing *Coleman* thusly:

> The defendant in *Coleman* admitted that he knew of the box that contained marijuana and heroin. However, while he admitted that he thought that the box contained cocaine in addition to marijuana, he said that he did not believe that the box contained heroin. In this case, defendant denied any knowledge of either the gift bag located in the van that he was driving or its contents. . .
>
> Thus, the basic pattern instruction given here, which required the jury to find that defendant "knowingly possessed" the drug,—that he was in fact "aware of its presence" and had the ability to exercise control over it—adequately informed the jury of the determination that it must make in light of the position that defendant asserted.

Id. at 439. In sum, North Carolina prosecutors continue to successfully convict individuals of trafficking, even in cases where the defendant did not confess, despite having to prove beyond a reasonable doubt that the defendant knowingly trafficked in a specific drug.

Conclusion

At trial, the State benefits from the permissible inference that a person is presumed to know the identity and nature of an item that they possess. *Hernandez*, 382 S.C. at 624, 677 S.E.2d at 605. This inference extends to items found on their property or in their vehicles. *Id.*

In Appellant's case, the State presented testimony in its case-in-chief from Officer Edmondson that Appellant believed the package that he was picking up likely contained marijuana. Tr. p. 123, l. 4 - p. 131, l. 11. There was no evidence that Appellant knew or even suspected that the package contained OxyContin. By its terms, S.C. Code Ann. § 44-53-370(e)(3) requires the State to prove that Appellant knowingly possessed over four grams of opiates.

As the long experience of other states, such as North Carolina, shows the State's apocalyptic predictions of the end of trafficking prosecutions are grossly exaggerated. Therefore, the trial court's instruction to the jury that Appellant only had to know or believe that he was possessing "illegal drugs" - as opposed to opiates specifically - was a misstatement of the law that substantially lowered the State's burden of proof and removed an element of the crime. Tr. p. 297, ll. 12-17. This was reversible error and Appellant is entitled to a new trial.

II.

The issue of whether the trial court reversibly erred by admitting into evidence Appellant's statements to police where the first statement was the product of an interrogation by officers who failed to advise Appellant of his *Miranda*[2] warnings and his subsequent statements were tainted by the initial violation and the product of an involuntary waiver, is preserved for appellate review.

In its brief, the State alleges that Appellant has waived this issue on appeal by failing to challenge the trial court's later ruling that defense counsel had opened the door to Appellant's pre-*Miranda* statements during his cross-examination of Agent Edmonson. Resp't Br. p. 29 - 30.

However, the rules of error preservation are not a suicide pact. Defense counsel moved pre-trial to suppress both the pre-*Miranda* and post-*Miranda* statements that Appellant made while being interrogated by law enforcement. Tr. p. 40, l. 16 - p. 42, l. 19. The trial court ruled that the post-*Miranda* statements were admissible. Tr. p. 63, ll. 16-23. This ruling was a legal error. Appellant's post-*Miranda* interrogation was a continuous extension of the pre-*Miranda* interrogation. *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010) Defense counsel made proper and timely objections.

The State's waiver argument misapprehends the bifurcated process for determining the voluntariness of a post-*Miranda* statement. "Once the trial judge determines that the statement is admissible, it is up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made." *State v. Miller*, 375 S.C. 370, 383, 652 S.E.2d 444, 451 (Ct. App. 2007).

By the time defense counsel cross-examined Edmonson, the court had already ruled on the statement's admissibility. Defense counsel, an experienced litigator, was then faced with a tactical decision regarding how to most effectively argue to the jury that Appellant's statement was

involuntarily made. Counsel elected, in light of the court's ruling, to provide the jury with the pre-*Miranda* statements in an effort to place Appellant's statements in their proper context.

The State's reliance on *State v. Fripp*, 396 S.C. 434, 721 S.E.2d 465 (2012), is misplaced. Fripp was convicted of burglary based largely on having been identified on the burglarized convenience store's video surveillance footage. During cross-examination, the lead investigator testified that another officer had seen Fripp in a neighbor's backyard adjacent to the robbed store on the day after the robbery. *Id.* at 437-438, 721 S.E.2d at 466. On redirect, the lead investigator stated that the other officer had told him that Fripp was wearing clothes that matched those of the robber. *Id.*

On appeal, Fripp alleged the trial court erred in allowing the lead investigator to testify about what the other officer, who did not testify at trial, had told him. *Id.* at 438-439, 721 S.E.2d at 467-468. Fripp separately alleged that his statement to law enforcement was involuntary. *Id.* In affirming his conviction, this Court ruled that Fripp had opened the door to the hearsay testimony by asking the lead investigator about the officer's observation during cross-examination. *Id.* This Court also **separately held** that Fripp's statement was voluntarily made after *Miranda* warnings were administered. *Id.* at 441-442, 721 S.E.2d at 468-469.

Other than being in the same paragraph, this Court's holdings on the hearsay testimony and on the voluntariness of Fripp's statement were entirely unrelated. Thus, Appellant's case is readily distinguishable from *Fripp*. The testimony in *Fripp* that defense counsel opened the door to was not the subject of a pre-trial ruling and dealt with completely different legal questions - exceptions to the rule against hearsay and a defendant's right to confront adverse witnesses. *Id.*

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

At trial, Appellant was faced with the admission of his *post*-Miranda statements, despite those statements being a virtually uninterrupted continuation of law enforcement's pre-*Miranda* interrogation. Tr. p.33, ll. 19 - p. 36, ll. 12. The State appears to believe that Appellant was required to make a kind of Faustian bargain whereby to preserve his objection to the admission of the post-*Miranda* statements, Appellant was precluded from making any reference to pre-*Miranda* statements before the jury. Resp't Br. p. 29 - 30.

This position is totally at odds with our courts' well-established framework for determining the voluntariness of statements made to police while the declarant is under custodial interrogation. *State v. Washington,* 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (trial judge determines voluntariness of a statement by a preponderance of the evidence; if admitted, the jury determines whether statement was freely and voluntarily given beyond a reasonable doubt).

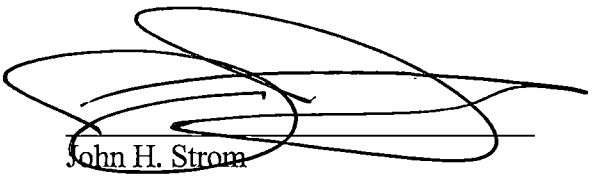
Unlike Fripp, Appellant did not contribute to the trial court's error. Nor did Appellant waive his objection by cross-examining Edmonson on the circumstances under which Appellant gave his post-*Miranda* statements, including that Appellant had been interrogated by law enforcement prior to the giving of *Miranda* warnings. Defense counsel's duty was to preserve his objection to the admission of the post-*Miranda* statements - which he did - then to mitigate the damage and make his case to the jury that Appellant's statements were involuntary and should not be believed. Tr. p. 123, l. 15 - 129, l. 14.

Accordingly, whether the trial court reversibly erred by admitting into evidence Appellant's statements to police when the first statement was the product of an interrogation by officers who failed to advise Appellant of his *Miranda* warnings and his subsequent statements were tainted by the initial violation and the product of an involuntary waiver, is preserved for appellate review.

CONCLUSION

For these additional reasons, Appellant Lance L. Miles respectfully requests that this Court reverse his conviction and remand this case to the Lexington County Court of General Sessions.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

This 16th day of May, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of May, 2016.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 16th day of May, 2016.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.