STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JO PRADUBSRI,

APPELLANT

APPELLATE CASE NO. 2015-000208

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court erred reversibly in refusing to reveal the identity of the confidential informant because the confidential informant acted beyond the scope of a mere tipster and, as the sole source of law enforcement information regarding Appellant, her identity was relevant and helpful to Appellant and essential to a fair determination of Appellant's case.

II. The trial court erred reversibly in finding that reasonable suspicion existed to justify stopping Appellant's vehicle where Appellant had not violated any traffic laws and the stop was based only on information provided by the confidential informer, whose information on Appellant was uncorroborated.

III. In violation of *State v. Daniels*, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012), and in contravention of his own ruling, the trial judge erred reversibly by instructing the jury that reasonable doubt, "is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act."

IV. The trial court committed reversible error in refusing to grant a directed verdict of acquittal on Appellant's indictment for possession with intent to distribute within the proximity of a school where the State failed to prove that Appellant knew, or was at a minimum willfully ignorant of the fact, that he was within one half mile of Irmo Elementary School.

V. The trial court erred reversibly in ruling that: (A) former co-defendant, Melissa Martin's testimony alleging that a prior drug sale occurred immediately before the investigatory stop and alleging that Appellant manufactured crack cocaine in his residence, constituted

evidence of an element of trafficking; and (B) 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.

STATEMENT OF THE CASE

On February 9, 2009, the Lexington County Grand Jury indicted Appellant Jo Pradubsri for: trafficking in crack cocaine (28-100 grams); possession with intent to distribute crack cocaine within the proximity of a school; and unlawful carrying of a pistol. R. 387.

On February 11, 2010, Appellant proceeded to trial before the Honorable Thomas A. Russo and a jury. R. 1. David M. Mauldin and Mathew C. Buchanan represented Appellant, and Assistant Solicitors David M. Stumbo and Michael D. Ross represented the State.

The jury found Appellant guilty as charged. R. 347, ll. 17 - 348, ll. 6. The trial court sentenced Appellant to 30 years imprisonment for trafficking, fifteen years imprisonment for possession with intent to distribute within the proximity of a school, and one year imprisonment for unlawful possession of a gun.

In an opinion filed on May 1, 2013, the South Carolina Court of Appeals reversed Appellant's conviction and remanded for a new trial. *State v. Pradubsri*, 403 S.C. 270, 743 S.E.2d 98 (Ct. App. 2013). On appeal, Dayne C. Phillips represented Appellant and Assistant Attorney General William M. Blitch represented the State.

On November 4-5, 2014, Appellant proceeded to trial before the Honorable Donald B. Hocker and a jury. Because of a mistake in the indictments, Appellant's second trial ended in a mistrial. Appellant was represented by David M. Mauldin, and the State was represented by Assistant Solicitors Lester M. Bell, Jr. and Casey N. Rankin.

On January 13, 2015, Appellant proceeded to trial before the Honorable Clifton B. Newman and a jury. R. 1 Dayne C. Phillips and David M. Mauldin again represented Appellant and Assistant Solicitors Lester M. Bell, Jr. and Casey N. Rankin represented the State.

The jury found Appellant guilty as charged. R. 347, ll. 17 - 348, ll. 5. The trial court sentenced Appellant to concurrent terms of twenty-five years imprisonment for trafficking, fifteen years imprisonment for possession with intent to distribute within the proximity of a school, and one year imprisonment for unlawful possession of a gun. R. 356, ll. 1-6.

STATEMENT OF FACTS

On November 9, 2008, Appellant and his girlfriend, Melissa Martin, were stopped while pulling out of the Kroger parking lot in Irmo, South Carolina, by Sgt. John Finch of the Lexington County Sheriff's Department. R. 136, ll. 18 - 137, ll. 24. The stop was the culmination of months of fruitless searching by Finch.

In the three months prior to the stop, Finch had been in communication with an informer, who had identified Appellant and Martin as drug dealers. R. 47, ll. 5 - 50, ll. 9. Finch said he had used the informer, a prostitute with past drug convictions, "informally" over the past six to eight years. R. 46, ll. 4-25; R. 55, ll. 4-23. ***Based solely on the informer's information***, Finch had issued multiple "be on the lookout" orders to his deputies and other county law enforcement agencies. R. 47, ll. 5 - 50, ll. 9 (*emphasis added*).

Despite being provided supposedly detailed information on the location, times of day, and method of sale; law enforcement had been unable to locate Appellant in the three months leading up the stop. *Id.* Law enforcement never observed any drug sales and police surveillance of Appellant's residence did not yield any incriminating evidence. R. 62, ll. 22 - 64, ll. 24. At trial, Finch candidly admitted, Appellant had committed no traffic violations and the stop was only based on the information supplied by the prostitute informer. R. 66, ll. 2-18.

Once stopped, Finch averred that Appellant and Martin made "furtive" movements as he and a back-up officer, Deputy Kevin Blake, approached the vehicle. R. 69, ll. 7 - 74, ll. 24. Finch claimed, inconsistently, that either as he was walking up to the vehicle or, after he opened the driver's side door that he saw the handle of a pistol protruding from the gap between the driver's side seat and center console. *Id.*

Appellant and Martin were ordered out of the vehicle. *Id.* While the two were being searched, Martin became confrontational with Deputy Blake. R. 188, ll. 3-21. Blake contended that, as he was taking Martin out of the vehicle, he noticed a small bag in her hand and a second bag in the waist line of her pants. R. 179, ll. 16 - 181, ll. 11. Blake further observed an unusual bulge in the crotch of Martin's pants and requested that a female deputy search Martin. *Id.*

Martin, who has an extensive criminal record with convictions for prostitution, drug, and property crimes, had in her possession what was later determined to be sixty-seven and eighty-eight hundredths grams of crack cocaine. R. 193, ll. 16 - 198, ll. 23. Further, law enforcement discovered a pistol in Martin's purse. R. 182, ll. 1-6. Martin confessed that the crack cocaine belonged to her. R. 238, ll. 10-20.

Once incarcerated, Martin wrote a letter to then Assistant Solicitor David Stumbo offering to testify against Appellant. Martin pleaded, "I'm willing to do anything that needs to be done" in order receive a lighter sentence and to secure bond. R. 239, ll. 22 - 240, ll. 24; R. 263, ll. 6-10.

After reaching an understanding with the State, Martin repudiated her ownership of the drugs found on her person and would testify at trial that the drugs belonged to Appellant. R. 261, ll. 4 - 264, ll. 23. In exchange, the State consented to a reduced bond and even arranged for her to be represented by a former solicitor during the bond hearing, despite already being represented by a different attorney for her pending charges. R.265, ll. 2-23.

Once released, Martin failed to attend her next appearance and a bench warrant was issued. R. 266, ll. 11-25. Martin was eventually arrested in Richland County. R. 267, ll. 3-7. She again secured bond, this time by offering to have sex with the bail bondsman. *Id.* at ll. 8-22. Subsequently, Martin was arrested for a third time and was also caught smuggling crack cocaine into prison. R. 258, ll. 12 - 259, ll. 19.

