STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 5511 (S.C. Ct. App. filed August 23, 2017)

THE STATE,

RESPONDENT,

V.

LANCE LEON MILES,

PETITIONER.

APPELLATE CASE NO. 2015-000308

APPENDIX

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The State, Respondent,

v.

Lance Leon Miles, Appellant.

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Appeal From Lexington County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5511
Heard June 7, 2017 – Filed August 23, 2017

AFFIRMED

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

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HILL, J.: Lance L. Miles appeals his conviction for trafficking in illegal drugs in violation of section 44-53-370(e)(3) of the South Carolina Code (Supp. 2016). He argues the trial court erred by: (1) instructing the jury, in reply to a question they posed during deliberation, that the State did not have to prove Miles knew the drugs were oxycodone; (2) denying his directed verdict motion; and (3) admitting three

statements he contends were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1960). We affirm.

I.

While scanning parcels for illegal drugs at the Federal Express office in West Columbia, agents from the Lexington County Sheriff's Office became suspicious of a package. They arranged for a controlled delivery to the listed address, which was within an apartment complex. Surveilling the delivery, they observed the delivery person ring the doorbell and leave the package by the front door. A few moments later, an agent noticed Miles exit a nearby apartment and begin walking around the parking lot. The agent then saw a young female emerge from the delivery address. She looked at the box, got on her phone, quickly hung up and went back inside. Miles then got on his phone while walking towards the box. Miles picked up the box and started back to his apartment. Seeing the agents advancing to intercept him, he tried to ditch the box. The agents apprehended and handcuffed him.

Agent Edmonson immediately questioned Miles about the contents of the box. Miles claimed he did not know what was inside. Edmonson then asked if there were drugs inside the box; Miles responded there probably were, but he did not know what kind. At this point, Edmonson read Miles his *Miranda* rights and asked Miles again whether there were drugs in the box. Miles again responded the box could contain drugs, but he did not know what kind. Upon obtaining a search warrant and Miles' consent, the agents opened the box and discovered three hundred pills that a chemist later testified contained a total of nine grams of oxycodone. Edmonson next asked Miles to write down everything he knew about the box and the drugs. Edmonson then reread Miles his *Miranda* rights, and Miles wrote a statement admitting he had been paid one hundred dollars to pick up the box, someone named "Mark" had called him to pick it up, and the "owner" was a "Stacks" from Tennessee.

Edmonson then wrote out two questions. First, "Did you know drugs are in the parcel 'box'?" Miles wrote, "Yes." The second question and answer—related to Miles' admission that he had previously picked up packages for money—were redacted and not presented to the jury.

Miles was indicted for trafficking in illegal drugs, in violation of section 44-53-370(e)(3). He did not testify at his trial and moved unsuccessfully for directed verdict, arguing in part there was insufficient evidence he knew the box contained oxycodone. During the jury charge, the trial court gave the following instruction:

> Mr. Miles is charged with trafficking in illegal drugs and in this case we are referring to [o]xycodone. The State must prove beyond a reasonable doubt that the Defendant knowingly delivered, purchased, brought into this state, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, deliver, purchase, or bring into this state and was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive pos[session] of the [o]xycodone. Possession may be either . . . actual or constructive.

The trial court charged that the State bore the burden of proving the amount of oxycodone was more than four grams. The trial court further instructed that the State had to prove criminal intent, which required a "conscious wrongdoing," and that intent may be inferred from the conduct of the parties and other circumstances. After deliberating for some time, the jury asked the following question: "Does the [S]tate have to prove that the defendant knowingly brought into the state four grams or more of [o]xycodone or just any amount of illegal drugs in order to consider this trafficking?"

The trial court, over Miles' objection, replied to the jury as follows:

> [T]he law in South Carolina is the State does not have to prove that the Defendant knew that the drugs in the package were [o]xycodone, just that he knew that the package contained illegal drugs. However, the State does have to prove beyond a reasonable doubt that the illegal drugs that were in the package w[ere] more than four grams of [o]xycodone.

The jury later returned with a verdict of guilty. Because Miles had at least two prior drug convictions, he was sentenced to the mandatory minimum term of twenty-five years, and ordered to pay a $100,000 fine.

II.

