

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LANCE LEON MILES,

APPELLANT

APPELLATE CASE NO. 2015-000308

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred reversibly by instructing the jury that the State did not need to prove that Appellant knew the drugs in the package he possessed were oxycodone; rather, for Appellant to be guilty of trafficking, the State only needed to prove that Appellant knew the package contained any illegal drugs.
- II. The trial erred reversibly by refusing to grant a directed verdict acquitting Appellant of trafficking in illegal drugs where the State presented no direct or substantial circumstantial evidence that Appellant knew that the package he possessed contained oxycodone as required by S.C. Code Ann. § 44-53-370(e)(3)(a).
- III. Appellant's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution was violated by the introduction of his statements to police where the first statement was the product of an interrogation by officers who failed to advise Appellant of his *Miranda*¹ rights and his subsequent statements were tainted by the initial violation and the product of an involuntary waiver.
 - A. The court erred in admitting statements made by Appellant prior to officers advising Appellant of his *Miranda* rights and obtaining a valid waiver of those rights where Appellant clearly was in custody based upon the totality of the circumstances.
 - B. The trial court erred in admitting statements made by Appellant subsequent to the officer advising him of his *Miranda* rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officer questioned Appellant in the same location with no temporal break between the post-advisement interrogation and the prior, unwarned interrogation.

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

STATEMENT OF THE CASE

On March 10, 2014, the Lexington County Grand Jury indicted Appellant Lance L. Miles for one count of trafficking in illegal drugs. R. 326-327.

On February 11-12, 2015, Appellant proceeded to trial before the Honorable Thomas A. Russo and a jury. Robert "Theo" Williams represented Appellant, and Assistant Solicitors Micah Caskey and Casey Rankin represented the State.

The jury found Appellant guilty as charged. R. 314, ll. 2-13. The trial court sentenced Appellant to twenty-five years imprisonment. R. 321, ll. 1-8.

STATEMENT OF FACTS

On the morning of September 13, 2013, Agent Doug Edmonson of the Lexington County Sheriff's Department was at a FedEx warehouse near the Columbia Metropolitan Airport looking at arriving packages in an effort to determine if they contained drugs. R. 65, ll. 6 - 67, ll. 13. Edmonson would allege that one particular package had "indicators of maybe containing some type of illegal narcotic." R. 8, ll. 12-19.

According to Edmonson the package was suspicious because: (1) it was "excessively" taped, (2) it was being sent overnight from California, (3) the sender paid in cash; and (4) the sender waived the signature requirement for the recipient. R. 44, ll. 6-23. Edmonson noted the recipient, the address and released the package for delivery. *Id.* He then ran the name of the recipient through a law enforcement database. The name did not match the delivery address. R. 50, ll. 18 - p 51, ll. 23.

Based on this information, Edmonson decided to conduct surveillance of the delivery address. Edmonson enlisted the help of Lexington City Police Officer Marc Miramontes and Lexington County Deputy Travis Bass. Miramontes, sitting in an undercover vehicle, observed the package being delivered and witnessed a never-identified black female, who was talking on a cell phone, step out of the apartment where the package was delivered. R. 31, ll. 3 - 32, ll. 14.

The unknown female looked at the package briefly, then went back inside the apartment. Shortly thereafter, Miramontes saw Appellant walk up to the apartment and pick-up the package. *Id.* Appellant then began to walk towards the back of the apartment complex. Edmonson and Bass drove into the complex's parking lot to intercept Appellant. R. 19, ll. 1 - 21, ll. 19.

Both officers exited their vehicles with guns drawn and ordered Appellant "to the ground." R. 37, ll. 1 - 38, ll. 13. When Appellant failed to immediately do so, the officers forced him to the

ground and handcuffed him. Edmonson interrogated Appellant.² *Id.* Without administering *Miranda* warnings, Edmonson demanded Appellant explain what he was doing with the package and what he thought was in it. R. 10, ll. 4-25.

Appellant initially denied knowing what was in the package. *Id.* Edmonson posited that he believed the package contained narcotics. *Id.* Still handcuffed, Appellant conceded that the package might contain drugs. *Id.* At trial Edmonson would recall, “[a]fter he told me that it might have drugs in it, then I *Mirandized*.” *Id.* at ll. 22-25 (*emphasis added*). Edmonson then told Appellant “I said ‘we need to talk about this . . . I want to talk about this. I want you to tell me everything you know about this.’” R. 12, ll. 19-24. Edmonson alleged that Appellant still wanted to talk about the package.

Having extracted a confession from the recently tackled and handcuffed Appellant without administering *Miranda* warnings, Edmonson then reiterated his initial questions asking Appellant again what did he believe was in the package. R. 11, ll. 10 - 12, ll. 24. Appellant repeated that he believed the package probably contained drugs. *Id.* Crucially, Appellant did not know what kind of drugs were in the package. *Id.* There was no evidence that Edmonson explained to Appellant that his *pre-Miranda* statements were very likely inadmissible.

According to Edmonson, Appellant then gave permission for police to open the package. However, because he “has no problem going the extra mile,” Edmonson requested that a K-9 unit

² During trial, the assistant solicitor joked with Edmonson that he must be “the largest physicist in the world,” referencing Edmonson’s undergraduate degree. R. 81, ll. 10-11. Edmonson agreed, adding that he was “one of the strongest ones in the world. That’s a fact.” *Id.* at ll. 12-13.

Defense counsel noted on cross-examination that, at the time of his arrest, Appellant would have seen two cars converging on him, “one with a rather large strong black man” coming out and is immediately forced to the ground and handcuffed. R. 122, ll. 14-22. Edmonson agreed with the characterization. *Id.*

inspect the package. R. 21, ll. 21 - 22, ll. 21. Once deployed the dog gave a “positive alert” indicating that there may be narcotics in the package. *Id.*

Then, rather than opening the package, Edmonson called Deputy Dennis Tracy who completed a pre-formatted search warrant and presented it to a magistrate. R. 125, ll. 1- 126, ll. 12. The magistrate signed the search warrant and Edmonson finally opened the package. Inside the package were a tee-shirt, a teddy bear, and a wax candle. R. 131, ll. 8 -24; R. 136, ll. 16-24. Police broke open the wax candle and discovered three hundred tablets of oxycodone, with total drug weight amounting to nine grams of oxycodone. R. 251, ll. 8 - 252, ll. 12.

Approximately, thirty to forty-five minutes after he was seized and interrogated without being given *Miranda* warnings, law enforcement had Appellant provide written answers to a series of questions regarding the package. R. 176, ll. 8-18; R. 195, ll. 6-15. Edmonson would recall ordering Appellant, for a third time, to “tell me everything that you know about this and write it down for me.” R. 12, ll. 19-24. Appellant was then belatedly *Mirandized* for a second time. *Id.* Appellant’s written statement indicated that he believed there were drugs in the package, but did not know what kind of drugs they were. R. 13, ll. 3 - 15, ll. 12.

At law enforcement’s prompting, Appellant admitted that he had retrieved packages on three different occasions. R. 25, ll. 8-14. Further, Appellant stated that he did not know the legal name of the drug dealer that directed him to pick up the package. R. 107, ll. 2-13. In addition, police never asked him where he delivered packages on prior occasions and did not ask him where he was to deliver the package at issue.

Law enforcement never identified the black female located in the apartment and never attempted to contact California law enforcement to determine where the package had been sent from. R. 119, ll. 5 - 121, ll. 4. Police ended their investigation once Appellant was arrested. *Id.*

***Jackson v. Denno*³ Hearing**

Appellant moved pre-trial to suppress the oral and written statements he made to police at the time of his arrest. The State conceded that Appellant's pre-*Miranda* oral statements made during custodial interrogation were inadmissible. R. 7, ll. 1-10. However, the State argued that the written statement, which was substantially similar to Appellant's pre-*Miranda* statements, was freely and voluntarily given. R. 41, ll. 4-19.

Edmonson, Miramontes, and Bass all testified. The officers agreed that Appellant gave his written statement approximately thirty to forty-five minutes after he was tackled and handcuffed by law enforcement. R. 176, ll. 8-18; R. 195, ll. 6-9. Edmonson was the only officer able to provide a complete timeline of Appellant's seizure and interrogation.

