STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JO PRADUBSRI,

PETITIONER
~~APPELLANT~~

APPELLATE CASE NO 2015-000208

APPENDIX

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THE STATE OF SOUTH CAROLINA
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The State, Respondent,

v.

Jo Pradubsri, Appellant.

Appellate Case No. 2015-000208

Appeal From Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 5499
Heard November 9, 2016 – Filed July 19, 2017

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

MCDONALD, J.: Jo Pradubsri appeals his convictions for trafficking in crack cocaine, possession with intent to distribute crack cocaine within the proximity of a school (the proximity charge), and unlawful carrying of a pistol. Pradubsri argues the circuit court erred when it (1) refused to reveal an informant's identity, (2) found reasonable suspicion existed to justify his traffic stop, (3) gave an erroneous jury instruction on reasonable doubt, (4) refused to grant a directed verdict on the proximity charge, and (5) allowed testimony from a former codefendant that

Pradubsri manufactured crack cocaine in his residence and participated in a drug sale immediately before the traffic stop. We affirm.

Factual Background

Around 3:00 a.m. on November 9, 2008, Sergeant John Finch of the Lexington County Sheriff's Department stopped Pradubsri's vehicle on St. Andrews Road in Irmo based on an informant's tip that the vehicle would likely contain crack cocaine and weapons. Finch conducted the stop as Pradubsri's vehicle exited a Kroger parking lot less than half a mile from an elementary school. Pradubsri was driving with his then-girlfriend, Melissa Martin, sitting in the passenger's seat. When Finch approached the vehicle, he saw furtive or shuffling movements and observed a black 9mm semi-automatic pistol on Pradubsri's side of the car. As Finch removed Pradubsri and Martin from the car, another officer saw that Martin had a small baggie in her clinched fist, a baggie in her waistband, and an unnatural bulge in her pants. In total, police found four baggies of crack weighing approximately seventy-five grams on Martin. Police also found a smaller .25-caliber semi-automatic pistol in a purse under a seat.

Law and Analysis

I. Reasonable Suspicion

Pradubsri argues police lacked reasonable suspicion to justify the traffic stop because the informant's information was neither sufficiently particularized nor corroborated. We disagree.

Before trial,[1] the State proffered testimony about the informant, whom Sergeant Finch had arrested for drugs and prostitution in the past. Finch testified he had used the informant multiple times before Pradubsri's arrest, he always found her information to be reliable, and she had assisted with several cases involving individuals on the "Midland's Most Wanted" list.

In Pradubsri's case, the informant participated informally by making "ten to twenty" phone calls to police over a three-month period. Through these calls, she

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[1] Pradubsri was initially tried in 2010, but his convictions were reversed after this court found the trial court erroneously restricted Martin's cross-examination. *See State v. Pradubsri*, 403 S.C. 270, 743 S.E.2d 98 (Ct. App. 2013). A 2014 retrial ended in a mistrial.

relayed information about Pradubsri's and Martin's vehicle, their travel plans, their nicknames, and the locations where they sold drugs. Specifically, the informant told police the pair mostly sold drugs in hotels and motels and "were moving up and down Bush River [Road] down to St. Andrews [Road] and then back into the Irmo area." The informant also reported where Pradubsri and Martin lived, how much cocaine they bought per week, and where it was cooked into crack.

According to the informant, if Pradubsri was driving at night with Martin as his passenger, the vehicle would likely contain crack and weapons. The informant also identified the weapons: Pradubsri carried a black 9mm Hi-Point semi-automatic pistol, and Martin had a small silver .25-caliber semi-automatic.

On the night of the traffic stop, Finch spotted the silver 2001 Chevy Monte Carlo with a dent on the front right panel on St. Andrew's Road. Pradubsri was driving and Martin was his passenger. Finch had previously dealt with both Pradubsri and Martin but testified he knew Martin "a little more extensively from the prostitution and drugs and on the street." After Finch and another deputy approached Pradubsri's vehicle, Finch saw the handle of a pistol protruding from the gap between the driver's seat and the car's center console.[2] At this point, Finch ordered Pradubsri and Miller to step out of the vehicle, and the deputies found the drugs and second weapon.

Pradubsri moved to suppress the evidence seized during the traffic stop, arguing police did not have reasonable suspicion of criminal activity necessary to justify the stop. The trial court found the stop proper based upon the reliable information provided by the informant that Pradubsri and Martin were in engaged in criminal activity.