Martin faced the same charges as Appellant with a mandatory minimum sentence of seven years imprisonment. R.268, ll. 6 - 269, ll. 19. Martin was allowed to plead guilty to simple possession of crack cocaine and unlawful possession of a gun. *Id.* She was sentenced to eighteen months imprisonment with no subsequent probation. *Id.*

Pre-Trial Motion: Reveal Informer's Identity

Defense counsel moved pre-trial to compel the State to reveal the identity of the informer arguing that the informer was more than a mere tipster and that her identity was highly relevant and helpful to the defense. R. 4, ll. 2 - 6, ll. 7. The defense identified a letter written by then Assistant Solicitor Stumbo acknowledging that the police had no formal agreement with the informer, and which noted that the informer had a long history of drug use and prostitution. *Id.*; *see also* R. 357.

Defense counsel argued that the letter's explicit denial of confidential informant status rendered the informant's privilege inapplicable. *Id.* Moreover, ***Finch was completely reliant on her information when he initiated the investigatory traffic stop,*** as such the informer was more than a mere tipster providing information for law enforcement to independently investigate. R. 6, ll. 25 - 12, ll. 3 (*emphasis added*). Finch conceded that law enforcement had ***conducted no independent investigation into the informer's allegations***, no attempted controlled buys, and only conducted cursory surveillance of Petitioner's residence. R. 63, ll. 18 - 65, ll. 24.

The State countered that no formal agreement between the solicitor's office and the informer was required to invoke confidential informant privilege. R. 30, ll. 22 - 33, ll. 23. The State further claimed that the informer simply provided law enforcement with information and that she was not an active participant in any crimes. *Id.*

Curiously, given that the informant's significant involvement in Appellant's case, the State noted that they "couldn't run programs like Crime Stoppers" if the informer's identity was

disclosed. *Id.* The State then proffered testimony from Sgt. Finch in an effort to establish the informer's reliability.

Proffered Testimony of Sgt. John Finch

Finch averred that the informer had been used by law enforcement since 2006 and had never provided false or inaccurate information. R. 43, ll. 2 - 46, ll. 25. He alleged that the informer had helped police locate and arrest a series of persons from "Midland's Most Wanted" lists. *Id.* However, Finch was unable to identify those individuals by name or to recall the details of their charges. *Id.* Instead he simply concluded that: "[t]here's been a lot of cases of wanted individuals, especially more special like Midlands Most Wanted-type individuals." R. 44, ll. 16-25.

According to Finch, the informer seemed able to regularly provide police with the same type of information on many different individuals. For example, Finch recollected that the informer had provided information on persons residing at an Executive Inn:

> "I've gotten several different people. In that case, let's see, those two different Midland's Most Wanted subjects based on intelligence received from the informant, very specific about the room, the dates and times they would be there, all of the identifiers, you know, everything just matched up perfectly in that case, and that was two at just the Executive Inn alone."

Id. The informer had also apparently provided almost identical information on two different "wanted subjects" residing at a Red Roof Inn and a Motel Six respectively. R. 45, ll. 1-8.

Likewise, the informer had previously told police about "an individual that was wanted for trafficking heroin." R. 43, ll. 2-17. On this occasion, she allegedly identified a co-defendant, the car being used, and the area and time that the targets sold drugs. *Id.* Oddly given that the informer provided police with the time and area of drug sales, Finch recalled that "I started working on that case. ***Subsequently*** we did locate the individuals." *Id.* (*emphasis added*).

The information the informer provided in Appellant's case followed the same basic pattern as her earlier information. Finch testified that for approximately three months prior to Appellant's traffic stop he had been in regular communication with the informer about Appellant's supposed whereabouts. R. 47, ll. 5 - 50, ll. 21. Finch alleged that the informer, whom he knew was a drug addict, had personally observed Appellant and Martin making crack cocaine in their residence. *Id.*

Finch claimed that he received between ten to twenty telephone calls from the informer. R. 42, ll. 17-22. She described Appellant's car; claimed that Appellant allegedly sold drugs in the Irmo-St. Andrews area of Columbia during nights and evenings; and – incredibly – the informer knew the make, model, and caliber of guns that Appellant and Martin carried. R. 55, ll. 2 - 90, ll. 23.

Finch admitted that he conducted almost no independent investigation to confirm this information and that he did not try corroborate any of the informant's information. R. 64, ll. 13-24. Instead, he claimed that he recognized Martin as someone he believed was involved in prostitution and that he accessed Appellant's criminal record. *Id.*

On cross-examination, Finch reluctantly agreed that the informer was likely involved in illegal activity, including prostitution and drug dealing. R. 54, ll. 23 - 59, ll. 23. Finch further conceded that the informer's telephone calls were the sole basis for his knowledge of Appellant's alleged drug dealing prior to the traffic stop. *Id.*

Crucially, Finch admitted that when law enforcement attempted to verify the accuracy of the informer's information on Appellant's whereabouts and activities; they were unable to corroborate the information. *Id.* Despite having supposedly accurate and detailed information from the informer; the police never observed Appellant make a single drug sale, made no effort to conduct a controlled buy, and only briefly surveilled Appellant's house - without observing anything that corroborated the informer's claims. R. 63, ll. 18 - 65, ll. 24

More alarmingly, Finch conceded that many of the informer's telephone calls over the three month period provided Appellant's current location and the direction in which he was traveling. R. 88, ll. 2 – 90, ll. 10. Finch blamed his inability to corroborate the information, not on the informer being unreliable, but on law enforcement having other commitments which made any independent investigation too onerous. *Id.*

After stressing that the informer had detailed personal knowledge of Appellant's alleged drug dealing; on cross-examination Finch became more reticent and skeptical of whether Appellant and the informer had a personal connection. A suddenly less certain Finch demurred, that "I don't know about how close of a personal relationship it was, but I'm saying that they knew each other on the street." R. 85, ll. 25 - 87, ll. 18.

When asked what benefits the informer had received from her long association with law enforcement, Finch adamantly denied that informer had received any benefits. He underlined the lack of motive conjecturing that the informer:

> "[K]new that if she committed a crime that I would lock her up and then that's -- you know, she -- she gave me this information voluntarily and willfully. On the street she developed a level of trust with the folks out there and, you know, after a long period of time it was developed with this individual, you know, so she forwards the information to me and I look into it, and everything she's ever given me has been reliable.

Id. at ll. 5-12. When asked, he again conceded that never corroborated the informer's information; never attempted to set-up a controlled buy; never sought a search warrant for Appellant's residence; and the minimal surveillance conducted did not yield any corroborating evidence of trafficking. R. 63, ll. 22 - 64, ll. 24.