He conceded that he first interrogated Appellant without giving *Miranda* warnings. R. 19, ll. 16 - 21, ll. 19. Edmonson testified that he only *Mirandized* Appellant after Appellant stated, in response to Edmonson's questioning, that he believed that the package likely contained drugs. Edmonson then had Appellant repeat his confession post-*Miranda*. *Id.* Then for a second time Edmonson belatedly re-*Mirandized* Appellant prior to having him provide written responses to a series of questions - which were virtually identical to his pre-*Miranda* questions. R. 12, ll. 19 - 15, ll. 12.

The trial court ruled that the written statement was "entered into freely and voluntarily without coercion" and that Appellant had been adequately advised of his rights. R. 42, ll. 16-23. However, the court also ruled that Appellant's statements regarding other occasions when he had previously picked-up packages must be redacted from the statement before it was submitted to the jury. *Id.*

³ *Jackson v. Denno*, 378 U.S. 368 (1964).

Trial

Edmonson, Miramontes, and Bass all testified for the State. Deputy Ted Xanthakis also testified to the positive alert by the drug dog.⁴ R. 8, ll. 12 - 9, ll. 7.

Trial Testimony of Doug Edmonson

Edmonson was the State's first and most important witness. Edmonson testified as to the factors that made the package suspicious and how he assembled several other police officers to begin surveillance of the delivery address. R. 88, ll. 7-21. Edmonson recalled that after he was notified that Appellant had taken the package, he and Bass drove up to Appellant, exited their cars with guns drawn, and "secured" him by forcing him to the ground and handcuffing him. R. 94, ll. 3-19.

Edmonson claimed that he believed Appellant was going to run and that Appellant had attempted to discard the package once he saw police. R. 95, ll. 3-13. Edmonson testified that Appellant confessed that he knew "narcotics" were in the package and that he gave permission for Edmonson to open it. R. 95, ll. 1-19. Edmonson then explained the "extra-mile" that he went to have a dog inspect the package and to call in a search warrant. *Id.*

Over the renewed objection of defense counsel, the State introduced Appellant's written statement. R. 102, ll. 4 - 106, ll. 16. When reviewing the statement with Edmonson, the State stressed that Appellant admitted he knew the package contained drugs. R. 106, ll. 24 - 110, ll. 11. However, Appellant's statement never indicated that Appellant knew the drugs were oxycodone. *Id.* In fact, Edmonson conceded on cross-examination that even he believed the package contained

⁴ Curiously, Xanthakis testified that the dog was never tested on its ability to identify oxycodone. R. 228, ll. 3-8.

marijuana. R. 126, ll. 13 - 127, ll. 4. During cross-examination, Edmonson testified that Appellant initially denied knowing what was in the package. R. 123, ll. 1-12.

Additional *Voir Dire* Testimony on Appellant's Pre-Miranda Statements

During a break in questioning, the State argued that the defense had opened the door to all of Appellant's pre-Miranda statements by asking Edmonson if Appellant had initially denied knowing the contents of the package. R. 146, ll. 3-21. The State now claimed that Appellant had apparently made additional, lengthy pre-Miranda statements going beyond simply denying knowledge of the package's contents and then conceding that the package likely contained drugs. *Id.*

Specifically, the State sought to introduce previously undisclosed pre-Miranda statements by Appellant that he was acting as a "mule" to support his family, that he handled packages before, that he had just been released from prison, and that he could not find a job. R. 149, ll. 20 - 150, ll. 6. On *voir dire*, Edmonson reiterated that Appellant did not know what types of drugs were in the package. R. 156, ll. 7-12.

The State claimed that they had not disclosed these statements because they had conceded that the all pre-Miranda statement were inadmissible. R. 158, ll. 2-8. However, now that the defense had opened the door on cross-examination, the statements provided proof of trafficking by conspiracy. R. 154, ll. 15 - 155, ll. 25. The trial court voiced concerns that the State could not prove that the other instances were sufficiently close in time to be admissible under the common scheme or plan exception. R. 160, ll. 13 - 161, ll. 7.

Conveniently, Edmonson claimed - for the first time - that Appellant had told him pre-Miranda that he had picked-up other packages "within that year." R. 161, ll. 18-25. Edmonson helpfully added, also for the first time, that when he interrogates people he always tries to get a timeline "so it won't be so vague." *Id.* Edmonson further alleged, again for the first time, that

Appellant confessed pre-*Miranda* to having done pick-ups between three and seven times in the past year, rather than the three times recorded in the written statement. R. 162, ll. 2-13.

A surprised defense counsel noted ruefully “that’s the first time we have heard this discussion It’s getting better.” R. 162, ll. 14-17. Ultimately, the trial court ruled that the prejudicial impact of Appellant’s alleged admission that he had previously picked-up packages outweighed its probative value. R. 163, ll. 4-13. The court did allow Edmonson to testify that Appellant told him he knew he was being paid to pick-up a package containing drugs. *Id.*

Directed Verdict

At the close of the State’s case, defense counsel moved for a directed verdict arguing that the State presented no evidence that Appellant knew that the drugs in the package were oxycodone. R. 264, ll. 22-24. The State countered that Appellant’s written statement, “clearly acknowledges that he knew the drugs were in there.” R. 265, ll. 3-6. Without taking further argument, the court denied the motion. *Id.* at ll. 7.

The defense rested without presenting any testimony and defense counsel renewed the directed verdict motion. R. 269, ll. 4-17. Defense counsel reiterated that the State had failed to present any evidence that Appellant knew that the package contained oxycodone and that all the testimony presented during the trial indicated that Appellant and the police believed the package contained marijuana. *Id.* The court again denied the motion. *Id.* at ll. 18-24.

Jury Instructions

Defense counsel argued that Appellant was entitled to an instruction that “before you commit a crime, you must have criminal intent to commit the crime, meaning you must have knowledge.” R. 273, ll. 23 - 295, ll. 3. The court disagreed, believing that the trafficking statute did not require an accused “to intend to possession oxycodone.” R. 274, ll. 4-15. Instead, the court

determined that trafficking only required Appellant to know that there are illegal drugs in the package. *Id.* at ll. 23-24.

Unsurprisingly, the State agreed with the court's reasoning. The assistant solicitor averred - without citing to any supporting legal authority - that, "the law is clear, as long as [Appellant] knows they are illegal drugs, we have satisfied that element." R. 276, ll. 12-17.

Jury Question

During its deliberation the jury submitted a two-part question: "[d]oes the State have to prove that the defendant knowingly brought into the State four grams or more of oxycodone or just any amount of illegal drugs in order to consider this trafficking?" R. 317, ll. 1-6. In response the court suggested:

[T]he State does not have to prove that the defendant knowingly brought into the state this particular drug, just that the statute requires knowing that it was illegal drugs. . . . [Appellant] [d]oes not have to know the particular drug that is in question. Simply that he knew they were illegal drugs. . . . My proposed response would be that the State does not have to prove that the Defendant knew the drugs were oxycodone, just that the package contained illegal drugs.

R. 317, ll. 7 - 318, ll. 4.

Defense counsel argued that the legislature created the trafficking statute, with its enhanced penalties, to punish individuals who knowingly possess a large amount of a certain drug; meaning that the defendant must know what drug they are possessing. R. 321, ll. 9-14. The court voiced concern that requiring the State to prove that a defendant knowingly trafficked in a certain drug would render the law unenforceable except in circumstances where the defendant confessed to knowing the type of drug he was trafficking. R. 322, ll. 11-24.

Defense counsel, looking to the trafficking statute, argued that the statute clearly required that the defendant "knowingly sells, et. cetera, then it says four grams or more of morphine." R. 323

5-15. Defense counsel noted that interpreting the statute in order to fit the facts of the case was improper and that straightforward reading of the trafficking statute evidenced that the legislature intended to require the State to prove that a defendant accused of trafficking, knowingly committed any of the enumerated acts with a specific drugs. R. 320, ll. 5-11; R. 323, ll. 5-15; S.C. Code Ann. § 44-53-370(e)(1)-(8).

The Court ultimately decided that because § 44-53-370(e)(3), the statute under which Appellant was indicted, was titled “Trafficking in Illegal Drugs” that the State need only prove that the Appellant knew that the package contained illegal drugs, not that it contained oxycodone. R. 323, ll. 16-22; R. 326, ll. 16 - 327, ll. 16. Focusing on the facts of Appellant’s case, the court concluded that, “[y]ou also have to assume that the legislature didn’t draft statutes that are meaningless.” R. 324, ll. 11-13.