Miles' primary argument on appeal is the trial court's supplemental charge misinformed the jury that the State did not need to prove beyond a reasonable doubt that Miles knew the drug he possessed was oxycodone. We review jury instructions to determine whether they, as a whole, adequately communicate the law in light of

the issues and evidence presented at trial. *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013).

Section 44-53-370(e)(3) provides in part:

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

(emphases added).

Miles contends the term "knowingly" as used in subsection (e) applies to each element of the trafficking offense, including the specific type of drugs listed in (e)(3). The issue of whether trafficking requires proof, not only that the defendant knowingly intended to "sell[], manufacture[], cultivate[] . . ." or "posses[]" illegal drugs, but also had knowledge of the precise identity of the illegal drug being trafficked, has, surprisingly, never been addressed by our appellate courts.

We are mindful that "statutory interpretation begins (and often ends) with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." *Smith v. Tiffany*, 419 S.C. 548, 555–56, 799 S.E.2d 479, 483 (2017) (citations omitted).

Courts grapple often with that tricky adverb "knowingly." In *United States v. Jones*, 471 F.3d 535, 538 (4th Cir. 2006), the court construed a federal statute that punished "[a] person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." (quoting 18 U.S.C. § 2423(a) (2000 & Supp. 2003)). Rejecting the argument that the government was required to prove the defendant knew the

person transported was a minor, Judge Wilkinson noted:

> [C]onstruction of the statute demonstrates that it does not require proof of the defendant's knowledge of the victim's minority. It is clear from the grammatical structure of § 2423(a) that the adverb "knowingly" modifies the verb "transports." Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil. We see nothing on the face of this statute to suggest that the modifying force of "knowingly" extends beyond the verb to other components of the offense.

Id. at 539.

The United States Supreme Court has not been so gun-shy about the adverb.[1] They ordinarily read a "statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). They have also found "the word 'knowingly' applies not just to the statute's verbs but also to the object of those verbs." *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015).

But the Court has not gone so far as to hold that a criminal statute that opens with "knowingly" invariably requires each element be proven by that level of intent. It is commonplace that "different elements of the same offense can require different mental states." *Staples v. United States*, 511 U.S. 600, 609 (1994). Even in *Flores-Figueroa*, the Court acknowledged that "knowingly" does not always modify every element, particularly where the statutory sentences at issue "involve special contexts or . . . background circumstances that call for such a reading." 556 U.S. at 652. The Court emphasized that "the inquiry into a sentence's meaning is a contextual one." *Id.*; *see also Avis Rent A Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986) ("Fundamental to any task of interpretation is the principle that text must yield to context.") (Friendly, J.).

Our duty is to determine legislative intent, and the text of the statute is often the best evidence of that intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Yet the text "must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and

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[1] We suspect the bar for causing grammarians to recoil is low.

accords with its general purpose." *Cabiness v. Town of James Island,* 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (citation and internal quotations omitted).

We find that by using "knowingly" in subsection (e), the Legislature did not intend to require the State to prove a defendant knew the specific type of illegal drug he was trafficking. Section 44-53-370 is concerned with criminalizing numerous forms of conduct involving illegal drugs. Thus, subsection (c) decrees "[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance," subject to certain exceptions not relevant here. S.C. Code Ann. § 44-53-370(c) (Supp. 2016). Our supreme court has held the language now codified in subsection (c) requires the State to prove beyond a reasonable doubt that the defendant knew he possessed a "controlled substance." *State v. Attardo*, 263 S.C. 546, 549, 211 S.E.2d 868, 869 (1975). Subsection (d) then sets forth the penalties for possession based on the type of controlled substance. S.C. Code Ann. § 44-53-370(d) (Supp. 2016).

This brings us to trafficking, subsection (e). Tellingly, our supreme court has explained "[i]t is the amount of [the controlled substance], rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession." *State v. Raffaldt,* 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995). While the court in *Raffaldt* was not confronted with the mental state required for a trafficking conviction, that issue was addressed in *State v. Taylor*, 323 S.C. 162, 166, 473 S.E.2d 817, 819 (Ct. App. 1996). In *Taylor*, the defendant was charged with trafficking more than ten grams of crank, in violation of section 44-53-375(C) of the South Carolina Code (Supp. 1995), which contains language nearly identical to section 44-53-370(e), including placement of the adverb "knowingly." Taylor argued the language required the trial court to charge the jury that "they could not find [her] guilty of trafficking in crank unless she knew there were ten grams or more." *Taylor*, 323 S.C. at 107, 473 S.E.2d at 819. Relying on *Raffaldt,* we disagreed. *Id.*