On redirect, Finch agreed with the State that the police - who had conducted almost no investigation into the informer's claims - had unsurprisingly not connected the informer to any illegal activity involving Appellant and Martin. R. 74, ll. 10 - 75, ll. 5. Finch also acceded to the

State's suggestion that simply because the informer supplied inaccurate or uncorroborated information on Appellant's location on ten to twenty separate occasions over a three month period did not mean that the informer was unreliable. *Id.*

Court's Ruling

The trial court ruled that the State was not required to reveal the identity of the informer. R.78, ll. 2 - 79, ll. 10. The court found that the informer was not an active participant in the crime and was not a material witness. *Id.* The court noted that "it's hard to put a label on who she was, but if I were to put a label on her[,] she would be a tipster as argued by the State." *Id.* The court further stated that the interests of law enforcement in receiving information outweighed any risk of Appellant being denied a fair trial. *Id.*

Pre-Trial Motion: Suppress Evidence Discovered During Traffic Stop

Next, Appellant moved to suppress the crack cocaine and guns seized during the traffic stop on the grounds that law enforcement did not have reasonable suspicion to justify the stop. R. 79, ll. 20 - 80, ll. 23; R. 369. Defense counsel stressed that because the police were completely reliant on the uncorroborated information provided by the informer, they lacked reasonable suspicion that Appellant was engaged in criminal activity. R. 84, ll. 5-15.

Citing to Sgt. Finch's testimony, counsel argued that the informer's reliability had not been established. R. 85, ll. 3-24. Moreover, the defense posited that the court's prior ruling deprived Appellant of the opportunity to confront the informer and adequately examine her reliability. R. 25, ll. 17-25. Appellant had not committed a traffic violation to justify the traffic stop and any post-stop confirmation of the accuracy of the informer's tip was irrelevant to the existence of reasonable suspicion at the time the stop was initiated. R. 85, ll. 3 - 87, ll. 4.

Without taking arguments from the State, the trial court denied Appellant's motion to suppress the evidence, ruling that law enforcement had reasonable suspicion based on the past reliability of the informer. R. 87, ll. 16-18.

Pre-Trial Motion: Exclude Prior Bad Act Evidence under Rule 404(b), SCRE

Appellant then moved, pursuant to Rule 404(b), SCRE, to prevent Martin from testifying about an alleged drug sale she conducted at the Irmo Kroger immediately before she and Appellant were stopped by Finch. R. 96, ll. 10 - 97, ll. 18. The defense anticipated Martin would claim that she made the sale at Appellant's insistence. *Id.* Martin was also expected to claim that Appellant manufactured crack cocaine at his residence. *Id.* Since Appellant was not charged with a crime relating to these acts, any testimony amounted to improper prior bad act evidence. *Id.*

The State countered that testimony on the prior sale of crack cocaine would be "narrowly" used to prove that Appellant had the intent to distribute with respect to the proximity charge. R. 97, ll. 15 - 98, ll. 25. The prior sale would also "show what [Appellant and Martin] were up to that night." R.98, ll. 2-3. Finally, the State suggested without further explanation that the alleged drug sale in Kroger was admissible because:

> Martin lived with [Appellant] . . . she has intimate knowledge of the process of them purchasing and cooking the crack cocaine that they then took into the car to this Kroger to sell . . . . I think that due to her personal knowledge and the fact that it explains the presence of the drugs that night, it's something that should be introduced under [Rule] 404(b).

Id. at ll. 16-25.

The defense countered that the alleged sale constituted a prior bad act that was not the subject of the conviction; accordingly the State would have to prove the event by clear and convincing evidence. R. 99, ll. 1-14. The trial court preliminarily denied the motion, but advised that the ruling would be revisited before Martin testified. *Id.* at ll. 15-17.

Trial

After opening statements the State called a series of law enforcement witnesses, beginning with Sgt. Finch who testified about initiating the investigatory traffic stop. When prompted by the State, Finch also explained that he charged Appellant with possession within intent to distribute within the proximity of a school because the traffic stop occurred within a half mile of Irmo Elementary School. R. 155, ll. 24 - 156, ll. 7.

Deputy Blake, who assisted Finch during the traffic stop, testified that when Martin was ordered out of the car, she had small packages of crack cocaine in her hand, stuck in the waistband of her pants, and stuffed into the crotch of her pants. R. 180, ll. 2-24. Deputy Andrea Grimstead testified that she was called to the traffic stop to search Martin's pants. R. 190, ll. 1 - 192, ll. 23.

Proffer Testimony of Melissa Martin

Prior to Martin taking the witness stand, the defense renewed its motion under Rule 404(b) SCRE to exclude her testimony on the alleged prior drug sales and to exclude any testimony regarding how Appellant allegedly made crack cocaine. R. 199, ll. 21 - 201, ll. 9. Martin testified *in camera* that she had a long criminal record with at least eight convictions for offenses ranging from prostitution and drug use to auto theft. R. 203, ll. 5-17.

Martin claimed that while she and Appellant were dating she smoked crack cocaine daily. R. 203, ll. 24 - 204, ll. 22. She further claimed that immediately before she and Appellant were arrested, she sold crack cocaine to two women in the Kroger bathroom. R. 207, ll. 11 - 208, ll. 24. One woman supposedly paid in cash and the other in a gift card. *Id.* No gift card was ever entered into evidence. When asked by the Court, Martin stated that she believed the Kroger was located "close" to Irmo Elementary School. R. 215, ll. 1-6.

On cross-examination Martin denied knowing who Appellant supposedly purchased cocaine from. R. 210, ll. 5-7. However, Martin reluctantly conceded that she first offered to provide law enforcement with information regarding a drug dealer named "Cruz" including his cell phone number and address. R. 210, ll. 8 - 272, ll. 6.

Martin then clarified that she only knew Cruz because Appellant purchased cocaine from him. *Id.* When pressed about inconsistencies in her testimony, Martin claimed that she suffered from significant, drug related memory loss. R. 213, ll. 8 - 277, ll. 6.

Rule 404(b) Arguments and Ruling

Citing to *State v. Humphries*[1], defense counsel again argued that the alleged sale at Kroger and Appellant's manufacture of crack cocaine, constituted impermissible bad character evidence. R. 219, ll. 5 - 221, ll. 7. Counsel also stressed that Martin's testimony was the only evidence of the alleged sale, as the State did not produce any store surveillance footage or even the gift card Martin accepted as payment. *Id.* Thus the State had failed to prove the prior bad acts occurred by clear and convincing evidence. *Id.*

The State countered that *Humphries* was distinguishable because the Kroger sale took place almost immediately before the arrests. R. 219, ll. 5 - 221, ll. 14. The State also advanced that the prior sale demonstrated a common plan or scheme under *Lyle v. State*.[2] *Id.* Assistant Solicitor Bell conceded that evidence of an alleged prior sale and method of manufacture was extremely prejudicial, but that the similarity between the alleged prior acts and the one for which Appellant was standing trial outweighed any unfair prejudice. *Id.*

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[1] 354 S.C. 87, 579 S.E.2d 613 (2003).
[2] 125 S.C. 406, 118 S.E. 803 (1923).