In summary the court noted that, “my interpretation is that the burden of proof on the State, it does not have to prove that a person knew that those particular drugs were oxycodone. . . Simply that they were illegal drugs.” R. 326, ll. 21-25. The Court then instructed the jury: “the law in South Carolina is the State does not have to prove that the Defendant knew that the drugs in the package were oxycodone, just that he knew that the package contained illegal drugs.” R. 329, ll. 21-25.

ARGUMENTS

I.

The trial court erred reversibly by instructing the jury that the State did not need to prove that Appellant knew the drugs in the package he possessed were oxycodone; rather, for Appellant to be guilty of trafficking, the State only needed to prove that Appellant knew the package contained any illegal drugs.

As seen during deliberations, the jury inquired if the State had to prove beyond a reasonable doubt that “the defendant knowingly brought into the State four grams or more of oxycodone or just any amount of illegal drugs in order to consider this trafficking?” R. 317, ll. 1-6. There was no evidence put forward at trial that Appellant knew the box contained oxycodone. Agent Edmonson recalled that Appellant admitted to him that he believed the package contained “narcotics.” R. 95, ll. 1-19. Crucially, Edmonson also recalled that Appellant told him he did not know what kind of drugs were in the package. R. 11, ll. 10-18; R. 21, ll. 13-15; R. 156, ll. 11-15. Edmonson personally believed that the package contained marijuana. R. 179, ll. 1-8.

Defense counsel argued that in order to be guilty of trafficking the State had to prove Appellant knew that the package contained oxycodone. R. 318, ll. 5 - 328, ll. 22. The trial court disagreed, specifically noting that § 44-53-370(e)(3) defined an offense known as “trafficking in illegal drugs” and reasoning that adopting the defense’s argument would render trafficking cases “unprosecutable.” *Id.* Thus, the court instructed the jury that “the State does not have to prove that the Defendant knew that the drugs in the package were Oxycodone, just that he knew that the package contained illegal drugs.” R. 329, ll. 22-25.

The trial court erred in erred reversibly by instructing the jury that the State did not need to prove that Appellant knew the drugs in the package he possessed were oxycodone for Appellant to be guilty of trafficking. The court’s instructions inaccurately stated the law and were based on a forced interpretation of § 44-53-370(e)(3), as well as South Carolina’s other trafficking statutes. The

clear legislative intent of the trafficking statutes is to *severely punish individuals who knowingly undertake a broad variety of activities involving certain amounts of specific drugs*. *State v. Taylor*, 323 S.C. 162, 164-166, 473 S.E.2d 817 (Ct. App. 1996) (court's erroneous instruction that defendant could be convicted of trafficking in crank if she acted with criminal negligence was not harmless where the trafficking statute specifically required that a defendant act "knowingly" and the main issue before jury was whether defendant was merely present but not participating in drug transaction or whether she was an active participant) (*emphasis added*).

Accordingly, to be guilty of trafficking oxycodone under § 44-53-370(e)(3), the State must prove beyond a reasonable doubt that Appellant knowingly possessed oxycodone and the trial court's instructions to the contrary were an incorrect statement of the law.

Jury Instructions and Rules of Statutory Construction

A trial judge must narrowly tailor his or her response to the specific question asked by the jury. *State v. Smith*, 304 S.C. 129, 132, 403 S.E.2d, 162, 164 (Ct. App 1991). The answer provided by a trial judge must not mislead the jury as to an element charged in the indictment or improperly suggest the answer to a question of fact. *Id.* at 131, 403 S.E.2d at 163. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21 (2009).

The Court has the responsibility to answer the jury's question correctly and in a way that clarifies the issues for the jury. *State v. Huckabee*, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010). In answering a question from the jury, the trial court must also keep in mind the juror's reliance on the Court to instruct them on the applicable law and the great weight that jurors give to the judge's pronouncements. *State v. Campbell*, 297 S.C. 24, 26, 374 S.E.2d 668, 669 (1988).

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).

To be Convicted of Trafficking under § 44-53-370(e)(3), the State must prove that Appellant knew that the drugs in the package he possessed were Oxycodone. It was reversible error for the trial court to instruct the jury that the State only needed to prove Appellant knew that he was possessing an illegal substance.

The structure of § 44-53-370(e)(3) makes clear that the legislature intended to punish individuals who are “knowingly⁵ in actual or constructive possession” of four grams or more of “any morphine, opium, salt, isomer, or salt of an isomer thereof.” 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). A plain reading of the § 44-53-370(e)(3) requires the State to prove that Appellant knew he was possessing oxycodone.

The trial court’s distress over the prospect of rendering trafficking statutes unenforceable was misplaced. R. 321, ll. 4 - 325, ll. 10. The Court’s preoccupation with the specific facts of Appellant’s case resulted in a forced and inconsistent interpretation of § 44-53-370(e)(3) at odds with the plain language of the trafficking statute and its purpose. In crafting its interpretation, the trial court repeatedly stressed that § 44-53-370(e)(3) defined a crime titled “trafficking in illegal drugs;” consequently, the State only had to prove that Appellant knew there were some kind of illegal drugs in the package. R. 329, ll. 13 - 351, ll. 14.

On the contrary, applying the court’s interpretation to the other seven drug specific subsections of § 44-53-370(e) demonstrates that the legislature clearly intended the “knowingly”

⁵ 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).

requirement to encompass not only the criminal act, but a defendant's knowledge of the specific drug being trafficked. For example, § 44-53-370(e)(1) defines "trafficking in marijuana;" § 44-53-370(e)(2) defines "trafficking in cocaine;" § 44-53-370(e)(8) defines "trafficking in MDMA;" and so on.

Moreover, the South Carolina Judicial Department's suggested jury charges support this consistent interpretation of § 44-53-370(e): "[t]he Defendant is charged with trafficking in _____ [drug]. The State must prove beyond a reasonable doubt that the Defendant knowingly sold . . . was knowingly in actual or constructive possession, [or] knowingly attempted to become in actual or constructive possession of _____ [drug]." *Suggested Jury Instructions - Criminal*, South Carolina Judicial Department (November 4, 2015), <http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf>.

In contrast, the trial court's interpretation of § 44-53-370(e) would require the State to prove a defendant knew the specific drug at issue in every trafficking case, ***except when a defendant is accused of trafficking under § 44-53-370(e)(3)***. See *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (courts must reject an interpretation which leads to an absurd result that could not have been intended by the legislature) (*emphasis added*).

This inconsistent outcome could not have been the intent of the legislature. The specific drugs identified in § 44-53-370(e)(3) show that "trafficking in illegal drugs" is more accurately described as trafficking in heroin or opiates, or its derivatives. Heroin was among the first drugs - along with marijuana, cocaine, LSD, and crack cocaine, included in the trafficking statute. McAninch, Fairey & Coggiola, *The Criminal Law of South Carolina* 447 (5th ed. 2007).

Over the years, the General Assembly has revised the trafficking statute to increase the number of prohibited acts and to include new drugs such as GHB and MDMA. *Id.* The evolution and expansion of § 44-53-370(e) strongly suggests that the “trafficking in illegal drugs” title of § 44-53-370(e)(3) is simply ill-conceived and out-of-date. *State v. Sweat*, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008) (“language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose”).

The title of the statute does not indicate that the General Assembly intended to inexplicably lessen the degree of knowledge required when a person is found in possession of a qualifying amount of oxycodone as opposed to a qualifying amount of any other of the enumerated drugs.

Trafficking Statutes in Other States

States with trafficking statutes substantially similar to South Carolina’s require prosecutors to prove that the 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).

Conversely, trafficking statutes that only require proof a defendant knew the substance trafficked was an illegal substance, rather than a specific drug, are organized and worded differently than § 44-53-370. For example, the Illinois' trafficking statute states:

Except for purposes as authorized by this Act, **any person who knowingly brings or causes to be brought into this State** for the purpose of manufacture or delivery or with the intent to manufacture or deliver **a controlled substance** other than methamphetamine or counterfeit substance in this or any other state or country **is guilty of controlled substance trafficking**.

720 Ill. Comp. Stat. Ann. § 570/401.1(a) (*emphasis added*).

Massachusetts' trafficking statute provides: "[a]ny person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a **controlled substance in Class B** of section thirty-one shall be punished by imprisonment. . . ." Mass. Gen. Laws Ann. ch. 94C, § 32A (*emphasis added*). Likewise, Maine's trafficking statute holds, "[A] person is guilty of **unlawful trafficking in a scheduled drug** if the person intentionally or **knowingly trafficks in what the person knows or believes to be a scheduled drug**." Me. Rev. Stat. tit. 17-A, § 1103(1-A) (*emphasis added*).