"Our review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding." *State v. Willard*, 374 S.C. 129, 133, 647 S.E.2d 252, 255 (Ct. App. 2007). "A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity." *State v. Vinson*, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012). "'Reasonable suspicion' requires a 'particularized and objective basis that would lead one to suspect another of criminal activity.'" *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting *United*

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[2] Finch's investigation revealed Pradubsri was a felon who could not legally possess a firearm.

States v. Cortez, 449 U.S. 411, 418 (1981)). "In determining whether reasonable suspicion exists, the court must consider the totality of the circumstances." *Willard*, 374 S.C. at 134, 647 S.E.2d at 255. "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." *Id.* "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990).

In *White*, police received an anonymous telephone tip that Vanessa White would leave a certain apartment complex at a specific time in a brown Plymouth station wagon with a broken taillight. 496 U.S. at 327. The tipster further stated White would travel to a particular motel and would have about an ounce of cocaine in a brown attaché case. *Id.* Police discovered White's vehicle at the apartment complex, followed it as it drove the most direct route to the motel, and initiated a stop shortly before it reached the motel. *Id.* A consensual search revealed marijuana in a brown attaché case and cocaine in White's purse. *Id.* The United States Supreme Court held that at the time of the stop "the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that [White] was engaged in criminal activity." *Id.* at 331. While acknowledging that not every detail mentioned by the tipster was verified, the Supreme Court placed particular importance on the tipster's ability to predict White's future behavior "because it demonstrated inside information—a special familiarity with [White's] affairs." *Id.* at 331–32. Ultimately, the Supreme Court concluded "[w]hen significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop." *Id.* at 332.

However, in *State v. Green*, this court held an anonymous caller who gave police a tip that Green was carrying a large sum of money and narcotics along with Green's name, a description of his car, and the location he would be departing did not "supply sufficient indicia of reliability to establish reasonable suspicion to justify an investigatory stop." 341 S.C. 214, 218, 532 S.E.2d 896, 897 (Ct. App. 2000). This court noted the caller's information was readily observable and provided no predictive information, especially when the location from which the defendant departed had only two possible exits and the officer had no reason, aside from the tip, to suspect criminal activity. *Id.* at 218, 532 S.E.2d at 897–98. Significantly, this court stated, "Since the telephone call was anonymous, the caller did not place his credibility at risk and could lie with impunity. Therefore, [the court] cannot judge the credibility of the caller, and the risk of fabrication becomes unacceptable." *Id.* at 218, 532 S.E.2d at 898.

Conversely, in *State v. Rogers*, an officer received information from a known informant concerning the location of a planned robbery, the individuals involved, and the vehicle they would be driving. 368 S.C. 529, 532, 629 S.E.2d 679, 681 (Ct. App. 2006). The officer later received a dispatch about the robbery and found and stopped the car described by the informant. *Id.* at 531–32, 629 S.E.2d at 681. On appeal from the denial of Rogers's motion to suppress, this court found *Green* "clearly distinguishable" because it involved an investigatory stop based on an anonymous tip, as opposed to information from a known and reliable informant whom police had used in the past. *Id.* at 535, 629 S.E.2d at 682. Specifically, the court stated the officer "received the information from a known, accountable informant whose reputation could be assessed and who explained how he knew about the planned robbery, thereby supplying a basis, outside of his already proven reliability, for [the officer] to believe the confidential informant had inside information on the matter." *Id.*

More recently, in *State v. Pope*, an informant facing a drug charge arranged a drug sale with the defendant in exchange for a bond reduction. 410 S.C. 214, 219–20, 763 S.E.2d 814, 817 (Ct. App. 2014). The informant described the make, model, and color of Pope's vehicle, as well as the highway and direction in which Pope would be traveling with more than one person. *Id.* at 220, 763 S.E.2d at 817. The informant also called Pope while he was in route to the sale and relayed his specific location to police. *Id.* When police stopped the vehicle and conducted warrantless searches of the vehicle and its occupants, they discovered drug residue, scales, and cash. Later, upon searching the car that transported two of Pope's companions to the detention center, a deputy discovered a yellow bag containing a little more than eleven grams of crack cocaine. *Id.* at 220–21, 763 S.E.2d at 817–18.[3] On appeal, this court found reasonable suspicion existed for the traffic stop because police were able to corroborate the informant's description of the vehicle, the highway and direction of the vehicle, the location of the vehicle at a specific time, and the fact that more than one person would be in the vehicle. *Id.* at 225, 763 S.E.2d at 820.