In denying the defense's motion, the trial court dismissed that the Kroger sale was a prior bad act, ruling that:

> I don't think the prior bad act has anything to do with this case. The Defendant is charged with trafficking cocaine. The State has to prove that the Defendant aided, abetted, attempted to manufacture, sell, and possess, and other various elements of trafficking. This witness's testimony, if believed, would show that the Defendant is guilty of aiding, abetting, conspiring with her, or possessing, and it doesn't turn on whether or not it's a prior bad act, it turns on the act of engaging in trafficking cocaine, and it's relevant, it's probative, and it's admissible. . .

R. 221, ll. 15 - 25. The State then helpfully offered, for the first time, that testimony on the Kroger sale now would actually be used to prove an element of trafficking and to support the possession with intent to distribute indictmet. R. 222, ll. 13-20.

The court agreed with the State's tardy justification, noting that "trafficking is all encompassing." R. 222, ll. 21-23. Defense counsel interjected that trafficking required the State to prove Appellant's possession of the sixty-seven grams of crack cocaine found on Martin (as charged in the indictment) and that the standard elucidated by the court had no application to the trafficking charge. R. 223, ll. 2-6.

The court rejected the defense, "part of trafficking is possession and part of possession is ownership and part of ownership is making it. If he cooked it, created it, gotten it, it's his, then she can testify that it was his regardless of whose actual possession it's in. All of that is part of proving trafficking." *Id.* at ll. 7-13.

Trial Testimony of Melissa Martin

Consistent with her proffered testimony, Martin claimed that the drugs found in her possession and that she first claimed were hers, actually belonged to Appellant. R. 238, ll. 10-16. Martin again detailed her long criminal record and history of drug abuse. Martin also testified on the

alleged sale at the Kroger and on how Appellant manufactured crack cocaine at their shared residence. R. 226, ll. 14 - 231, ll. 25.

On cross-examination, Martin admitted that she was the owner of "Belles of the South" a registered escort service which provided legal cover for her prostitution ring. R. 244, ll. 15 - 248, ll. 20. Martin admitted that she regularly sold crack cocaine to the prostitutes that worked for her and that she had independent drug supply courtesy of a man she identified only as "Big." *Id.*

Directed Verdict Motion

Defense counsel moved for a directed verdict of acquittal on all charges. R. 283, ll. 16 - 284, ll. 7. In denying Appellant's motion, the trial court specifically identified Martin's testimony as providing sufficient evidence so as to submit the charges to the jury. R. 284, ll. 8-15.

Jury Instructions

The defense, citing to *State v. Daniels*[3], moved to redact any references to "a search for the truth" or other similar language in the jury instructions. R. 291, ll. 9 – R. 293, ll. 3. The trial court agreed with the defense, but, nevertheless instructed the jury that:

> 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.

(*emphasis added*) R. 330, ll. 11-18. In addition, the trial court also twice instructed jurors to determine the "truth of the evidence presented" and to "determine that evidence which convinces you of its truth." R. 325, ll.13-15; R. 326, 13-18.

[3] 401 S.C. 251, 737 S.E.2d 473 (2012).

Defense counsel objected at the conclusion of the charge and requested a mistrial, referencing the court's previous ruling. R. 339, ll. 5-14. The court overruled the objection, "I think that's nitpicking to the nth degree." *Id.* at ll. 15-16.

Jury Notes, Verdict, and Sentencing

After beginning the deliberations, the jury asked: "[i]f someone has active possession of drugs, can another passenger also have constructive possession at same time of same drugs? If someone has active possession of drugs, can another passenger also have constructive possession at same time of same drugs?" R. 342, ll. 18-19. In reply, the court reread its instruction on possession. R. 343, ll. 13 - 344, ll. 24.

The jury also asked what offenses Appellant was charged with at the time of his arrest, which the court declined to answer. R. 346, ll. 11-18. After three and half hours of deliberation, the jury found Appellant guilty on all charges. R. 347, ll. 17 - 349, ll. 14.

The court sentenced Appellant to concurrent terms of fifteen years imprisonment for the proximity charge and twenty five years imprisonment for trafficking. R. 356, ll. 1-6. Appellant received time served for the unlawful carrying of a pistol charge. R. 355, ll. 13 - 356, ll. 6.

ARGUMENTS

I.

The trial court erred reversibly in refusing to reveal the identity of the confidential informant because the confidential informant acted beyond the scope of a mere tipster and, as the sole source of law enforcement information regarding Appellant, her identity was relevant and helpful to Appellant and essential to a fair determination of Appellant's case.

Introduction

Information from the informer was the sole basis for law enforcement's reasonable suspicion to initiate the traffic stop. R. 51, ll. 4 - 64, ll. 24. Sgt. Finch's testimony regarding the informer's reliability was contradictory as he simultaneously claimed that the informer was "totally reliable" while conceding that it took police three months and many failed attempts to locate Appellant based on information provided by the informer. R. 47, ll. 1 - 50, ll. 21.

Further, Finch alleged the informer personally knew Appellant and Martin and knew, in great detail how Appellant supposedly trafficked crack cocaine. R. 54, ll. 14 - 56, ll. 24. The informer's depth of knowledge and involvement was incompatible with the peripheral role of a mere tipster. *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995)(state not required to disclose identity of informant who called police stating he had observed a quantity of cocaine in a hotel room, which the police subsequently investigated). The information she provided was more than a lead for law enforcement to investigate; it was the investigation.

Accordingly, the trial court erred in refusing to reveal the identity of the confidential informer where she was law enforcement's only source of information on Appellant's alleged drug trafficking and was the sole basis for reasonable suspicion; thus a material witness whose identity was essential to a fair determination of the case. R. 78, ll. 2 - 79, ll. 9.

Discussion

Generally, the State may not be compelled to disclose the names of its confidential informants. *State v. Burney*, 294 S.C. 61, 362 S.E.2d 635 (1987). However, the United States Supreme Court has held, "Where the disclosure of an informer's identity . . . is *relevant and helpful* to the defense of an accused, or is *essential to a fair determination of a case*, the privilege must give way." *Roviaro v. United States,* 353 U.S. 53 (1957) (*emphasis added*); *see State v. Hayward*, 302 S.C. 75, 393 S.E.2d 635 (1990).

Our Supreme Court has held, "[p]ublic policy considerations for nondisclosure of an informant's identity are absent where the informant openly participates in the criminal transaction." *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984)(whether to call an informant as a witness is a matter for the accused rather than the State); *see McLawhorn v. North Carolina,* 484 F.2d 1 (4th Cir. 1973) (disclosure is required where an informant is an actual participant, particularly where he sets up the criminal transaction); *see also State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (finding "where . . . the informant is either *a material witness to the crime* or directly participates in it, disclosure may be required, particularly where, in a drug related crime, he is the *only witness to the transaction other than the buyer and the defendant*") (internal citation omitted) (*emphasis added*).