Accordingly, the trial court committed reversible error by instructing the jury 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).

II.

The trial erred reversibly by refusing to grant a directed verdict acquitting Appellant of trafficking in illegal drugs where the State presented no direct or substantial circumstantial evidence that Appellant knew that the package he possessed contained oxycodone as required by S.C. Code Ann. § 44-53-370(e)(3)(a).

Discussion

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

When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395. "When the State fails to produce *substantial circumstantial evidence* that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (*emphasis added*). In *Odems*, the Court cited *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001) as "jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence." *Id.* Specifically, the trial court "should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty." *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (*emphasis added*) (citation omitted).

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

The evidence presented by the State merely raised the suspicion of Appellant’s guilt, as the State failed to present evidence any substantial circumstantial evidence that Appellant knew that the package he was taking possession of contained oxycodone. R. 11, ll. 10-18; R. 21, ll. 13-15; R. 156, ll. 11-15.

Appellant was indicted for trafficking in illegal drugs under S.C. Code Ann. § 44-53-0370(e)(3)(a):

That [Appellant] did in Lexington County, South Carolina on or about September 23, 2013 **knowingly, intentionally, willfully**, and unlawfully sell, cultivate, manufacture, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or **was knowingly and intentionally in actual or constructive possession of or did knowingly and intentionally attempt to become in actual or constructive possession** of any morphine, salt, isomer, or salt of an isomer thereof . . . To Wit: **Oxycodone**, in a quantity of four (4) grams or more but less than fourteen (14) grams.

R. 347-348 (*emphasis added*). Section 44-53-370(e) requires a defendant to act “knowingly, mere criminal negligence is not sufficient.” *Taylor*, 323 S.C. at 164-166 (Ct. App. 1996) (trafficking statute specifically required defendant act “knowingly”). “If there is a reasonable doubt as to whether the defendant was aware of the nature of substance possessed or being manufactured, [the

defendant] would not be guilty of the offense. Willaim S. McAninch, W. Gaston Fairey & Lesley M. Coggiola, *The Criminal Law of South Carolina* 448 - 449 (5th ed. 2007)

The State presented no direct or substantial circumstantial evidence that Appellant knew that the package he took possession of contained oxycodone. Edmonson testified that Appellant told him that he believed the package contained narcotics, but that he did not know what kind. R. 13, ll. 3 - 15, ll. 12. There was no testimony that Appellant knew or had any reason to know that the package contained oxycodone.

The trial court did not explain his reason for denying the motion, but, in crafting an answer to a question from the jury on the same issue, the court expounded on its reasoning and concerns to defense counsel:

Let me ask you this: Because I also believe that under statutory interpretation you have to go with the presumption that the legislature did not enact a statute that is unenforceable or unprosecutable in this case of a criminal statute. Let's use this case as an example. **If we use your interpretation of the statute and we use the facts of this case based on what has been presented in this case, then it would have required this Court to direct a verdict of acquittal** because there is no way that even under the intent statute it even talks about how you can't cut open a person's brain to figure out what's in there.

R. 332, ll. 2-8.

Absent a confession or first-hand witness, a defendant's guilty knowledge must often be proved by circumstantial evidence. *State v. White*, 311 S.C. 276, 44 S.E.2d 741 (1947). "The knowledge element may be proved circumstantially by evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that the accused knew of the existence of the prohibited substance." *State v. Mollison*, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) (citing *State v. Attardo*, 263 S.C. 546, 211 S.E.2d 868 (1975)).

As discussed above, the trial court's instructed to the jury that "the State does not have to prove that the Defendant knew that the drugs in the package were Oxycodone, just that he knew that the package contained illegal drugs" wrongly stated the law. R. 329, ll. 22-25. To be guilty of trafficking, the State must prove that Appellant knowingly committed one of the prohibited acts, knew the specific drug involved, and that the total amount of that drug exceeded the drug-specific statutory minimums. § 44-53-370(e)(1) - (8). The trial court's denial of Appellant's directed verdict motion rests on the same improper statutory interpretation.

The State presented no direct or 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. Accordingly, the trial court erred in refusing to grant a directed verdict on Appellant's indictment for trafficking in oxycodone where 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).

III.

Appellant's right against self-incrimination as guaranteed by the Fifth and the Fourteenth Amendments to the U.S. Constitution was violated by the introduction of his statements to police where the first statement was the product of an interrogation by officers who failed to advise Appellant of his *Miranda*⁶ rights and his subsequent statements were tainted by the initial violation and the product of an involuntary waiver.

Police interrogated Appellant immediately after forcing him to the ground and placing him in handcuffs. The interrogating officer, Doug Edmonson, admitted that he confronted Appellant about the contents of the package before administering *Miranda* warnings. R. 10, ll. 4-25. Appellant first denied any knowledge of the package's contents, but under continued interrogation, eventually admitted that he believed the package contained illegal drugs. *Id.*

Approximately thirty to forty-five minutes after being seized by law enforcement, Appellant was finally advised of his *Miranda* rights and signed a waiver of those rights. R. 12, ll. 19 - 15, ll. 12. There was no break in the interrogation. At law enforcement's instigation, Appellant made a written statement virtually identical to the admissions he made pre-*Miranda*. *Id.*

During the *Jackson v. Denno* hearing, Edmonson claimed that the pre-*Miranda* interrogation was limited to a few questions about the contents of the package. R. 10, ll. 4-25. The State conceded that the pre-*Miranda* statements were inadmissible. R. 41, ll. 4-19. However, the State argued that the post-*Miranda* statements were freely given and thus admissible. *Id.* The trial court agreed. R. 42, ll. 16-23.

After Edmonson was cross-examined at trial, the State sought to introduce the pre-*Miranda* statements arguing the defense had opened the door to those statements. R. 146, ll. 3-21. The State revealed and alleged for the first time that the pre-*Miranda* interrogation was significantly more extensive than portrayed at the *Denno* hearing and that Appellant had, according to the State,

⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

implicated himself in a year-long drug trafficking conspiracy. R. 149, ll. 20 - 150, ll. 6. Ultimately, the trial court ruled portions of Appellant's *pre*-Miranda statements where Appellant allegedly claimed that he knew "he was being paid to pick up a box of drugs" and that he was unable to find employment were admissible. R. 148, ll. 15-21; R. 163, ll. 4-13.

Discussion

A. The court erred in admitting statements made by Appellant prior to officers advising Appellant of his *Miranda* rights and obtaining a valid waiver of those rights where Appellant clearly was in custody based upon the totality of the circumstances.

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. The Fourteenth Amendment secures against state invasion of the same privilege that the Fifth Amendment guarantees against federal infringement. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *see also* U.S. Const. amend. XIV.

"[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Jackson v. Denno*, 378 U.S. 368, 376 (1964). Prior to any questioning by law enforcement, "the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

"Law enforcement must state the *Miranda* warnings 'after a person has been taken into custody or otherwise deprived of his freedom of action in any way.'" *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003) (quoting *Miranda*, 384 U.S. at 444). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 445; *see also Stansbury v. California*, 511 U.S. 318, 322 (1994).

Determining whether a defendant is in custodial interrogation is an objective assessment of the facts and circumstances surrounding the questioning:

[W]hat were the circumstances surrounding the interrogation; and . . . given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. . . . [T]he court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Thompson v. Keohane, 516 U.S. 99, 112 (1995); see *Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994). In order to introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966); see also *State v. Moses*, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

Clearly, Appellant was in custody when Edmonson interrogated him. Bass and Edmonson (the self-described largest and strongest physicist/police officer in the world) exited their vehicles with guns drawn and ordered Appellant to the ground. R. 37, ll. 1- 38, ll. 13. Appellant was physically forced to the ground and handcuffed. *Id.* Edmonson's interrogation started immediately thereafter.

Accordingly, the court erred in permitting the introduction of any portion of Appellant's pre-*Miranda* statements due to the officer's failure to inform Appellant of his rights prior to subjecting Appellant to a custodial interrogation.

B. The trial court erred in admitting statements made by Appellant subsequent to the officer advising him of his *Miranda* rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officer questioned Appellant in the same location with no temporal break between the post-advisement interrogation and the prior, unwarned interrogation.