Likewise, the evidence here supports the circuit court's finding that police had reasonable suspicion to stop the Pradubsri vehicle. *Willard*, 374 S.C. at 133, 647 S.E.2d at 255. Finch's in camera testimony revealed the informant provided police with the following information: Pradubsri's and Martin's nicknames were JoJo and Magic, they drove a silver 2001 Chevy Monte Carlo with a dent on the front right

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[3] The court of appeals further upheld the warrantless searches of the vehicle and found a complete chain of custody was established for the cocaine.

panel, they sold drugs "moving up and down Bush River [Road] down to St. Andrews [Road] and then back into the Irmo area," they lived off of Lord Howe Road, they cooked the cocaine into crack at their home, and they were more likely to be dealing drugs at night when Pradubsri was driving and Martin was in the passenger seat. The informant also specified the vehicle would contain crack, a black 9mm pistol, and a silver .25-caliber semi-automatic weapon.

Given these facts, evidence supports the circuit court's decision that under the totality of the circumstances, the police had reasonable suspicion for the traffic stop. *See Willard*, 374 S.C. at 134, 647 S.E.2d at 255. This case is somewhat unique because the informant here did not give as much predictive information as the tipster in *White* and because the informant provided her information to law enforcement over some three months before Pradubsri's vehicle was located and stopped. However, given that the informant's identity was known to law enforcement and she had a history of providing reliable information, Finch was justified in making the stop once he saw Pradubsri driving a vehicle matching the informant's description in the small, identified area at a time when the informant had reported drugs and two specified weapons would very likely be in the vehicle. *See Adams v. Williams*, 407 U.S. 143, 146–47 (1972) (stating an unverified tip from a known informant may not have been sufficient to establish probable cause but carried enough indicia of reliability to justify a forcible stop and frisk); *Rogers*, 368 S.C. at 535, 629 S.E.2d at 682 (holding reasonable suspicion existed when a police officer stopped a vehicle after receiving information from a known and accountable informant whose reputation could be assessed); *Florida v. J.L.*, 529 U.S. 266, 276 (2000) ("If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip."). Accordingly, we affirm the circuit court's denial of Pradubsri's motion to suppress the evidence seized during the traffic stop.

II. Reasonable Doubt Charge

Pradubsri argues the circuit court erred in instructing the jury that reasonable doubt "is doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act." He further challenges the circuit court's language instructing the jury to "to evaluate the evidence and determine that evidence which convinces you of its truth" and that "it is your duty to determine the effect, the value, weight, and the truth of the evidence presented during trial." We find no reversible error.

During the charge conference, Pradubsri moved to exclude any jury charge language referencing a "search for the truth," arguing it improperly shifted the

State's burden of proof as forbidden by *State v. Daniels*.[4] After a colloquy, the circuit court agreed to remove this line from the charge. Nevertheless, the circuit court charged the jury, "A reasonable doubt is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." Pradubsri objected, but the circuit court overruled the objection and denied a subsequent motion for a mistrial.

"The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). "In reviewing jury charges for error, this [c]ourt must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* "To warrant reversal, a [trial] court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.*

Recently, in *State v. Beaty*, a circuit court used "truth seeking" language in its preliminary jury remarks. Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13–14), *reh'g granted* Mar. 24, 2017. On appeal, our supreme court explained,

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the

[4] 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (instructing a trial judge to remove language from his charge that told the jury to reach a verdict that would represent truth and justice for all parties because such language could alter the jury's perception of the burden of proof).

> jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Id. at 15–16. Nevertheless, the supreme court held the defendant was unable to show prejudice from the comments sufficient to warrant reversal. *Id.* at 16.

Beaty echoes the supreme court's previous admonition against such language in *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998). *Needs* addressed a circumstantial evidence charge and the following reasonable doubt charge:

> [A] reasonable doubt is a doubt which makes an honest, sincere, conscientious juror *in search of the truth* in the case 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 to act upon it in the most important of his or her own affairs.

Id. at 152, 508 S.E.2d at 866.

Needs urged trial courts to avoid using such language but ultimately upheld the conviction because the circuit court reiterated the "beyond a reasonable doubt" standard twenty-six times and the rest of the charge did not contain other disfavored language—particularly the "moral certainly" and "real reason" language found in *State v. Manning*.[5] *See Needs*, 333 S.C. at 154–55, 508 S.E.2d at 867–68.