In determining whether disclosure of an informant's identity is essential to the defense, the trial court must determine whether the informant is a mere "tipster" who has only peripheral knowledge of the crime or an active participant in the criminal act and/or a material witness on the issue of guilt or innocence. *Bultron*, 318 S.C. at 329, 457 S.E.2d at 620. An informant's identity need not be disclosed where the informant possesses only a peripheral knowledge of the crime or is a mere tipster supplying a lead for law enforcement to investigate. *Blyther*, at 31, 336 S.E.2d at 151.

Since the State was not required to identify the informer, Appellant was unable to effectively challenge whether reasonable suspicion existed to justify the investigatory stop. R. 81 - 82. Police conducted virtually no independent investigation to confirm the validity of the informer's information. *State v. Burns*, 294 S.C. 338, 340, 364 S.E.2d 465, 466 (1988) (***informant relied upon by law enforcement when seeking warrant was a material witness***).[4]

What investigation police did do, should have lead them to question their informer's reliability. Finch testified that he received between ten and twenty calls about Appellant from the informer over a three month period. R. 47, ll. 5 - 50, ll. 4. Despite the timeliness of the informer's information and her supposed unassailable reliability, police repeatedly failed to locate Appellant. R. 55, ll. 9 - 59, ll. 16. Thanks to the informer, law enforcement supposedly knew when, where, and how Appellant allegedly sold drugs. *Id.* She also claimed to know where Appellant manufactured drugs, but cursory police surveillance failed to corroborate the information. R. 63, ll. 22 - 65, ll. 24.

The identity of the informant was not only helpful and relevant to Appellant's case, but essential to a fair determination of reasonable suspicion, especially in light of law enforcement's inability to independently corroborate the informer's information. As a mere tipster, the State maintained that the informer did not participate in any drug transactions; the defense could not investigate whether this was the case. However, the quantity and the specificity of the information provided by the informer strongly suggests more than "peripheral knowledge" of the alleged crimes.

Finch stressed the informer's personal connection to Appellant, before later waffling on her degree of involvement during cross-examination R. 55, ll. 9 - 59, ll. 16. In addition to the

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[4] *See also*: *Burns,* 294 S.C. at 340-341, 364 S.E.2d at 467 ("The right of an accused to learn the identity of an informant includes more than the state's revelation of the informant's name. In cases where the informant's testimony relates to the offense, preliminary matters such as search and seizure, or other constitutional matters, the defense is entitled to a reasonable opportunity to search for the informant") (internal citations omitted).

information above, the informer knew Appellant's supposed method for manufacturing drugs and, most incredibly, the make, model, caliber of guns usually carried by Appellant and Martin. Defense counsel was also precluded from investigating the informer's background, which the State conceded included multiple drug and prostitution arrests. R. 193, ll. 16 - 198, ll. 23.

Whether the informer had ulterior motives was likewise impossible to discover. The defense was also unable to challenge Finch's odd contention that the informer received "no benefits" as a result of her nearly eight years of cooperation with law enforcement. *Diggers*, 322 S.C. at 514, 473 S.E.2d at 61 (ulterior motives of informer relevant to reliability). His claim is especially curious given that tips leading to the arrest of individuals on the "Midland's Most Wanted" list includes a cash reward.[5]

Finally, Appellant was arrested over six years before trial, thus there was minimal risk that revealing the informer's identity would compromise the flow of information to law enforcement or harm the informer. R. 387. Moreover, law enforcement's investigative decisions made the informer a material witness; notably police choose to forgo other investigative techniques such as controlled buys or surveillance, and did not even wait for a pretextual traffic violation.

Without the identity of the informer, Appellant was unable to effectively attack the existence of reasonable suspicion. Therefore, the trial court erred in refusing to reveal the identity of the informer where the informer acted beyond the scope of a mere tipster and her identity was essential for a fair determination of Appellant's case.

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[5] *See*: http://www.midlandcrimestoppers.com/wanteds.aspx.

II.

The trial court erred reversibly in finding that reasonable suspicion existed to justify stopping Appellant's vehicle where Appellant had not violated any traffic laws and the stop was based only on information provided by the confidential informer, whose information on Appellant was uncorroborated.

The Fourth Amendment to the United States Constitution ensures "the right of the people to be secure. . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. The "temporary detention" of individuals during an automobile stop by police constitutes a "seizure" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809 (1996). Generally, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *State v. Butler*, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000).

However, if an officer has reasonable suspicion that the occupants of an automobile are involved in criminal activity, the officer may stop and briefly detain them. *Id.; Knight v. State*, 284 S.C. 138, 325 S.E.2d 535 (1985*); see also State v. Nelson*, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999) (*quoting Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)) ("'[A] policeman who lacks probable cause but ***whose observations lead him*** reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.'")(*emphasis added*).

Reasonable suspicion requires "a particularized and objective basis that would lead one to suspect another of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Lesley*, 486 S.E.2d 276 (Ct. App. 1997). A court must consider "the totality of the circumstances – the whole picture" when determining whether reasonable suspicion exists. *Cortez*, 449 U.S. at 417; *see also State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001) ("reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of

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criminal activity. . . the whole picture must be considered."). Reasonable suspicion "entails. . . something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause" *Butler*, 343 S.C. at 202, 539 S.E.2d at 416.

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (evidence not admissible under the "fruit of the poisonous tree" doctrine when police exploit unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment makes the exclusionary rule applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Here, the State claimed that the informer was a mere tipster, but was sufficiently reliable as to provide reasonable suspicion to initiate the traffic stop. R. 30, ll. 5 - 34, ll. 24. As to reliability, Finch claimed that the informer had always been accurate and reliable in past investigations. R. 44, ll. 14 - 47, ll. 4. However, his testimony on these past instances was conclusory and circular. *Id.*

He could not recall the names of those arrested, the dates, or the final disposition of these cases. *Id.* All Finch seemed to remember was that on each occasion the informer supplied police with almost exactly the same quantity of information which was "all very reliable, very accurate." R. 44, ll. 14.

In Appellant's case, Finch testified that he received between ten and twenty calls about Appellant from the informer over a three month period. R. 47, ll. 8-18. The information was nearly identical in kind and in quantity to information she provided on prior cases. In many of her calls, the informer told Finch where Appellant was and where Appellant was going to be.

Nevertheless, it took law enforcement three months to locate Appellant. In many respects the informer in the present case is a less precise, less reliable version of the informer in *State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014). In *Pope,* police received a tip from a non-confidential informant that a black Ford Exhibition would be leaving Spartanburg on Highway 176. *Id.* at 224, 763 S.E.2d at 820.

Police observation confirmed the information. *Id.* at 225, 763 S.E.2d at 820. In the presence of police officers, the informant called Pope, who was driving the Exhibition. *Id.* Pope told the informant that he was passing the "Lighthouse Fish Camp," this was confirmed by a trailing police car. After the phone call, law enforcement initiated the traffic stop. *Id.*

On appeal, this Court found that reasonable suspicion justified the traffic stop, based solely on the information provided by the informant:

> We find [the informant's] description of the vehicle, including the color, make, and model***; the highway and direction the vehicle would be traveling; the location of the vehicle at a specific time;*** and that more than one person was in the vehicle, was ***corroborated by officers*** observing a vehicle matching the exact description, traveling in the specified direction, located in the stated area, and containing more than one person. Furthermore, [the informant] was ***not a confidential informant*** and exposed himself to criminal liability should the information he supplied to officers prove to be false.