The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must

be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the United States Supreme Court confronted a case very similar to the present case. Officers awakened Seibert at 3 a.m. and transported her to the police station. There, an officer questioned Seibert for thirty to forty minutes without giving her *Miranda* warnings and obtained an admission from Seibert that she knew a mentally-ill teenager living with her family was meant to die in a house fire, which was started to cover up the death of Seibert’s own disabled child. The officer then gave Seibert a twenty-minute break. *Id.* at 604-605.

When the interrogation resumed, the officer turned on a tape recorder and gave Seibert the *Miranda* warnings. He also obtained a written waiver from her. The officer restarted questioning by confronting Seibert with her pre-warning statements. Again, the officer obtained the desired answer – that Seibert knew the teenager was supposed to die in the fire. *Id.* at 605.

At trial, the judge suppressed Seibert’s pre-warning statements, but admitted the post-warning statements. *Id.* at 606. The United States Supreme Court held this was in error because “[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.” *Id.* at 611. The Court held “when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and ‘deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.’” *Id.* at 613-614 (quoting *Moran*, 475 U.S. at 424).

The facts presented in Seibert were that the unwarned interrogation was conducted in the police station, and “the questioning was systematic, exhaustive, and managed with psychological skill.” *Id.* at 602. Officers paused only for twenty minutes before resuming questioning after

administering the warnings and “said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited.” *Id.* at 617.

The style of questioning, including repeated references to past responses, fostered the impression that resumed questioning was a continuation of the earlier interrogation. *Id.* at 616 - 617. Thus, “these circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect’s shoes would not have understood them to convey a message that she retained a choice about continuing to talk.” *Id.*

Our Supreme Court confronted this issue in *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of his son, Navy gave a statement to police at the hospital. Officers later learned that the cause of death was smothering or suffocation. *Id.* at 297, 688 S.E.2d at 839. The next day, Navy was driven by police to the station and gave a statement in which he described the child having breathing problems and his ensuing panic. *Id.* at 297-298, 688 S.E.2d at 839.

Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy was told he was not under arrest. The officers then asked follow-up questioning. “At this juncture, the nature of the interrogation and [Navy]’s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation.” In this second statement, Navy admitted to popping the child on the back and possibly patting the child on the mouth. *Id.* at 298-299, 688 S.E.2d at 840.

After a short break, officers then advised Navy of his *Miranda* warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first adding only that Navy admitted to placing his hand over the child’s mouth to stop the crying multiple times and to “popping” the child on the back. *Id.* at 299-300, 688 S.E.2d at 840. Officers contacted the

pathologist who stated the actions detailed in Navy's second statement could not have caused the child's death. In response, officers obtained a third written statement from Navy admitting that he could have held his hand over the child's nose and mouth for longer than he first said. *Id.* at 300, 688 S.E.2d at 840-841.

The Court held the first statement at the hospital was admissible because there was evidence to support the trial judge's finding that Navy was not in custody. However, the second and third statements were inadmissible as they were obtained in violation of *Seibert*. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (3) the continuity of police personnel; and (4) the degree to which the interrogator's questions treated the second round as continuous with the first. *Navy*, 386 S.C. at 302, 688 S.E.2d at 841-842.

The Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. *Id.* at 303, 688 S.E.2d at 842. Once Navy was at the police station, officers "began an unwarned custodial interrogation designed to elicit incriminating information." *Id.* After receiving incriminating statements, officers permitted Navy a break, and then administered *Miranda* warnings. The interrogation resumed with the same officers, who made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four *Seibert* factors were satisfied. *Navy*, 386 S.C. at 303, 688 S.E.2d at 842.

The interrogation of Appellant presents a similar factual scenario as in *Seibert* and *Navy*. 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.

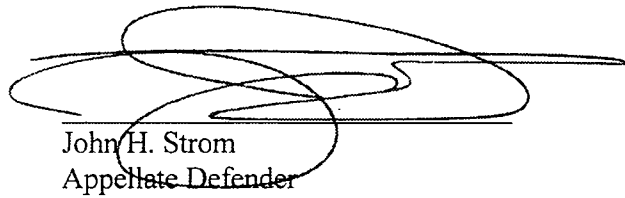
What is clear is that after obtaining a written waiver of Appellant's rights, the same officer, Edmonson, continued to ask Appellant the same questions and Appellant's post-*Miranda* statements were virtually identical to his pre-*Miranada* statements. Moreover, there was no break whatsoever between 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, the trial court erred reversibly in admitting Appellant's post-*Miranda* statements because the statements were tainted by the initial violation as the same officers questioned Appellant in the same location and in close temporal proximity to the prior unwarned interrogation.

CONCLUSION

Based on the foregoing arguments, Appellant Lance L. Miles respectfully requests that this Court reverse Appellant's 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

ATTORNEY FOR APPELLANT

This 2nd day of June, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 2nd, 2016

A handwritten signature in black ink, appearing to read "John Harrison Strom", written over a horizontal line.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LANCE LEON MILES,

APPELLANT

APPELLATE CASE NO. 2015-000308

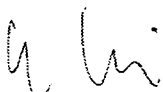
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of June, 2016.


John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: May 12, 2025.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-000308

THE STATE,

Respondent,

vs.

LANCE LEON MILES,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly instructed the jury that the State only needed to prove Appellant knew the package contained illegal drugs to convict him of trafficking in illegal drugs, where the jury asked the court during deliberations whether the State needed to prove Appellant knew the package contained Oxycodone specifically or illegal drugs generally and the court properly and correctly responded to the jury's question.
- II. The trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find Appellant knowingly possessed more than four grams of illegal drugs as required for trafficking pursuant to S.C. Code Ann. § 44-53-370(e)(3)(a).
- III. The trial court properly admitted Appellant's statements to law enforcement into evidence.

STATEMENT OF THE CASE

On September 13, 2013, Lexington County law enforcement officers arrested Appellant Lance Leon Miles following the controlled delivery and subsequent seizure of three hundred tablets of Oxycodone concealed inside a package. In March 2014, the Lexington County Grand Jury indicted Appellant for trafficking in illegal drugs. On February 11, 2015, Appellant proceeded to a jury trial before the Honorable Thomas A. Russo. On February 12, 2015, the jury convicted Appellant as indicted. Judge Russo sentenced Appellant to twenty-five years imprisonment. Thereafter, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

During the early morning hours of September 13, 2013, Agent Douglas Edmonson, a narcotics investigator with the Lexington County Sheriff's Department, was working at the Federal Express shipping and distribution center in West Columbia. (R. 8, 16, 43-44, 80-83). Edmonson was a member of the Lexington County Multi Agency Narcotics Team and focused solely on parcel interdiction and package monitoring at major shipping companies to thwart narcotics trafficking. (R. 8-9, 16, 81-85, 185). Edmonson's shift began routinely alongside fellow officer Dennis Tracy, with the two watching the conveyor belt for suspicious packages. (R. 16-17, 82-87). During the morning, Edmonson noticed a particular box with excessive tape that roused his suspicions. (R. 8, 16-17, 44, 82-87). In accordance with standard procedures, Edmonson used his cellular phone to photograph the package's label for further investigation in the future and allowed the package to continue down the conveyor belt. (R. 8, 45, 85-88).

A few hours later, Edmonson resumed his investigation into the suspicious package. (R. 87-88). He and Tracy ran information from the label through a law enforcement database and determined the listed information for the sender and recipient was either vague or inaccurate. (R. 45-46, 88, 116). Edmonson also noted the shipper sent the box overnight from California to South Carolina via the United States Postal Service at a considerable expense. (R. 44-45, 112-15). Recognizing these factors as common signs that the package contained illegal drugs, Edmonson decided to investigate further. (R. 44, 88). Edmonson set up a team with fellow investigators, including Travis Bass and Marc Miramontes, to conduct surveillance at the delivery location, 146 Villas Court. (R. 9, 88).

At approximately 9:30 a.m., Miramontes drove an undercover vehicle to the Villas Court complex and parked in a location enabling him to view the apartment where the delivery was to take place and the central mailbox unit for the complex. (R. 90, 199-201). Edmonson and Bass drove two separate undercover vehicles to the complex and parked out of view. (R. 90-91). The three communicated by radio, with Miramontes relaying his observations to Edmonson and Bass. (R. 90-91).