In Pradubsri's case, the circuit court used truth-seeking language almost identical to that challenged in *Needs*. However, the circuit court referenced the "beyond a reasonable doubt" standard at least twenty times during its instructions. Further, the instructions did not contain *Manning*'s disfavored language. *See Needs*, 333 S.C. at 155, 508 S.E.2d at 867 (holding a charge was harmless partly because "it did not contain . . . troubling language identified in *Manning*"); *see also State v. Kirkpatrick*, 320 S.C. 38, 46, 462 S.E.2d 884, 889 (Ct. App. 1995) (noting a charge was not defective partly because it lacked "language found objectionable in the *Manning* case").

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[5] 305 S.C. 413, 409 S.E.2d 372 (1991).

In considering Pradubsri's argument that the challenged language improperly shifted the State's burden of proof, we note the circuit court stated, "The Defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt." Additionally, the circuit court instructed, "The presumption of innocence is like a robe of righteousness placed about the shoulders of the Defendant[,] which remains with the Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt." Thus, our review of the record and the entire charge reveals no prejudice sufficient to warrant reversal. *See Beaty*, No. 1 at 16 (reviewing the trial court's comments and the entire trial record and concluding there was no prejudice from the trial court's error sufficient to warrant reversal); *Simmons*, 384 S.C. at 178, 682 S.E.2d at 36 (holding appellate courts must consider the trial court's jury charge as a whole); *id.* ("If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.").[6]

III. Remaining Issues

As to the remaining issues, we affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Pradubsri's argument that the circuit court erred in refusing to reveal the informant's identity, we find the circuit court acted within its discretion. *See State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003) ("[I]f the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances. On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere 'tipster' who supplies a lead to law enforcement."); *id.* at 90, 579 S.E.2d at 614–15 ("The burden is upon the defendant to show the facts and circumstances

[6] We find unpreserved Pradubsri's arguments that the circuit court erred in instructing the jury to determine "the effect, the value, weight and the truth of the evidence presented" and that it was the jury's duty to "determine that evidence which convinces you of its truth" because Pradubsri's trial objection related only to the "search for the truth" language. However, even if the other "truth" references are considered, the instructions as a whole adequately covered the law and do not warrant reversal. *See Simmons*, 384 S.C. at 178, 682 S.E.2d at 36.

entitling him to the disclosure."); *id.* at 90, 579 S.E.2d at 615 (holding a trial court did not abuse its discretion by failing to require disclosure of an informant's name).

2. As to Pradubsri's argument that the circuit court erred in refusing to grant a directed verdict on the proximity charge, we find the charge was correctly submitted to the jury. *See State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 477–78 (2004) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* at 593–94, 606 S.E.2d at 478 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.").[7]

3. As to Pradubsri's argument that the circuit court erred in allowing Martin to testify about Pradubsri's prior bad acts, we find the circuit court did not abuse its discretion in allowing the testimony. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *State v. Sweat*, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004) ("Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted.").

Conclusion

For the foregoing reasons, Pradubsri's convictions are

AFFIRMED.

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[7] Further, we note the version of the statute that governed the proximity charge at the time of Pradubsri's arrest did not contain a knowledge requirement and made it a crime to "unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a[n] . . . elementary . . . school . . . ." S.C. Code Ann. § 44-53-445 (2002). The statute was rewritten in 2010 and now requires that a person "have knowledge that he is in, on, or within a one-half mile radius of the grounds of a public or private elementary . . . school . . . ." S.C. Code Ann. § 44-53-445(B)(1) (Supp. 2016). However, this new requirement has no bearing on Pradubsri's case. *See State v. Henkel*, 413 S.C. 9, 11 n.4, 774 S.E.2d 458, 460 n.4 (2015) (stating a statute that was amended in 2009 was not applicable when the defendant's arrest occurred in 2008).

LOCKEMY, C.J., and KONDUROS, J., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

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JO PRADUBSRI,

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APPELLATE CASE NO 2015-000208

Appeal from Lexington County

Honorable Clifton Newman, Circuit Court Judge

Opinion No. 5499

PETITION FOR REHEARING

On July 19, 2017, this Court affirmed Appellant's conviction and sentence in a published opinion. *State v. Pradubsri*, 2015-OP-5499 (S.C. Ct. App. filed July 17, 2017). Pursuant to Rule 221(a), SCARC, Appellant asks this Court to rehear this matter in light of the significant points overlooked and/or misapprehended by this Court in rendering its opinion, which will be explained more fully below and addressed in the order of this Court's opinion.