Id. at 225, 763 S.E.2d at 814 (*emphasis added*); *see also Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983) ("Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work").

In contrast, the informer in Appellant's case provided significantly less specific information. In ten to twenty phone calls during a three month period, the informer told police about Appellant's

III.

In violation of *State v. Daniels*[6], and in contravention of his own ruling, the trial judge erred reversibly by instructing the jury that reasonable doubt, "is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act."

Introduction

Before closing arguments, the trial court held a charge conference. R. 285, ll. 1 - 299, ll. 10. Defense counsel objected to language in the court's proposed charge instructing jurors to "search for the truth." R. 291, ll. 9 -292, ll. 25. Citing to *State v. Daniels*, defense counsel argued that such language was improper. *Id.* The trial court agreed to remove the incorrect language. R. 295, ll. 9-10.

Nevertheless, in its charge, the trial court defined reasonable doubt as "doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." R. 330, ll. 13-15. The trial court also charged that, "it is your duty to determine the effect, the value, weight, and the truth of the evidence presented during trial." R. 325, ll. 13-15. The court further instructed the jury that, "[i]t becomes your duty as jurors to evaluate the evidence and determine that evidence which convinces you of its truth." R. 326, ll. 13-18.

At the end of the charge, defense counsel renewed its objection and moved for a mistrial, noting that the court had agreed to remove such language. R. 339, ll. 5-20. The trial court overruled the objection, stating "I think that's nitpicking to the 'nth' degree." *Id.*

Discussion

The purpose of jury instructions is to enlighten the jury as to applicable law so that a just, fair, and proper verdict can be reached. *See State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); *see also State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) ("The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict."). The South

[6] 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012).

working patterns: an approximate area where Appellant sold drugs and the times of day when Appellant usually made sales. R. 47, ll. 8 - 50, ll. 4.

Despite this information, the police were unable to locate Appellant, let alone observe him making any drug sales. R. 63, ll. 22 - 65, ll. 24. Further, while the informer provided accurate information about Appellant's car; the car was traveling legally; no citations were issued; there was no evidence of attempted flight; and there was no pre-stop evidence of evasive behavior. *See Butler*, 343 S.C. 198, 539 S.E.2d 414 (presence of temporary tag on back of car, without more, was insufficient to provide reasonable suspicion that driver was involved in criminal activity).

Likewise Appellant's case is distinguishable from *State v. Willard*, 374 S.C. 129, 64 S.E.2d 252 (Ct. App. 2007), and *State v. Roberts*, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) which were both argued extensively at trial. R. 357. In *Rogers*, law enforcement knew that a crime had been committed - based on a police report of a bank robbery - when they initiated the investigatory stop. *Id.* In *Willard*, law enforcement utilized a non-confidential informant to arrange a drug buy via telephone with officers present. 374 S.C. 129, 64 S.E.2d 252. Crucially, Willard also confessed to law enforcement following the traffic stop. *Id.*

The information furnished by the confidential informer was not sufficiently particularized to provide law enforcement with reasonable suspicion to initiate an investigatory stop. Unlike the informant in *Pope*, who provided a specific time, road, travel direction, confirmed the location with the defendant, and had his information confirmed by law enforcement; the informer in Appellant's case simply alleged that Appellant was selling crack cocaine in the evenings and nights somewhere in the Irmo - St. Andrews area (covering approximately twelve square miles).

Therefore, the trial court erred in refusing to suppress the evidence seized by law enforcement. See *Wong Sun*, 371 U.S. at 484; see also *Nelson*, 336 S.C. 186, 519 S.E.2d 786.

Carolina Supreme Court has held that it is error to give instructions which are calculated to confuse or mislead a jury. *Blurton*, 352 S.C. at 208, 573 S.E.2d at 804 (quoting *Leonard*, 292 S.C. at 137, 355 S.E.2d at 273).

On review an appellate court considers the instructions as a whole, and "if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The standard of review when considering 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.* at 27, 538 S.E.2d at 251 (*citing Estelle v. McGuire*, 502 U.S. 62, 72 (1991)).

Our Supreme Court has specifically held jurors should not be instructed that, "their verdict would represent truth and justice for the parties." *State v. Daniels*, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012); *see also State v. Needs*, 333 S.C. 20, 538 S.E.2d 248 (2000) (instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they risk unconstitutionally shifting the burden of proof to defendant).

In Appellant's case, the trial court instructed jurors three times that they should base their verdict on what they believed to be the truth. Critically, reasonable doubt was defined in terms of the search for the truth:

> The State must prove the Defendant guilty beyond a reasonable doubt. What is a reasonable 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 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.

R. 330, ll. 11-18 (*emphasis added*). In addition, the trial court also twice instructed jurors to determine the "truth of the evidence presented" and to "determine that evidence which convinces you of its truth." R. 325, ll.13-15; R. 326 13-18.

The improper instruction in Appellant's case raises serious concerns that the jury will base its verdict by, "determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard. ***Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt.***" *Daniels*, 401 S.C. at 259, 737 S.E.2d at 477 (*citing United States v. Gonzales-Balderas*, 11 F.3d 1218 (5th Cir. 1994)) (internal citations omitted)(*emphasis added*).

In contrast, the trial courts in *Daniels* and *Aleksey* gave correct reasonable doubt charges, thus their charges, as a whole, properly conveyed the law to the jury. *Id.*; *Aleksey*, 343 S.C. at 29, 538 S.E.2d at 252–53 (reversal not required when improper instructions were given in the context of witness credibility and not reasonable doubt). In Appellant's case, the trial court's reasonable doubt charge was improper and resulted in unconstitutional burden shifting.

Accordingly, Appellant was prejudiced because the court's reasonable doubt charge instructed the jurors' to determine whether it was more likely than not that Appellant was guilty, instead of requiring jurors to weigh whether the State had proven Appellant's guilt beyond a reasonable doubt. Jurors are presumed to follow the law as instructed to them. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998).

It is very likely that the jurors substituted the trial court's repeated admonition to determine the truth in this case for the State's constitutional duty to prove Appellant's guilt beyond a reasonable doubt. *Accord Daniels*, 401 S.C. 251, 737 S.E.2d 737; *Needs*, 333 S.C. 134, 508 S.E.2d 857; *Aleksey*, 343 S.C. 20, 538 S.E.2d 248; *Cf: Todd v. State*, 355 S.C. 396, 585 S.E.2d 305 (2003) (no reasonable likelihood that the jurors applied the judge's instruction in a way that violated Due Process Clause).