Raffaldt and *Taylor* illuminate the "special context" revealed by viewing section 44-53-370 as a whole. Because section 44-53-370(c) only requires knowledge that the substance is "controlled," and because *Raffaldt* and *Taylor* tell us the only difference between the elements of distribution and simple possession and the elements of trafficking is the amount of the controlled substance involved, there is no reason to suspect the Legislature meant to require knowledge of the specific type of controlled substance in trafficking prosecutions. Miles' interpretation depends upon isolating "knowingly" in subsection (e) and extending its modifying reach not only to "possession," but to the specific type of drugs listed. Magnifying individual

words of a statute and insisting they be interpreted concretely can lead to strange results. One could, for example, myopically diagram subsection (e)(3) and conclude it criminalizes the possession of more than four grams of table salt, or even the conduct of the delivery person in this case. Further, were we to adopt Miles' version of subsection (e), the State would have to convince the jury beyond a reasonable doubt the defendant not only knew the drugs were oxycodone, but also knew that oxycodone is a "morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or . . . any mixture containing any of these substances." We doubt the Legislature, in passing the drug trafficking laws, meant to create a scenario where a defendant is culpable only if armed with a proficiency in chemistry on par with a pharmacist or Walter White.[2] That is why considering the words in their surrounding environment is essential, especially here where the statute runs to nearly five-thousand words and represents the Legislature's will in the massive field of drug interdiction. Given this background, "[i]f ever we are justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 557 (1943) (Jackson, J., dissenting).[3]

When a statute can be read in its ordinary sense, courts have no right to engineer an extraordinary one. That the Legislature titled the offense defined by subsection (e) as "trafficking in illegal drugs" affirms our conclusion that a defendant need not know the precise identity of the controlled substance to be guilty. *See Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966) ("[I]t is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature."). This sense becomes inescapable when we consider subsection (e)'s reference to sections 44-53-190 and 44-53-210 of the South Carolina Code (Supp. 2016), which set forth Schedules I and II governing classification of controlled substances. While we can interpret statutes by bringing in rules of grammar, logic, and other tools, we must be careful not to construe common sense out.

Courts in many other states share our conclusion that proving the defendant knew the specific type of drug is not required in trafficking and other controlled substance offenses. *See, e.g., State v. Stefani*, 132 P.3d 455, 461 (Idaho Ct. App. 2005); *People v. Bolden*, 379 N.E.2d 912, 915 (Ill. 1978); *Com. v. Rodriguez*, 614 N.E.2d 649, 653

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[2] *Breaking Bad* (AMC 2008–13).

[3] Our emphasis on context and structure bears on the threshold decision of whether the statute is ambiguous, and is not meant to dilute the rule of lenity, as we later discuss.

(Mass. 1993); *State v. Ali*, 775 N.W.2d 914, 919 (Minn. Ct. App. 2009); *State v. Edwards*, 607 A.2d 1312, 1313 (N.J. Super. Ct. App. Div. 1992); *State v. Engen*, 993 P.2d 161, 170 (Or. 1999); *State v. Sartin*, 546 N.W.2d 449, 455 (Wis. 1996).

We cannot leave this issue without discussing the important canon of statutory construction that penal statutes are to be strictly construed. This rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the defendant's favor. *Berry v. State*, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009). But the rule of lenity is not a device to create ambiguity, nor should a court invoke it before considering the words of the statute in context. *State v. Dawkins*, 352 S.C. 162, 166–67, 573 S.E.2d 783, 785 (2002); *State v. Firemen's Ins. Co. of Newark, N.J.*, 164 S.C. 313, 162 S.E. 334, 338 (1931) ("The rule that a penal statute must be strictly construed does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, and is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding . . . even the demands of exact grammatical propriety." (citation and internal quotations omitted)); *see also United States v. Bass*, 404 U.S. 336, 347 (1971) (court should rely on lenity only if, "[a]fter 'seiz[ing] every thing from which aid can be derived,'" it is "left with an ambiguous statute" (quoting *United States v. Fisher*, 6 U.S. 358, 386 (1805) (Marshall, C.J.))).