First, this Court held that reasonable suspicion existed for law enforcement to initiate the traffic stop of Appellant's vehicle based solely on the information provided by a confidential informant. Notably, this Court conceded that "the informant here did not give as much

predictive information as" confidential informants had in other cases. However, this Court concluded that the informant's record of providing accurate information to law enforcement in unrelated past investigations and her correct information regarding the make and model of Appellant's vehicle, provided reasonable suspicion.

This Court further held that Appellant's presence in "the small, identified area" where the informant had previously stated Appellant would be gave police additional justification to stop Appellant. Respectfully, this Court's conclusion that reasonable suspicion existed based solely on the informant's information was an error of law.

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). Reasonable suspicion "entails. . . something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause" *State v. Butler*, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000).

In determining that reasonable suspicion existed to support the traffic stop, this Court ignored that the informant had proven she was unreliable. Finch testified that he received between ten and twenty calls about Appellant from the informant over a three month period. R. 47, ll. 8-18. In many of her calls, the informant 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 informant in the present case is a less precise, less reliable version of the informant in *State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014). Moreover, when law enforcement finally located Appellant, they did not observe any of the illegal activity the informant attributed to Appellant.

This Court also misconstrued "the small, identified area" that the informant predicted Appellant would located in during the three months she was in contact with law enforcement. The informant told police that Appellant lived and sold drugs in the Irmo – St. Andrews area. This description encompasses one entire municipality, Irmo, and a densely inhabited portion of another, Columbia. The area spans two counties and has a combined population of over thirty thousand people.

The informant's vague location information coupled with the three months of unsuccessful efforts by law enforcement to corroborate her allegations and the complete lack of incriminating corroborative details when Appellant was finally located meant that it was an error for this Court to conclude that the informant's information was sufficiently particularized to provide law enforcement with reasonable suspicion to initiate an investigatory stop. *Cf. State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014) (reasonable suspicion existed where informant provided a specific time, road, travel direction, confirmed the location with the defendant, and his information confirmed by law enforcement); *State v. Roberts*, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) (reasonable suspicion existed where informant accurately predicted robbery and police located car matching informant's information after the robbery).

Next, this Court held that, while the trial court erred defining reasonable doubt as "doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act," the error was harmless. This Court concluded that the error was harmless because the trial court "referenced the 'beyond a reasonable doubt' standard at least twenty times during its instructions." Respectfully, this Court's prejudice analysis makes two significant errors.

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).

First, this Court appears to have overlooked the fact that, while the trial court used the words "beyond a reasonable doubt" some twenty times during its instructions; the trial court provided only one definition of what "beyond a reasonable doubt" actually means. Namely, reasonable doubt was a "doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act," Simply repeating that jurors must find Appellant guilty "beyond a reasonable doubt" did not correct the erroneous definition of what constituted "beyond a reasonable doubt."

Jurors are presumed to follow the law. The trial court repeatedly instructed jurors that they must determine whether the State had proven Appellant's guilt beyond a reasonable doubt. The trial court defined reasonable doubt in a way that suggested jurors should determine whether they believed the State's version of events was more likely true or the defendant's version of events.

Thus, the trial court was instructing jurors to decide Appellant's guilt using a preponderance of the evidence standard. Instructing jurors, whether done once or one hundred times, that they must find Appellant guilty "beyond a reasonable doubt" cannot render the trial court's use of an improper definition of "beyond a reasonable doubt" harmless.

Second, this Court overlooked that the trial court not only defined "beyond a reasonable doubt" in terms seeking the truth, but 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.

Under these circumstances, 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 State v. Daniels*, 401 S.C. 251, 737 S.E.2d 737 (2012); *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (2000); *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000); *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).

In addition, this Court held that the trial court did not err in refusing to reveal the informant's identity. Citing to *State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003), this Court concluded that the informant was not a material witness or an active participant in a criminal transaction.

This conclusion was an error of law. The informant was material witness. As an initial matter, as the State was not required to identify the informant, 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 informant'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).

Moreover, the State's theory at trial was that Appellant was the drug dealer and Martin simply worked for him in exchange for drugs. The defense's theory was that Martin was the drug dealer and Appellant was her driver. The defense highlighted that Martin had the drugs on her when they were stopped by police and that she ran her own prostitution ring, which included drug dealing, independent of Appellant. Martin had an obvious motive to lie and to cast blame on Appellant. She had also received a highly favorable plea deal in exchange for her testimony despite repeatedly violating the terms of her probation.