The State's reasonable doubt instruction could not have been harmless error. The State did not present overwhelming evidence of Appellant's guilt to the jury, and the trial court's erroneous instructions clearly contributed to the guilty verdict. *See Lowry v. State*, 376 S.C. 499, 509, 657 S.E.2d 760, 765 (2008) ("in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'") (internal citation omitted). This is illustrated by the following facts: Appellant had previously received a mistrial and had an earlier conviction remanded, the length of deliberations, and the jurors' questions regarding constructive possession and Appellant's initial charges. R. 340, ll. 24 - 347, ll. 16.

Thus, the trial judge erred reversibly by instructing the jury that reasonable doubt, "is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act," thereby confusing the jury as to their duty to determine whether the State had proven Appellant's guilt beyond a reasonable doubt. *See Needs*, 333 S.C. 20, 538 S.E.2d 248; *see also Aleksey*, 343 S.C. 20, 538 S.E.2d 248.

IV.

The trial court committed reversible error in refusing to grant a directed verdict of acquittal on Appellant's indictment for possession with intent to distribute within the proximity of a school where the State failed to prove that Appellant knew, or was at a minimum willfully ignorant of the fact, that he was within one half mile of Irmo Elementary School.

Introduction

Appellant was entitled to a directed verdict on the indictment for possession within intent to distribute crack cocaine within the proximity of a school as the State failed to present any substantial circumstantial evidence that Appellant knew, or was willfully ignorant of the fact, that Irmo Elementary School was within a half-mile radius of where he was arrested. R. 283, ll. 21 - 284, ll. 15.

Discussion

Our Supreme Court has held that, when reviewing a trial judge's refusal of a defendant's motion for a directed verdict, the Court is required to consider "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627, 632 (1982), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). *See also, State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997). The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *see also State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395. "When the State fails to produce ***substantial circumstantial evidence*** that the

defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (*emphasis added*). Specifically, the trial court "should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty." *Id.* at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *Lollis*, 343 S.C. 580, 541 S.E.2d 254). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only "if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (citing *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Appellant was indicted for possession with intent to distribute crack cocaine within proximity of a school. R. 387. At the time of Appellant's arrest, this offense was defined as: "[i]t 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 one-half mile radius of the grounds of a public or private elementary school . . ." S.C. Code Ann. § 44-53-445 (1995).[7]

The evidence presented by the State merely raised the suspicion of Appellant's guilt, as the State failed to present evidence any substantial circumstantial evidence that Appellant knew he

[7] Before Appellant's second and third trials, the "Omnibus Crime Reduction and Sentencing Reform Act of 2010" amended the proximity statute to clarify that the General Assembly intended for a defendant to "have knowledge that he is in, on, or within a one-half mile radius of a public or private elementary school. S.C. Code Ann. § 44-53-445 (2010).

Likewise, the trial court's jury charge stated: "[t]he State must prove beyond a reasonable doubt that . . . the Defendant had knowledge that he was in a one-half radius of a school, and that the Defendant intended to distribute crack cocaine within one-half mile radius of the school." R. 421, ll. 9-15.

was within a one-half mile radius of Irmo Elementary School when law enforcement initiated the investigatory stop. "To prove distribution of crack cocaine under [§ 44-53-445] , the State must establish the following elements: (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" *State v. Watts*, 321 S.C. 158, 167-168, 467 S.E.2d 272, 278 (1996)

Where criminal statutes contain significant penalties, courts are reluctant to conclude that the legislature intended any material element of the crime to be one of strict liability. *Morissette v. United States*, 342 U.S. 246 (1952). Our Supreme Court has regularly held that the failure of the legislature to explicitly include a mental state in defining a particular element of a crime does not mean that the legislature intended to make the crime one of strict liability. *State v. Jefferies*, 316 S.C. 13, 446 S.E.2d 427 (1994) (review of the evolution of the kidnapping statute illustrated that it was not intended to be a strict liability offense); *State v. Ferguson*, 302 S.C. 269, 395 S.E.2d 182 (1990) (distribution of cocaine case, controlled substances statute required a mental state of at least criminal negligence); *see also*: *State v. Freeland*, 106 S.C. 220, 91 S.E. 3 (1916) (possible to be guilty of cocaine possession if defendant acted with "willful or negligent want of knowledge. If she was culpably ignorant of the fact, her ignorance would not excuse her").

There was no substantial circumstantial evidence produced by the State tending to show that Appellant knew or was "willfully ignorant" of the fact that Irmo Elementary was within a half-mile of the Kroger. *Freeland*, 106 S.C. 220, 91 S.E. 3 (1916)("statute must be read in the light of the fundamental principle of the common law, which is of general, though, perhaps, not of universal,

application, that ***an evil intent must concur with an act to make it a crime***. Bish. Stat. Crimes, §§ 132, 231")(*emphasis added*).

After initially claiming that she did not know where Irmo Elementary School was, Martin testified *in camera* that the school was "real close" to where she and Appellant were arrested. R. 215, ll. 1-6. The only other testimony on this issue was from Sgt. Finch:

> Q: ...[W]hy did you charge [Appellant] with possession with intent to distribute crack cocaine within proximity of a school?
>
> A: Because it fell within the boundaries or the scope of that law. We were less than a half mile from a school.
>
> Q: What school?
>
> A: Irmo Elementary School.

R. 155, ll. 24 - 156, ll. 6. This was the full extent of the evidence offered by the State that Appellant knew or was "willfully ignorant" of his proximity to the Irmo Elementary School. Appellant was sentenced to fifteen years for PWID within the proximity of a school. R. 356, ll. 1-6.

The evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777. PWID within the proximity of a school is not a strict liability offense and the State failed to present any substantial circumstantial evidence that Appellant had the necessary mental state to commit it.

Therefore, the trial court erred in refusing to grant a directed verdict on Appellant's indictment for PWID within proximity of a school where the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence that Appellant knowingly or with willful ignorance possessed with intent to distribute crack cocaine

within proximity of a school. *See Ferguson*, 302 S.C. 269, 395 S.E.2d 182; *see also Freeland*, 106 S.C. 220, 91 S.E. 3.

V.

The trial court erred reversibly in ruling that: (A) former co-defendant, Melissa Martin's testimony alleging that a prior drug sale occurred immediately before the investigatory stop and alleging that Appellant manufactured crack cocaine in his residence, constituted evidence of an element of trafficking; and (B) 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.

Introduction

Over Appellant's objection, Martin testified that immediately before police initiated the traffic stop, she had sold crack cocaine to two women in the Irmo Kroger's bathroom. R. 232, ll. 1 - 234, ll. 22. Martin claimed that Appellant had waited outside during the sale and that she had conducted the sale at Appellant's instigation. *Id.* Martin alleged that one woman paid with a gift card, the other with cash. R. 248, ll. 8 - 249, ll. 24. No gift card was reported by police, the two women were never located, and no video footage was ever retrieved from the Kroger.

In addition to testifying about the alleged sale, Martin also claimed that Appellant manufactured crack cocaine in their shared residence. R. 227, ll. 9 - 231, ll. 22. The trial court ruled that her testimony on both the sale and the method of manufacturing did not constitute prior bad act evidence, but that her testimony was evidence tending to prove the "all encompassing" nature of trafficking. Accordingly, the trial court declined to conduct a Rule 404(b) analysis. R. 222, ll. 4 - 223, ll. 1.