One of the foundations of the rule of lenity is the concept of fair notice—the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). The line for conduct involving contraband is not merely clear but fluorescent. At least since *State v. Freeland*, 106 S.C. 220, 91 S.E. 3 (1916), we have required a defendant to know or be willfully ignorant that he was dealing with contraband drugs to satisfy criminal intent. This removes innocent activity, inadvertence or accident from the law's grasp. At any rate, we need not apply the rule of lenity here, as context has convinced us section 44-53-370(e)(3) does not require proof of knowledge of the specific identity of the controlled substance. *Carter v. United States*, 530 U.S. 255, 269 (2000) (courts are required "to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'").

Another foundation of the rule of lenity is the separation of powers. Our Constitution commits the task of defining criminal offenses solely to the Legislative Branch.

Bass, 404 U.S. at 347-48; *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). If the Legislature believes our interpretation expands or is otherwise contrary to the scope it intended section 44-53-370(e)(3) and its harsh penalty scheme to have, they can amend the statute.

The trial judge's instructions—including his initial charge that criminal intent consists of "conscious wrongdoing"—conveyed the pertinent legal standards to the jury. He further correctly charged that the State still bore the burden of proving the drug quantity and identity.

III.

Miles next argues he was entitled to a directed verdict because the State presented insufficient evidence that he knowingly trafficked oxycodone. As we have held, the State needed only to prove Miles knew the item was a controlled substance. Because there was evidence Miles possessed the box, the jury was free to infer he knew what was in it. As the assistant solicitor pointed out, the evidence was literally lying at Miles' feet. *See State v. Gore*, 318 S.C. 157, 163, 456 S.E.2d 419, 422 (Ct. App. 1995) ("Possession gives rise to an inference of the possessor's knowledge of the character of the substance."). Of course, Miles also admitted he knew the box contained drugs. Viewing the evidence in the light most favorable to the State, these circumstances go far beyond mere suspicion. There was ample direct and substantial circumstantial evidence from which Miles' guilt could be fairly and logically deduced. Rule 19, SCRCrimP; *State v. Odems,* 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

IV.

Miles contends the series of three statements he gave to law enforcement should have been suppressed because the agents engaged in the "question-first" manipulation of *Miranda* forbidden by *Missouri v. Seibert*, 542 U.S. 600 (2004), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). He asserts Agent Edmonson's immediate questioning of him upon arrest was a custodial interrogation triggering *Miranda*. At trial, the State conceded as much and agreed not to present evidence of Miles' first two statements. But, during a later bench conference, Miles agreed to their admissibility, which is unsurprising as this strategy allowed Miles to get his theory of the case—that he didn't know what kind of drugs were in the package—before the jury without having to take the stand. *See State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582 (2007) (stating an issue conceded at trial cannot be argued on appeal).

The issue of whether admission of Miles' third, written statement violated *Seibert* and *Navy* is unpreserved. Miles did not raise these cases or the "question-first" principle to the trial court. *See State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("For an admissibility error to be preserved, the objection must include a specific ground 'if the specific ground was not apparent from the context.'" (quoting Rule 103(a)(1), SCRE)); *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court." (citation omitted)).

Even if the issue was preserved, any error in admitting the redacted written statement was harmless. The statement was cumulative and could not have reasonably contributed to the verdict. It did not contradict Miles' earlier statements that he did not know the type of drugs in the box, and added he was paid one-hundred dollars to retrieve it. *See State v. Martucci*, 380 S.C. 232, 261, 669 S.E.2d 598, 614 (Ct. App. 2008) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence."). We cannot imagine the vague references to others involved packed any punch with the jury.

V.

The trial court did not err in its supplemental instruction to the jury that the State was only required to prove Miles knowingly trafficked in a controlled substance. There was sufficient evidence to carry the case to the jury, and even if the *Miranda* issue was preserved, we find no prejudice. Miles' conviction is therefore

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.

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Opinion No. 5511

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Lance Miles respectfully petitions this Court for a rehearing in the above-captioned matter after a published opinion, dated August 23, 2017, affirmed his conviction for first degree burglary. In support of his petition, Appellant respectfully alleges that this Court overlooked or misapprehended the following arguments:

Issues I & II

Respectfully, this Court's opinion misconstrued the cannons of statutory interpretation when concluding that a defendant only needs to know that he is possessing a controlled substance to be guilty of trafficking in heroin under § 44-53-370(e). In so doing, this Court effectively rewrote S.C,

Code Ann. § 44-53-370(e), instead of interpreting the plain language of the subsection in a straightforward manner consistent with the other sections of the Narcotics and Controlled Substances Act.