Miramontes watched as the mail carrier filled various boxes and noticed a man, later identified as Appellant, come out of an apartment, get on a bicycle, ride to the mailboxes to retrieve mail, and ride back to the same apartment. (R. 201). Appellant then exited his apartment again and milled around the parking lot until the mail carrier finished filing the boxes. (R. 201). Once finished, the mail carrier proceeded to deliver the packages too large to fit into the boxes, including the suspicious package Edmonson identified earlier that morning. (R. 201-02). The mail carrier drop the suspicious package on the doorstep of 146 Villa Court, rang the doorbell, and left. (R. 201-02). Miramontes observed Appellant, who on his cellular phone, walking towards the apartment. (R. 201-02). He relayed this information to Edmonson and Bass by radio. (R. 201-02). Simultaneously, a young woman on her cellular phone came out of the apartment, bent down to look at the box, but went inside without picking up or otherwise touching the box. (R. 201-02). Appellant approached the apartment, picked up the box, and started walking back towards his apartment. (R. 202).

Edmonson and Bass converged on Appellant, who threw the package near a vehicle and began looking around as if he was trying to find an escape route. (R. 92-94, 122, 187-88). Bass exited his vehicle with his gun drawn and ordered Appellant to the ground. (R. 121, 187-88). When Appellant failed to comply, Bass assisted Appellant to

the ground and placed him in handcuffs. (R. 94, 121, 188). Edmonson identified himself as law enforcement and asked Appellant what was in the package. (R. 94-95). Appellant indicated the package likely contained illegal drugs. (R. 95, 170). Edmonson read Appellant his rights pursuant to Miranda¹ and Appellant orally waived his rights. (R. 9-10, 94-95). Appellant acknowledged the package likely contained narcotics and gave consent to open the package. (R. 11, 95). Edmonson elected to call a canine unit trained to identify narcotics before opening the package. (R. 95).

Canine handler Ted Xanthakis and his dog Arcos arrived on the scene shortly thereafter. (R. 123, 218-19). Xanthakis circled Arcos around the vehicle near the package and reported that Arcos's behaviors indicated the package contained narcotics. (R. 223-24). Xanthakis informed Edmonson of Arcos's response and Edmonson took control of the package. (R. 223-24).

Edmonson contacted his partner, Dennis Tracy, who was working off-site, and asked him to get a search warrant for the package. (R. 46-47, 54-61, 96-97). Tracy obtained a search warrant from a magistrate and called Edmonson while still before the magistrate to tell him the search warrant had been signed. (R. 46-47, 54-61, 96-97, 125-26). Edmonson opened the package and saw that it contained a gift bag, a stuffed toy, child's t-shirt, and a wax candle. (R. 97-99, 132, 136-37, 224-25). Edmonson broke apart the wax candle and found three-hundred Oxycodone pills hidden inside three separate plastic bags. (R. 99-101, 133-35, 224-25).

After discovering the pills, Edmonson asked Appellant what was going on and Appellant agreed to give a statement. (R. 100-01). Edmonson advised Appellant of his Miranda rights for second time and Appellant acknowledged in writing he understood

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

those rights and wished to waive them. (R. 101-02, 106-08). Appellant gave a written statement that he was picking up the package for one-hundred dollars, was to deliver it to its owner, and knew it contained illegal drugs. (R. 106-07). Following his statement, Edmonson transferred Appellant to the Lexington County Detention Center. (R. 110).

Edmonson took the pills into his custody and placed them into an evidence bag, commonly referred to as a BEST Kit, before turning it over to the Lexington County Sheriff's Department evidence custodians. (R. 110-12). The pills remained sealed in the BEST Kit within the custody of the Lexington County Sheriff's Department evidence custodians until chemist Emily Homer-Conrad removed the kit for testing on February 7, 2014. (R. 238-41). Homer-Conrad tested the pills on February 10 and 18, 2014, and determined the pills were Oxycodone. In total, the three-hundred pills amounted to nine grams of Oxycodone, a Schedule II drug. (R. 244-60).

Appellant proceeded to trial on February 12, 2015. During pre-trial hearings, Appellant moved to suppress his oral and written statements made at the scene and the trial court conducted a Jackson v. Denno² hearing. (R. 7). During the hearing, the State presented testimony from Edmonson, Miramontes, and Bass. Edmonson testified he and Bass ordered Appellant to stop and placed him in handcuffs before they asked Appellant what he was doing. (R. 9-10, 20-21). Edmonson testified Appellant initially denied being in possession of the package or knowing what was inside the package, but eventually indicated the package likely contained narcotics. (R. 10-11, 19-21). Edmonson then read Appellant his rights pursuant to Miranda. (R. 10-11). After Edmonson informed Appellant of his rights, Appellant indicated again the package likely contained illegal drugs—likely narcotics—and agreed to waive his rights and speak with law enforcement.

² 378 U.S. 368 (1964).

(R. 10-12). Appellant agreed to give a written statement and Edmonson advised him of his rights pursuant to Miranda for a second time. (R. 12-13, 345-46, Court's Ex. No. 1). Appellant signed a written waiver of his rights and provided a written statement that he knew drugs were in the package and he was picking it up for money. (R. 12-15, 345-46, Court's Ex. No. 1). Miramontes testified he watched Appellant pick up the package from the doorstep, but was not present when Appellant gave any statements. (R. 28-33). Bass testified similarly to Edmonson to the events surrounding Appellant's statements, but recalled Appellant receiving Miranda warnings before giving his initial oral statement that the package likely contained drugs. (R. 34-39). Appellant did not testify and did not call any witnesses on his behalf.

Following the testimony from the three law enforcement witnesses, Appellant moved to suppress his oral and written statements and argued he was under duress when he made the statements. (R. 40). Appellant also argued there was conflicting testimony as to whether Edmonson questioned Appellant prior to giving any Miranda warnings. (R. 40). The State conceded Appellant's statements made pre-Miranda warnings were inadmissible and it would not seek to introduce those in its case in chief. (R. 41). The trial court ruled Appellant's oral and written statements made following the advisement of Miranda warnings were given knowingly, freely, and voluntarily, and therefore, were admissible. (R. 42). However, the trial court determined the portions of Appellant's statements pertaining to his prior involvement in retrieving packages for money must be redacted. (R. 41-43).

During trial, the State presented Edmonson, Bass, Miramontes, Xanthakis, and Homer-Conrad as witnesses, along with Lexington County Sheriff's Department Evidence Custodian Margaret Elizabeth Holliman. During Edmonson's testimony, the

State presented Appellant's oral and written statements establishing Appellant knew the package contained illegal drugs. (R. 95-110). During cross-examination, Appellant's counsel questioned Edmonson if Appellant initially denied knowing what was in the package. (R. 123). Following cross-examination, the State argued Appellant had opened the door to allow it to question Appellant on his pre-Miranda statements to law enforcement by questioning Edmonson if Appellant initially denied knowing the package's contents. (R. 146-49). The trial court allowed the State to proffer its intended line of questioning, which was intended to elicit testimony regarding Appellant's recent release from prison, his inability to find employment, and his previous involvement picking up packages he knew contained illegal drugs. (R. 148-56). After argument from both parties, the trial court ruled the preferred testimony was more prejudicial than probative, but did allow the State to elicit testimony from Edmonson that Appellant knew the package contained illegal drugs and was picking it up for payment. (R. 152-63, 169-70).

Following the State's case, Appellant moved for a directed verdict on two grounds. First, Appellant argued the State failed to present sufficient evidence that the total weight of Oxycodone was more than four grams or that Oxycodone is a Schedule II drug. (R. 262). The trial court declined to grant Appellant a directed verdict on these grounds. (R. 262). Next, Appellant argued he was entitled to a directed verdict because the State failed to present sufficient evidence Appellant knew the drugs inside the package were Oxycodone. (R. 264-65). The State replied Appellant's statements established he knew the package contained drugs. (R. 265). The trial court denied Appellant's directed verdict motion. (R. 265). Appellant did not present a defense and renewed his motions for directed verdict, which the trial court again denied. (R. 269).

The trial court then asked both parties if they had any charge requests. (R. 269-70). The State requested the court charge all elements of the trafficking in illegal drug statute. (R. 270). The court responded it would charge only the relevant portion of the statute and asked for a proposed charge including the relevant portions. (R. 270-73). Appellant asked the trial court to charge criminal intent as knowledge and argued Appellant must have knowledge that the drugs were Oxycodone. (R. 273-74). The trial court disagreed, stating Appellant merely needed to know the package contained illegal drugs. (R. 274).