Discussion

Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts are generally not admissible to prove the defendant's guilt for the crime charged. *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). However, such evidence is admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan,*

369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.*; *State v. Beck*, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000).

Even if otherwise admissible, prior bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 404(b), SCRE; *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007) (trial court must gauge logical relevancy of the prior bad act, whether it reasonably tends to prove a material fact in issue, to the particular purpose for which it is sought to be introduced).

A. The trial court erred reversibly in ruling that Martin's testimony alleging that a prior drug sale occurred immediately before the investigatory stop and alleging that Appellant manufactured crack cocaine in his residence, constituted evidence of an element of trafficking.

As an initial matter, the trial court erred in ruling that Martin's testimony was being offered to prove that Appellant was guilty of trafficking. R. 222, ll. 4 - 223, ll. 1. Trafficking is:

> 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 . . . . is guilty of a felony which is known as "trafficking in cocaine"

S.C. Code Ann. § 44-53-370(e) & (e)(2). In short, trafficking "includes practically any activity related to being involved with drugs above ***a certain weight***." Willaim S. McAninch, W. Gaston Fairey & Lesley M. Coggiola, *The Criminal Law of South Carolina* 448 - 449 (5th ed. 2007) (*emphasis added*).

Petitioner's indictment makes clear that he was accused of trafficking by "actual of constructive possession" or attempted actual or constructive possession, not by conspiracy. R. 387. Other than Martin's testimony, there is no supporting evidence regarding the Kroger sale or the manufacturing of crack cocaine at Appellant's residence. *See State v. Gosnell*, 341 S.C. 627, 535 S.E.2d 453 (2000) (defendant indicted for trafficking by conspiracy "handled" a maximum of 252 grams and could not be found guilty on indictment alleging trafficking by conspiracy in excess of 400 grams).

Accordingly, the trial court erred in ruling that Martin's allegations regarding the prior sale at the Kroger and regarding Appellant's alleged manufacturing of crack cocaine was evidence of an element of trafficking.

B. The trial court erred reversibly by refusing to rule whether the State had proved these alleged prior bad acts by clear and convincing evidence, and whether the testimony's probative value was outweighed by its prejudicial effect.

In the present case, the trial court reversibly erred by ruling that Rule 404(b), SCRE, was inapplicable to Martin's testimony regarding the alleged prior drug sale at Kroger and regarding Appellant's alleged manufacturing of crack cocaine. R. 222, ll. 4 - 223, ll. 1. The trial court incorrectly held that this testimony was being offered to prove an unspecified element of trafficking. *Id.* As detailed above, Appellant was charged with trafficking by constructive possession and the State was only able to produce the 68.88 grams of crack cocaine found on Martin at trial.

Thus, Martin's testimony is evidence of two alleged bad acts that were not the subject of a conviction and that must satisfy the requirements of Rule 404(b), SCRE, to be admissible. *Beck*, 342 S.C. at 135–36, 536 S.E.2d at 682–83 (admissible when it tends to establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent; the evidence must relate to the crime charged). To be admissible, other crimes that are not the subject of conviction must be

proved by clear and convincing evidence. *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998); *State v. Pierce*, 326 S.C. 176, 485 S.E.2d 913 (1997).

Here, the evidence presented by the State of the alleged prior drug sale and the alleged manufacture of cocaine did not rise the level of clear and convincing. For both purported bad acts, the State was totally reliant on Martin's unreliable, biased testimony. *Cf. State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) (testimony that defendant previously murdered cab driver was admissible: there was evidence appellant was in possession of the murder weapon at the time of the cab driver shooting and the cab driver gave a description generally matching appellant).

The State could not produce any surveillance footage from the Kroger, nor the gift card that Martin claimed she accepted as a payment for the crack cocaine. With respect to her claims that Appellant manufactured crack cocaine in their residence, Sgt. Birch testified that his observation of the house did not reveal any suspicious activity. R. 62, ll. 22 - 64, ll. 24; *State v. Humphries*, 345 S.C. 87, 579 S.E.2d 613 (2003)(testimony by former employee that defendant had marijuana delivered to employee's residence two days following defendant's arrest was improper bad act evidence).

Moreover, South Carolina courts have rejected the common plan or scheme exception for prior drug transactions which were similar to the charged offense and involved the same actors, but were otherwise unconnected. *State v. Carter*, 323 S.C. 465, 476 S.E.2d 916 (1996) (requiring courts to conduct a similarity analysis). Appellant was charged with trafficking in crack cocaine by possession or by constructive possession. R. 387.

Therefore, Martin's testimony regarding the alleged Kroger sale and, particularly, Appellant's alleged manufacture of crack cocaine were unconnected to Appellant's specific trafficking charge. *See Humphries,* 354 S.C. at 91, 579 S.E.2d at 615 *citing State v. Humphries*, 346

S.C. 435, 551 S.E.2d 286 (Ct. App. 2001) (discrepancies between delivery to employee's home and alleged prior deliveries to defendant's business defeat similarity requirement); *see also State v. Raffaldt*, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995) ("[i]t is the amount of cocaine, rather than the criminal act, which triggers the trafficking statute").

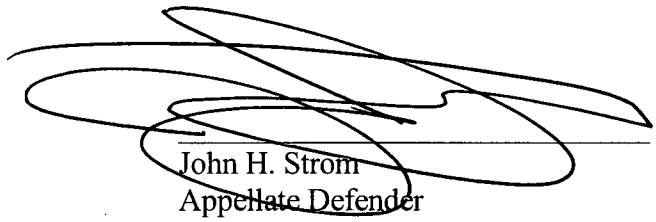
With respect to prejudice, Martin's prior bad act testimony was damning because it provided the State with a coherent narrative alleging that Appellant was the trafficker; despite Martin possessing the crack cocaine and initially claiming the crack cocaine belonged to her. Further, Martin's unsubstantiated testimony emphasizing that Appellant regularly manufactured crack cocaine enhanced the unfair prejudice. Testimony on these alleged prior bad acts also served to confuse the issues and mislead the jury as to the elements of trafficking.

Accordingly, trial court abused its discretion in admitting the Martin's testimony because it constituted impermissible prior bad act evidence under Rule 404(b), SCRE, having no logical relation to the crimes for which Appellant was standing trial, and, to the extent the testimony had any probative value, its probative value was outweighed by its prejudicial effect.

CONCLUSION

For the foregoing reasons, Appellant Jo Pradubsri respectfully requests that this Court reverse Appellant's conviction and remand this case to the Lexington County Court of General Sessions (Issues I, II, III, and V), or in the alternative, issue an Order of acquittal (Issue IV).

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of March, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

March 7th, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Clifton Newman, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JO PRADUBSRI,

APPELLANT

APPELLATE CASE NO. 2015-000208

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of March, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of March, 2015.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.