Rules of Statutory Construction

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (*citing State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999) *cert. denied as improvidently granted, State v. Hudson*, 346 S.C. 139, 551 S.E.2d 253 (2001).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan* at 366, 574 S.E.2d 203, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.* Courts should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson*, 336 S.C. 237, 519 S.E.2d 577.

Finally, penal statutes must be strictly construed against the State and in favor of the defendant. *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991). Any doubt as to the proper construction should be resolved in favor of the citizen against the state. *State v. Cutler*, 374 S.C.

376, 264 S.E.2d 420 (1980); *see also Yates v. United States*, 135 S.Ct. 1074 (2015) (ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

The South Carolina Narcotics and Controlled Substances Act

The Narcotics and Controlled Substances Act ("The Act") is a comprehensive statutory scheme regulating the all aspects of the use and prohibition of controlled substances. In § 44-53-110, the Act defines number of relevant terms. For instance, the Act defines "controlled substance" as a drug, substance, or immediate precursor in Schedules I through V in Sections 44-53-190, 44-53-210, 44-53-230, 44-53-250, and 44-53-270." § 44-53-110(6). The Act also defines specific drugs and narcotics such as marijuana, cocaine base, methamphetamine, and opium. § 44-53-110 (9), (27)-(30).

The Act criminalizes the possession of "a controlled substance." Possession encompasses a broad range of conduct:

> Except as authorized by this article it shall be unlawful for any person:
>
> (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase **a controlled substance** or a controlled substance analogue;
>
> (2) to create, distribute, dispense, deliver, or purchase, or aid, abet, attempt, or conspire to create, distribute, dispense, deliver, or purchase, or possess with intent to distribute, dispense, deliver, or purchase a counterfeit substance.

§ 44-53-370(a) (*emphasis added*). Notably, possession of a controlled substance does not require the State to prove a defendant "knowingly" possessed a "controlled substance." *State v. Ferguson*, 302 S.C. 269, 395 S.E.2d 182 (1990) (holding that defendant must be at least criminally negligent when he or she manufactured, distributed, or dispensed a controlled substance under § 44-53-

370(a)). The punishment for unauthorized possession of a "controlled substance," "counterfeit substance," or "controlled substance analogue" varies depending on the which schedule the "controlled substance" falls into. § 44-53-370(b).

The Act also "prohibits any person knowingly or intentionally to possess a **controlled substance** unless the substance was obtained directly from, or pursuant to a valid prescription or order of, a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article." § 44-53-370(c) (*emphasis added*). A person who violates § 44-53-370(c) is sentenced based on the schedule of drug they possessed and the number of prior convictions. § 44-53-370(d).

Turning to § 44-53-370(e)(3), the structure of this subsection different from that of § 44-53-370(a) and § 44-53-370(c). The trafficking statute does not use the word "**controlled substance.**" Rather, South Carolina's trafficking offenses are divided by drug type and then further divided by the amount of the specific drug with sentencing ranges also determined based, in part, on the number of the defendant's prior offenses. § 44-53-370(e)(1)-(8). This structure, when read in a straightforward manner, makes clear that the legislature intended to punish individuals who are "knowingly in actual or constructive possession" of four grams or more of "any morphine, opium, salt, isomer, or salt of an isomer thereof."

Our Supreme Court has held that "knowledge" can to be equated with a defendant having a "**firm belief" or awareness of a particular element or fact.**" *State v. White*, 311 S.C. 276, 44 S.E.2d 741 (1947) (former receipt of stolen goods statute required that State to prove that defendant knew he was receiving stolen goods). It will often be proved by circumstantial evidence. *Id.* Our courts have rejected a definition of "knowledge" that encompasses "willful blindness" as it would improperly "broaden the meaning of knowledge.'" *Ducworth v. Neely*, 319 S.C. 158, 456 S.E.2d

896 (Ct. App. 1995). Requiring knowledge of the specific drug being trafficked makes sense given the harsh penalties for trafficking and the lesser penalties for the two possession offenses.