The informant was the only one apart from Martin and Appellant who could testify as to whether Appellant or Martin was the drug dealer. This court also failed to take into consideration

the fact that Appellant was arrested over six years before trial so there was minimal risk that revealing the informant's identity would compromise the flow of information to law enforcement or harm the informant. R. 387.

Law enforcement's investigative decisions made the informant a material witness. The police choose to forgo other investigative techniques such as controlled buys or surveillance, and did not even wait for a pretextual traffic violation. Furthermore, the State relied totally Martin's testimony to establish that Appellant – and not Martin – was the drug dealer. *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*).

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

This Court also misconstrued Appellant's argument with respect to the *mens rea* requirement of the former version of the proximity charge. 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).

This Court was correct in noting that the current version of the statute requires the State to prove a defendant knew he was within a one-half mile radius of one of the enumerated places. This Court was also right to note that the current version of the statute has no relevance to Appellant's case. However, Appellant's argument raises a separate issue and the subsequent revision of the proximity charge statute is irrelevant to the appeal.

This Court erred in rejecting Appellant's argument that the previous version of the statute – at a minimum – required Appellant to act with criminal negligence. 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); *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).

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); *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").

The default *mens rea* requirement in South Carolina is criminal negligence. Criminal negligence is defined in our case law as when a defendant "inadvertently creates a substantial and unjustifiable risk of which he ought to be aware." *State v. Taylor*, 323 S.C. 162, 473 S.E.2d 817 (Ct.App.1996).

In Appellant's case, 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. 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.

Therefore, this 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.

Finally, this Court erred in affirming the trial court's admission of Martin's testimony regarding alleged prior drug manufacture and sales by Appellant. The trial court erroneously ruled that the prior manufacturing and sales were an element of trafficking. Accordingly, the trial court refused to rule on whether the State had proven these prior bad acts by clear and convincing evidence.

Affirming the trial court's ruling was legal error. Trafficking in crack cocaine is defined 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 . . . . 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 accused him of trafficking by "actual of constructive possession" or attempted actual or constructive possession of 68.88 grams of crack cocaine. Appellant was not charged with conspiracy to traffick in some larger, undetermined amount of crack cocaine. R. 387. Therefore, the prior manufacture and sales of crack cocaine could not have constituted proof of an element of Appellant's trafficking charge. *State v. Amerson*, 311 S.C. 316, 428 S.E.2d 871 (1993).

Had the trial court properly assessed the evidence of prior drug sales and manufacture under Rule 404(b), SCRE, it would have been clear that the State could not prove these prior bad acts by a preponderance of the evidence and that the danger of unfair prejudice substantially outweighed any marginal relevance.

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).

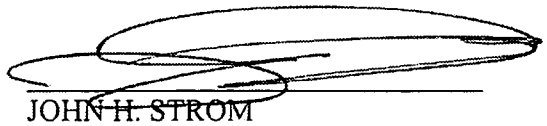
The State could not produce any surveillance footage from the Kroger, nor the gift card that Martin claimed she accepted as a payment for the crack cocaine. With respect to her claims that Appellant manufactured crack cocaine in their residence, Sgt. Birch testified that his observation of the house 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).

Turning 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. Most importantly, these alleged prior bad acts confused the issues and misled the jury as to the elements of trafficking.

Consequently, this court erred in affirming the trial court's admission of 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.

In light of the factors listed above that were overlooked and/or misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court rehear the matter and dismiss the charge against him.

Respectfully Submitted,



JOHN H. STROM
Appellate Defender

This 25th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

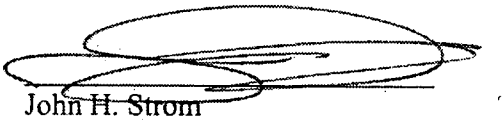
V.

JO PRADUBSRI,

APPELLANT

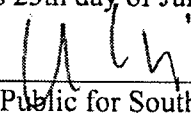
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jo Pradubsri, #181097, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 25th day of July, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 25th day of July, 2017.



_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025

The South Carolina Court of Appeals

The State, Respondent,

v.

Jo Pradubsri, Appellant.

Appellate Case No. 2015-000208

ORDER

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

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
John Harrison Strom, Esquire
William M. Blitch, Jr., Esquire
Samuel R. Hubbard, III, Esquire
The Honorable Clifton Newman

FILED

August 18, 2017