STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



Certiorari to the Court of Appeals
Appeal From Lexington County
Hon. Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2017-002061

The State, Respondent,

v.

Jo Pradubsri, Petitioner.

Opinion No. 5499 (S.C. Ct. App. filed July 19, 2017)

**RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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## STATEMENT OF THE CASE

The State agrees with Petitioner's procedural statement of the case.

## ARGUMENT

### I. The Court of Appeals correctly found the trial court did not err in refusing to require disclosure of the identity of the State's confidential informant who was a mere tipster and did not participate in the underlying crime committed by Petitioner.

The Court of Appeals correctly found the trial court did not abuse its discretion in refusing to require disclosure of the identity of the informant. The informant did not materially participate in the crime and served as a mere tipster. As a result, the motion to require disclosure of the person's name or other information was properly denied.

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

In seeking the disclosure of the identity of a confidential informant, "the burden is upon the accused to show facts and circumstances giving rise to an exception to the privilege against

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

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

The informant in this case made multiple phone calls to Sergeant Finch with information regarding Petitioner and his co-defendant. The informant provided very specific information about the vehicle they drove—a 2001 Chevy Monte Carlo, silver, with a dent on the right front quarter panel. (T.78-79; R.47-48). The informant also provided information about the types of drugs involved and where Petitioner and his co-defendant would sell the drugs. (T.79; R. 48). The informant indicated Petitioner and the co-defendant would have crack cocaine in the vehicle as well as two handguns, a black 9mm Hi-Point that belonged to Petitioner and a silver .25 caliber pistol belonging to his co-defendant. (T.81-82; R.50-51). Sergeant Finch indicated the informant was not involved in the distribution or trafficking for which Petitioner was charged.

(T.86; 105; R.55; 74). Sergeant Finch specifically testified he had no information indicating the informant was "involved with this crack cocaine in this case." (T.105; R.74).

Accordingly, the trial court did not err in refusing to require disclosure of the informant's identity when the informant was a mere tipster and Petitioner could not offer anything more than mere speculation regarding how the identity would assist in his defense or any testimony the informant could provide relevant to his guilt or innocence. Accordingly, this Court should deny the Petition for Writ of Certiorari as to Question I.

## II. The Court of Appeals correctly found the trial court did not err in finding reasonable suspicion supported the stop of Petitioner's vehicle when the information received was corroborated and originated from a reliable informant.

The Court of Appeals correctly found the State demonstrated the officers had reasonable suspicion to justify the stop of Petitioner based on the known reliability of the informant and corroboration of details provided. Therefore, the trial court did not err in denying the motion to suppress.

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

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . ." U.S. Const. amend. IV. The ultimate touchstone of the Fourth Amendment is "reasonableness," and the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). "A warrantless search withstands constitutional scrutiny under the Fourth

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

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

An anonymous tip lacks sufficient indicia of reliability to support a reasonable suspicion to conduct a stop. See e.g., Florida v. J.L., 529 U.S. 266 (2000). However, where sufficient indicia of reliability are present, a stop may be properly conducted based on reasonable suspicion. See e.g., State v. Rogers, 368 S.C. 529, 535, 629 S.E.2d 679, 682 (Ct. App. 2006) (finding reasonable suspicion existed where specific information provided by a known informant who could be held accountable and whose reputation could be assessed). In J.L., the United

States Supreme Court (USSC) noted the distinction between an anonymous tip and one from a known informant: "Unlike a tip from a known informant whose **reputation can be assessed** and **who can be held responsible** if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." J.L., 529 U.S. at 270 (emphasis added).

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

In Navarette v. California, 134 S. Ct. 1683 (2014), the USSC determined a 911 call provided sufficient indicia of reliability for reasonable suspicion to stop a vehicle for drunk driving. The Court found "[b]y reporting that she had been run off the road by a specific vehicle—a silver Ford F–150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." Id. at 1689. Additionally, details such as the vehicles location were corroborated by the police prior to the stop. Id. Further, the Court found the 911

system provided a means for identifying the informant and holding her accountable for any false information. Id. at 1689-1690; see also, State v. Pope, 410 S.C. 214, 225, 763 S.E.2d 814, 820 (Ct. App. 2014) ("We find Harris' 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, Harris was not a confidential informant and exposed himself to criminal liability should the information he supplied to officers prove to be false. Therefore, we find the trial court did not err in denying the motion to suppress the evidence seized during the search of the vehicle because law enforcement had reasonable suspicion to justify the traffic stop.").