In issuing its opinion, this Court failed to consider that § 44-53-370(e) is not the only trafficking statute. Additional standalone trafficking offenses are found in § 44-53-375(c) covering trafficking in methamphetamine and crack cocaine. This statute is worded identically to the trafficking offenses found in § 44-53-370(e):

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" and, upon conviction, must be punished as follows if the quantity involved is:

§ 44-53-375(c).

A plain reading of the § 44-53-370(e)(3) requires the State to prove that Appellant knew he was possessing oxycodone. This Court's opinion inserted the term "controlled substance" into § 44-53-370(e). Injecting the word "controlled substance" into § 44-53-370(e)(3) would create two arbitrary classes of trafficking offenses. Under § 44-53-370(e), a defendant could be guilty of trafficking in one of the enumerated drugs, by virtue of there being evidence that he knew he was dealing with a controlled substance. By contrast, to be guilty of trafficking under § 44-53-375(c), the State would have to prove that a defendant specifically knew he was trafficking in methamphetamine or crack cocaine. This inconsistent outcome among similarly situated defendants could not have been the intent of the legislature.

Likewise, adopting this Court's construction of § 44-53-370(e), requiring only knowledge of a "controlled substance," to § 44-53-375(c) would cause a serious due process problem if because trafficking in methamphetamine and crack cocaine are punished more severely than other kinds of trafficking. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) (holding a hate crime statute unconstitutional because it allowed the trial court to increase a criminal sentence beyond a statutory maximum based on his own finding of an aggravating factor).

Trafficking Statutes in Other States

This Court's opinion also misapprehended the practical effect of requiring the State to prove knowledge of the specific drug being trafficked. Other jurisdictions, with similarly written trafficking statutes require the prosecution prove that a defendant knew what drug he was trafficking. *See Way v. State*, 475 So.2d 239 (Fl. 1987) (trafficking statute requires "knowing" possession of cocaine); *Young v. Commonwealth*, 659 S.E.2d 308 (Va. 2008) (defendant must have knowledge of the nature and character of the substance in his possession); *Calhoun v. State*, 460 So.2d 268 (Al. Ct. Crim. App. 1984) (prosecutors must prove that "the accused knew he was in possession of more than one kilogram of marijuana"); *Wilson v. State*, 718 S.E.2d 31 (Ga. Ct. App. 2011) (cocaine trafficking statute explicitly requires that defendant know substance possessed and know it is cocaine); *State v. Zetina-Torres*, 400 S.W.2d 343 (Mo. Ct. App. WD 2013) (must prove defendant knew methamphetamine was in vehicle and that defendant exercised control over it); *Martin v. Commonwealth*, 409 S.W.2d (Ky. 2013) (defendant must know that substance he possessed was cocaine); *State v. Coleman*, 742 S.E.2d 346 (N.C. Ct. App. 2013) (court erred in failing to give instruction that the State must prove defendant's knowledge of the type of contraband he was carrying); *State v. Dudick*, 213 S.E.2d 458 (W.V. 1975) (must prove beyond a reasonable doubt defendant knew there was marijuana where police found it and that defendant exercised

control over it); *State v. Henry*, 63 P.3 490 (Id. Ct. App. 2003) (trafficking requires defendant to have knowledge that the substance was methamphetamine).

Accordingly, this Court erred in affirming the trial court's instruction to jurors that the State did not need to prove beyond a reasonable that Appellant knowingly possessed oxycodone, rather the State needed only to prove that the Appellant knowingly possessed a controlled substance. This response was a misstatement of the applicable law and based on an improper construction of § 44-53-370(e) and § 44-53-370(e)(3).

As to Issue II, the trial court erred in refusing to grant a directed verdict on Appellant's indictment for trafficking in oxycodone as the State failed to present any evidence that Appellant was "knowingly and intentionally in actual or constructive possession" of oxycodone, as required under § 44-53-370(e)(3); *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

Issue III

Respectfully, this Court erred in concluding that the State did not violate Appellant's right against self-incrimination by introducing Appellant's statements to police when the first statement was the product of an interrogation by officers who failed to advise Appellant of his *Miranda*[1] rights and Appellant's subsequent statements were tainted by the initial violation and the product of an involuntary waiver.