During deliberations, the jury sent the trial court a note asking, "Does the State have to prove that the defendant knowingly brought into the state four grams or more of Oxycodone or just any amount of illegal drugs in order to consider this trafficking?" (R. 317). After sharing the note with both parties, the trial court proposed responding that the State only needed to prove Appellant knew the package contained illegal drugs, not specifically Oxycodone because the required intent is to "possess, control, deliver, [or] move illegal drugs." (R. 317-19). Appellant objected, arguing the legislature intended that a defendant must know the specific drug he is possessing. (R. 321-27). The trial court disagreed, noting under Appellant's approach, the State would not be able to prosecute unless the defendant gave a statement implicating himself as knowing the particular illegal drug enumerated in Section 44-53-370(e)(3). (R. 322-27). The trial court ultimately responded to the jury,

"[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 Oxycodone, 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 was more than four grams of Oxycodone. So the State continues to carry that burden.

Then your second question was, "Does the state have to prove that he intended to traffic?"

And the law in South Carolina with regards to trafficking is this: The term traffic or trafficking under South Carolina law deals with or refers to the weight of the illegal drugs. To prove trafficking the State must prove that the amount of the illegal drugs was four grams or more. If it was less than four grams, then it's not trafficking. So trafficking deals with the weight, okay?

(R. 329-30). The jury then continued its deliberations, resulting in a verdict of guilt. (R. 335).

ARGUMENT

- I. **The trial court properly instructed the jury that the State only needed to prove Appellant knew the package contained illegal drugs to convict him of trafficking in illegal drugs, where the jury asked the court during deliberations whether the State needed to prove Appellant knew the package contained Oxycodone specifically or illegal drugs generally and the court properly and correctly responded to the jury's question.**

Appellant contends the trial court committed reversible error by instructing the jury the State did not need to prove Appellant knew the drugs in the package were Oxycodone but only illegal drugs. Appellant asserts the trial court's instructions were based on an erroneous and forced interpretation of S.C. Code Ann. §44-53-370(e)(3), as "the clear legislative intent" of South Carolina trafficking statutes is to "severely *punish individuals who knowingly undertake a broad variety of activities involving certain amounts of specific drugs.*" (IBOR 17) (emphasis in original). Appellant avers that to be guilty of trafficking Oxycodone under §44-53-370(e)(3), the State must prove a defendant knowingly possessed Oxycodone specifically and therefore, the trial court's instructions were a reversible and incorrect statement of law. However, Appellant's contentions are incorrect and the trial court properly charged the jury on all relevant law and then correctly re-instructed the jury on those matters necessary to answer its question. Appellant's conviction should be affirmed.

In criminal cases, the appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In reviewing a trial court's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "A trial court's decision regarding jury charges will not be reversed

where the charges, as a whole, properly charged the law to be applied.” State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007).

During a trial, the law to be charged is determined by the evidence presented. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). When instructing the jury on the law, the trial court is required to charge only the current and correct law of South Carolina. State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000). A trial court’s jury instructions are appropriate if they are substantially correct and adequately cover the law applicable to the particular case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) (“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.”). Only the substance of the law must be charged to the jury, not any particular verbiage. State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). When reviewing the trial judge’s jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004).

“When a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury’s request.” State v. Barksdale, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993). It is proper to limit a re-charge to simply answering the jury’s questions. State v. Anderson, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996); see In re McCracken, 346 S.C. 87, 96, 551 S.E.2d 235, 240 (2001) (ruling the trial judge did not improperly emphasize one portion of a jury charge over another during additional instructions given in response to a jury question when the judge merely reminded the jury about one element of an offense and then offered the statutory

definition of another element); State v. Nichols, 325 S.C. 111, 118-119, 481 S.E.2d 118, 122 (1997) (finding no error in the trial judge's failure to re-charge the law of self-defense when the jury did not specifically request clarification on that particular principle of law).

Pursuant to S.C. Code Ann. § 44-53-370(e)(3), "[a]ny 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." The trafficking in illegal drugs statute, like all trafficking statutes in South Carolina, is broad reaching and covers a multitude of behaviors as detailed in the statute, including: actual or constructive possession, sale, manufacture, cultivation, purchase, giving of financial assistance or any type of aid, or the attempt or conspiracy to do any of the above.

At issue in the present case is the legislative intent behind the "knowingly" element of Section 44-53-370(e)(3). When interpreting a statute, a court's primary function is to ascertain the intention of the legislature. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 318 (1992) (citing Gilstrap v. S.C. Budget and Control Board, 310 S.C. 210, 423 S.E.2d 101 (1992)). The words used in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Id. Here, the forbidden act is "knowingly" undertaking one

of the specific acts with a certain substance as enumerated in the Section 44-53-370(e)(3). Under Section 44-53-370(e)(3), as well as the other trafficking statutory provisions, the “knowingly” element of the crime requires general, not specific intent. See State v. Attardo, 263 S.C. 546, 549, 211 S.E.2d 868, 869 (1975) (“This language evinces a legislative desire to fasten a general, but not a specific, criminal intent as an element of the offense.”). Accordingly, to obtain a conviction for trafficking, the State must prove a defendant either: committed, attempted to commit, or conspired to commit one of the enumerated behaviors as listed in the statute to establish a person is guilty of trafficking. However, the State is not required to establish the defendant knew the specific controlled substance to obtain a conviction for trafficking. This is true for trafficking in illegal drugs as well as all other trafficking subsections. See S.C. Code Ann. § 44-53-370.

Additionally, it is well-settled under South Carolina law that “every one may be presumed to know what he has in his possession.” State v. Freeland, 106 S.C. 220, 91 S.E. 3, 3 (1916); see State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975) (“Possession [of a controlled substance] . . . gives rise to an inference of the possessor's knowledge of the character of the substance.”); 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.”); State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) (“Possession gives rise to an inference of the possessor's knowledge of the character of the substance.”)

Here, the trial court's original jury instructions properly covered all relevant portions of the law, including what the State must prove to convict Appellant of trafficking in illegal drugs pursuant to Section 44-53-370(e)(3). Following the court's charge, the jury requested clarification as to whether the State must prove that Appellant

knew the package contained Oxycodone or any illegal drug. (R. 317). The trial court suggested responding that the State only needed to prove Appellant knew the package contained illegal drugs, not specifically Oxycodone. The trial court noted the required intent for trafficking in illegal drugs is to “possess, control, deliver, [or] move illegal drugs.” (R. 317-19). Appellant objected, averring the legislature intended that a defendant must know the specific illegal drug he is possessing. (R. 321-27). The trial court disagreed, noting if it was to adopt Appellant’s approach, the State would not be able to prosecute unless the defendant gave an incriminating statement indicating he knew the particular drug. (R. 322-27). The trial court then re-charged 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 Oxycodone, 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 was more than four grams of Oxycodone.” (R. 329-30). The trial court properly instructed the jury that the State only needed to prove Appellant knew the package contained illegal drugs in response to the jury’s question.

In arguing the trial court’s additional jury instruction following the jury’s note warrants the reversal of his convictions, Appellant contends the trial court’s re-charge was reversible error because a plain reading of Section 44-53-370(e) requires the State to prove that Appellant knew he was possessing Oxycodone. In support of this position, Appellant argues a review of the seven other subsections of Section 44-53-370 demonstrate that the legislature clearly intended the “knowingly” requirement to encompass not only the criminal act, but a defendant’s specific knowledge of the exact controlled substance being trafficked. Appellant avers the trial court’s interpretation of “knowingly” would lead to an absurd result where the State would be required to prove

the defendant knew of the specific substance he was trafficking for every other subsection other than illegal drugs, effectively making it easier for the State to prosecute trafficking in illegal drugs compared to trafficking of other substances. However, this argument is misguided, as the “knowingly” element for all trafficking offenses, including trafficking in illegal drugs, requires general intent, not specific intent. See Attardo, 263 S.C. at 549, 211 S.E.2d at 869 (“This language evinces a legislative desire to fasten a general, but not a specific, criminal intent as an element of the offense.”).