In the instant case, the informant was an individual known to Sergeant Finch and the Lexington County Sheriff's Department. The informant provided significant information in the past which lead to multiple arrests. (T.74-77; R.43-46). Further, the informant gave specific details about the area of town in which Petitioner dealt drugs; who he would be with; the vehicle they would be driving, including the location of a specific dent on the vehicle; and the type of drugs and weapons they would have in their possession.[1] (T.78-82; R.47-51). Significantly, Sergeant Finch corroborated the details of the car and the area of town it was located in prior to making the stop. (T.83; R.52). He also knew both Petitioner and his co-defendant. (T.82; R. 51). Finally, because the informant was known to Sergeant Finch, the informant's reputation could be assessed and the informant could be held accountable for any false information provided. (T.77; R. 46).

[1] This information alone would be sufficient indicia of reliability to allow for **probable cause** to obtain a search warrant. See e.g., Illinois v. Gates, 462 U.S. 213, 238 (1983); State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). Certainly it is sufficient to establish a proper basis for reasonable suspicion.

Accordingly, this case is similar to the cases of White, Navarette, Pope, and Rogers and the Court of Appeals correctly found Sergeant Finch's stop of Petitioner's vehicle was properly made and supported by reasonable suspicion. Accordingly, this Court should deny the Petition for Writ of Certiorari as to Question II.

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

The Court of Appeals correctly found no prejudice existed from the trial court's instructions when read as a whole. Petitioner contends the trial court erred in giving a reasonable doubt instruction which included a definition of reasonable doubt that included it "is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." He contends using the language "search for the truth" is error and is an incorrect explanation of the burden of proof of reasonable doubt. The trial court properly charged the jury on the State's burden of proof and the included language would not have confused the jury or caused its verdict to be rendered on an incorrect standard.

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

Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v.

Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

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

Significantly, this Court has repeatedly recognized trial judges are not required to specifically define reasonable doubt when instructing the jury in criminal cases. See State v. Adams, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) (finding no error in the trial judge's refusal to define reasonable doubt during the jury instructions). "Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). "The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." Id. (citing Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

Petitioner objects to three statements by the trial court. In the instant case, the trial court charged the jury regarding its role as fact finder and stated: "As jurors then, it is your duty to determine the effect, the value, weight, and truth of the evidence presented during this trial." (T.413; R. 325). Further, in continuing to define the jury's role as fact finder and in judging credibility, the court stated: "It becomes your duty as jurors to evaluate the evidence and determine that evidence which convinces you of its truth." (T.414; R. 326).[2] Finally, in defining reasonable doubt, the court stated in part: "A reasonable doubt is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." (T.418; R. 330). None of these charges, however, alter the burden of proof, shift the burden of proof to Petitioner, or create a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution.

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

[2] Any objection to the first two statements raised by Petitioner are not preserved for review as the only objection raised at trial was to the reasonable doubt charge given by the court. (T.427; R. 339). See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal). As a result, this Court should not consider the first two statements in its determination of whether the trial court committed reversible error.

the burden of proof beyond a reasonable doubt." Aleksey, 343 S.C. at 28-29, 538 S.E.2d at 252.[3] The jurors were not told to make their decision based on a quest for the truth, but were clearly instructed their decision would be based on whether the State met its burden beyond a reasonable doubt.

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

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

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

He charged:

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

(T.417-418; R. 329-330) (emphasis added). The jury charge, when read as a whole, did not create a reasonable likelihood the jury applied the instruction in an unconstitutional manner.

Nothing in this charge shifted the burden to Petitioner, and instead the court's charge, when read as a whole, made it perfectly clear the burden of proof was on the State beyond a reasonable doubt. As in Hoffman and Aleksey this Court should find the charges as given were proper statements of the law and did not create a reasonable likelihood the jurors applied the instructions in an unconstitutional manner. Accordingly, this Court should deny the Petition for Writ of Certiorari as to Question III.

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

The Court of Appeals correctly found the trial court properly admitted the testimony of the drug transaction because it was relevant to prove a material fact. The evidence served as both *res gestae* of the crimes for which Petitioner was charged as well as substantive evidence to prove elements of the crimes. Additionally, even if not properly admitted as res gestae or to prove elements of the crimes, the testimony was properly admitted as a prior bad act to prove intent.

In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

**Proving an Element of the Crime**

First, the testimony regarding Petitioner manufacturing crack cocaine at his home as well as the testimony about the drug transaction at Kroger are evidence supporting elements of the charged offenses of trafficking crack cocaine and distribution of crack cocaine within proximity of a school. "Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted." State v.

Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004). Further, "relevant evidence admissible for [purposes other than to attack a defendant's character] need not be excluded merely because it incidentally reflects upon the defendant's reputation." State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980).

In order to prove trafficking, even as indicted based solely on possession, the State had to establish Petitioner actually or constructively possessed the large quantity of drugs. The testimony that he purchased cocaine, brought it back to his home to use to manufacture crack cocaine, and directed the sale of the crack cocaine certainly is relevant evidence tending to prove the element that Petitioner knowingly possessed the drugs even though they were physically found on his former co-defendant, Martin.[4] The trial court's ruling made it clear he was admitting the testimony in order to establish the element of possession for the trafficking charge. (T.284; R. 223).

Additionally, to establish the proximity charge, the State had to prove Petitioner distributed, manufactured, sold, or possessed with the intent to distribute the crack cocaine within one-half mile of the school. The testimony indicated Petitioner manufactured the crack cocaine at his residence in the Irmo area, transported the crack cocaine to the Kroger a short distance away, directed his former co-defendant to sell the crack cocaine at the Kroger, and reaped the benefit of the distribution. As the trial court concluded, the testimony establishes the necessary element of intent to distribute within one-half mile of the school for the proximity charge. Accordingly, because the trial court properly found both pieces of testimony were relevant to proving a material fact or element of the crimes for which Petitioner was charged,

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

there was no need to even conduct analysis under Rule 404(b), SCRE. Further, the trial court's determinations were correct and it was not an abuse of discretion to admit the testimony for the purposes cited by the trial court.

***Res Gestae***

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

This evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "*res gestae*."

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)). The story in the instant case is Petitioner's

involvement with a significant quantity of drugs when stopped during an investigatory stop. In order to properly tell that story to the jury, the testimony regarding how he acquired the drugs, manufactured the drugs, and directed the sale of the drugs is necessary for a full presentation because it is intimately connected with the underlying charges. The full context of the crime is not presented to the jury if they begin the story only upon the traffic stop after much of Petitioner's involvement with the drugs has already taken place.

**Rule 404(b), SCRE**

Even if the Court found the evidence was not properly admitted as relevant evidence of elements of multiple offenses for which Petitioner was charged, nor as *res gestae*, the evidence would still be properly admitted under Rule 404(b). Petitioner has changed his argument from his Brief with the Court of Appeals. Initially, he maintained the trial court erred "by refusing to rule whether the State had proved these alleged prior bad acts by clear and convincing evidence, and whether her testimony's probative value was outweighed by its prejudicial effect." (App.Br.6; 39). This differs from his current argument in which he maintains the trial court should not have found the testimony necessary to prove an element but instead should have concluded the testimony was improper prior bad act testimony. (Pet.p.22).

First, Petitioner never asked the court to conduct further analysis regarding whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. As a result, any claimed error regarding the trial court's failure to conduct the balancing test is not preserved for review on appeal. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court.").

The court held the evidence proved the prior bad acts by clear and convincing evidence: "I don't believe it's a prior bad act, but to the extent that it is, I believe her testimony meets that it may be considered by someone as being relevant to this analysis. **I find the testimony to be clear and convincing** and uncontradicted based on what I heard." (T.283; R. 222) (emphasis added). Petitioner's statement of issue only contests the lack of a finding and the record clearly demonstrates a finding was made by the trial court. He has never appealed this finding so it is the law of the case.

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

The trial court properly concluded the testimony of Petitioner's former co-defendant was clear and convincing. She explained why they were at the Kroger location where they were later found—to conduct a drug transaction. The information was corroborated by the informant's tip to Sergeant Finch regarding what Petitioner and Martin would be doing. Petitioner was found with drugs, money, and a gun in his possession. The trial court did not abuse its discretion in finding the evidence clear and convincing.

Additionally, the evidence was properly admitted to prove intent, a required element of the proximity charge. The fact Petitioner bought cocaine, used it to manufacture crack cocaine, and sold crack cocaine from the same batch of drugs he was found with shortly later definitely

shows an intent to distribute those drugs as required to prove the proximity charge. The trial court did not err in allowing the testimony to prove elements of the crime, as part of the *res gestae* of the crimes, or as a prior bad act to demonstrate Petitioner's intent. Accordingly, this Court should deny the Petition for Writ of Certiorari as to Question IV.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 3, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal From Lexington County
Hon. Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2017-002061

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The State, Respondent,

v.

Jo Pradubsri, Petitioner.

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**PROOF OF SERVICE**

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I, Anne A. Mueller, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served.
This 3rd day of November, 2017.

Anne Mueller

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