The police engaged in an improper interrogation technique. They questioned Appellant without providing *Miranda* warnings. After extracting an incriminating admission, the police then *Mirandized* Appellant and asked him the same questions again. R. 10, l. 4 – 15, l. 12. This issue is preserved for appellate review. Defense counsel objected to the admission of both Appellant's pre-*Miranda* and post-*Miranda* statements. *State ex rel. Wilson v. Ortho-McNeil-Janssen*

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

Pharmaceuticals, Inc., 414 S.C. 33, 777 S.E.2d 176 (2015) (holding counsel is not required to harass the trial judge by making continued objections after an issue has been ruled upon to preserve an issue for appeal.); *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011); *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014).

Admitting Appellant's statements could not have been harmless error as his statements were the only evidence that Appellant knew, under this Court's lower *mens rea* requirement for trafficking, the package he intercepted contained a "controlled substance." *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985) (holding that an error can only be harmless when "it could not reasonably have affected the result of trial."). Without his incriminating admissions, jurors would have had to speculate as to whether Appellant was simply stealing the package – contents unknown – from the front porch of the apartment or whether he believed the package likely contained a "controlled substance." *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (holding an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.).

Appellant's interrogation mirrors those found improper under *Seibert* and *Navy*. *Missouri v. Seibert*, 542 U.S. 600 (2004); *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). Officers interrogated Appellant for an extended period of time prior to advising him of his rights. At the onset of the pre-advisement interrogation, Appellant initially denied knowing the contents of the package. R. 10, ll. 4-25. Unsatisfied with this answer, Agent Edmonson continued to probe Appellant, telling him that he believed there were drugs in the package. *Id.*

Appellant eventually conceded that there were very likely drugs in the package. *Id.* In response to continued questioning, Appellant also allegedly admitted that he had previously picked-up other packages in the past year, and that he did so because he could not find other employment to

support his family. R. 149, ll. 20 - 150, ll. 6. As law enforcement was not forthcoming at trial regarding the extent of its pre-*Miranda* interrogation, the exact contours of the pre-*Miranda* interrogation are unclear.

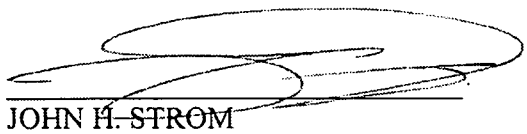
What is clear is that after obtaining a written waiver of Appellant's rights, the same officer, Edmonson, continued to ask Appellant the same questions and Appellant's post-*Miranda* statements were virtually identical to his pre-*Miranda* statements. Moreover, there was no break whatsoever between the unwarned statements and the warned statements as Appellant made his written statement only thirty to forty-five minutes after being tackled and handcuffed by police. R. 176, ll. 8-18; R. 195, ll. 6-15. The setting of the interrogation did not change. The arresting officers did not attempt to cure their error by informing Appellant that his pre-*Miranda* statements could not be used against him.

Accordingly, this Court erred by finding defense counsel failed to preserve his objection to the trial court's admission of Appellant's post-*Miranda* statements. This Court also erred by concluding that the admission of Appellant's statements constituted harmless error.

Conclusion

Based on the foregoing arguments, Appellant Lance L. Miles respectfully requests that this Court this Court issue an order granting a rehearing and, ultimately, reverse his conviction and remand this case to the Lexington County Court of General Sessions (Issues I and III), or in the alternative, issue an Order of acquittal (Issue II).

Respectfully Submitted,



JOHN H. STROM
Appellate Defender

This 7th day of September, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

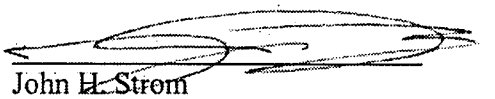
V.

LANCE L. MILES,

APPELLANT

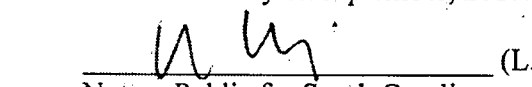
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Lance L. Miles, #299857, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of September, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of September, 2017.



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

The South Carolina Court of Appeals

The State, Respondent,

v.

Lance Leon Miles, Appellant.

Appellate Case No. 2015-000308

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.

J.

J.

J.

Columbia, South Carolina

FILED

October 19, 2017

RECEIVED

OCT 19 2017

APPELLATE DEFENSE

cc:
Alan McCrory Wilson, Esquire
John Harrison Strom, Esquire
Megan Harrigan Jameson, Esquire
Samuel R. Hubbard, III, Esquire

David A. Spencer, Esquire
The Honorable William P. Keesley