Additionally, as the trial court noted, adopting Appellant’s interpretation of “knowingly” would lead to the absurd result where the State would be essentially unable to prosecute a defendant for trafficking in illegal drugs unless the defendant gave a statement implicating himself as knowing the particular illegal drug enumerated in Section 44-53-370(e)(3). This clearly could not have been the legislature’s intention as it would render the State unable to prosecute pursuant to Section 44-53-370(e)(3) in all but rare situations where the defendant has provided a statement implicating himself in knowing the specific illegal drug he is trafficking. See State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (internal citations omitted) (“Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.”). This interpretation would also lead to an absurd result where drug traffickers and the drug mules they employ would have an unfettered ability to conduct their criminal enterprise and move large quantities of controlled substances without punishment so long as the mules knowingly engaged in the transportation of drugs but intentionally remained ignorant as to the exact type of drug they possessed.

Simply put, adopting Appellant's interpretation of "knowingly" would lead to absurd results the legislature could not have intended when drafting and enacting Section 44-53-370.

Alternatively, assuming Appellant's interpretation of "knowing" was correct, the trial court's instructions would still be appropriate in this case because Appellant was willfully ignorant of the specific illegal drug he possessed. Appellant's deliberate and willful ignorance of the specific substance he was possessing, despite knowing it was illegal, amounts to guilty knowledge. See State v. Freeland, 106 S.C. 220, 91 S.E. 3, 4 (1916) (holding culpable ignorance is not an excuse to relieve liability from criminal acts). See also United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990) (finding a "deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires"); United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976), cert. denied, 426 U.S. 951 (1976) ("[D]eliberate ignorance and positive knowledge are equally culpable"). Here, Appellant admitted multiple times he knew he possessed illegal drugs, yet intentionally avoided knowledge as to the specific controlled substance. This intentional, deliberate ignorance amounts to guilty knowledge and the trial court's instructions were a correct and proper statement of the law. See Turner v. United States, 396 U.S. 398 (1970) (holding the jury was entitled to rely on instructions that it could infer from accused's unexplained possession of heroin that he knew that heroin he possessed had been unlawfully imported, in prosecution for receiving, concealing and facilitating transportation and concealment of heroin while knowing that the heroin had been unlawfully imported into United States).

Appellant argues the trial court's instruction allows the jury to convict Appellant invalidly based on a lesser standard of culpable negligence rather than "knowingly,"

citing to State v Taylor. 323 S.C. 162, 473 S.E.2d 817 (Ct. App. 1996). However, this case is readily distinguishable from Taylor. In Taylor, the trial court instructed the jury that it could convict the defendant of trafficking in methamphetamine if she was at least criminal negligent. Id. This Court reversed Taylor's conviction, holding a defendant could not be convicted of trafficking in methamphetamine if she was criminally negligent, as the statute specifically required the defendant act "knowingly." Id. Here, the trial court's instructions did not inform the jury it could convict Appellant based on criminal negligence, but rather, used the correct "knowingly" standard. Furthermore, there is a significant difference between criminal negligence and a willful or intentionally lack of knowledge, which is the equivalent of actual knowledge and sufficient to prove the knowledge element of a criminal offense. Compare BLACK'S LAW DICTIONARY 1134 (9th ed. 2009) (defining "criminal negligence" as "[g]ross negligence so extreme that it is punishable as a crime" and defining "culpable negligence" as "[n]egligent conduct that, while not intentional, involves a disregard of the consequences likely to result from one's actions") with Giovannetti, 919 F.2d at 1228 (finding a "deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires") and Jewell, 532 F.2d at 700 ("[D]eliberate ignorance and positive knowledge are equally culpable"). The trial court's instructions to the jury charged the correct standard of law. Appellant's conviction should be affirmed.

II. The trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find Appellant knowingly possessed more than four grams of illegal drugs as required for trafficking pursuant to S.C. Code Ann. § 44-53-370(e)(3)(a).

Appellant contends the trial court erred in denying his directed verdict motion. In support of that contention, Appellant maintains the State failed to present sufficient evidence to establish he had knowledge of the specific illegal drug—Oxycodone—inside the package, which he avers was necessary to allow the case to proceed forward to deliberations. Contrary to Appellant's contentions, the State presented evidence and testimony establishing Appellant was aware of the package contained illegal drugs, intentionally took possession of the illegal drugs from the known delivery location, and responded in an inculpatory manner when confronted by law enforcement while still in possession of the illegal drugs. Additionally, the State presented evidence that the total weight of the three-hundred Oxycodone pills Appellant had been in possession of was nine grams. Viewing that evidence and testimony in a light most favorable to the State as required, the jury could logically and rationally conclude Appellant was guilty of the offense of trafficking in illegal drugs and, more specifically, the criminal act of trafficking in Oxycodone. Accordingly, the trial court properly denied Appellant's directed verdict motion and submitted the case to the jury. Appellant's conviction should be affirmed.

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Pearson, Op. No. 27612 (S.C. filed Mar. 23, 2016) (Shearouse Adv. Sh. No. 12 at 18) (citing State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). An appellate court's review is limited to considering the existence or nonexistence of evidence, not its

weight. State v. Bennett, 415 S.C. 232, 235-36, 781 S.E.2d 352, 353 (2016) (citing State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478-79 (2004)). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial court's ruling. Cherry, 361 S.C. at 593-94, 606 S.E.2d at 478. The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial court's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986); see also Crawford v. United States, 375 F.2d 332, 334 (D.C. Cir. 1967) ("It is not the function of appellate judges to weigh the evidence and decide that if they had doubts other reasonable persons were compelled to have the same doubts. If that were the test the jury of twelve would be relegated to the very low grade function of secondary fact finders.").

"[T]he lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." Bennett, 415 S.C. at 236-37, 781 S.E.2d at 354 (citing State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955)). "Within the jury's inquiry, 'it is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.'" Id. (quoting Littlejohn, 228 S.C. at 328, 89 S.E.2d at 926). However, when ruling on a directed verdict motion, the trial court must view the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which

reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.” *Id.* (quoting Littlejohn, 228 S.C. at 329, 89 S.E.2D at 926). “Therefore, although the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.” *Id.* (emphasis in original); see also Crawford, 375 F.2d at 334 (“The jury question of whether there was proof of guilt beyond a reasonable doubt presents a stricter or higher standard than the trial court’s consideration of whether there is sufficient evidence to allow the jury to find guilt beyond a reasonable doubt, and it rests in the unreviewable ratiocinations of twelve reasonable persons whose deliberations are protected by the highest security.”).

In South Carolina, it is unlawful to traffic in illegal drugs. See S.C. Code Ann. § 44-53-370(e)(3) (Supp. 2006) (prohibiting trafficking in illegal drugs). In relevant part, South Carolina’s definition of trafficking in illegal drugs includes: “Any person . . . who is knowingly in actual . . . 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.” S.C. Code Ann. § 44-53-370(e)(3). The offense of trafficking can be committed in a wide variety of ways, including by knowingly possessing a specified quantity of the illegal substance. State v. Ezell, 321 S.C. 421, 426, 468 S.E.2d 679, 681 (Ct. App. 1996); see Taylor, 323 S.C. at 165, 473 S.E.2d at 818 (instructing the offender

must act knowingly to be guilty of trafficking). In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially. State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009) (citing Attardo, 263 S.C. at 550, 211 S.E.2d at 869). Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances. Id. “It is the amount of [the illicit drug], rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession.” Taylor, 323 S.C. at 167, 473 S.E.2d at 819 (citing State v. Raffaldt, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995)). Possession gives rise to an inference of the possessor’s knowledge of the character of the substance. State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) (citing Attardo, 263 S.C. 546, 211 S.E.2d 868). Additionally, as noted previously, the “knowingly” element for all trafficking offenses, including trafficking in illegal drugs, requires general intent, not specific intent. See Attardo, 263 S.C. at 549, 211 S.E.2d at 869 (“This language evinces a legislative desire to fasten a general, but not a specific, criminal intent as an element of the offense.”).

In Appellant’s case, Appellant contends he was entitled to a directed verdict on the charge of trafficking in illegal drugs because the State’s evidence “merely raised the suspicion of Appellant’s guilt, as the State failed to present any substantial circumstantial evidence that Appellant knew the package he was taking possession of contained oxycodone.”(App. Br 24). Contrary to Appellant’s contentions, looking at the evidence and all reasonable inferences in the light most favorable to the State as required, the trial court properly denied Appellant’s directed verdict motion because the State presented

substantial evidence and testimony establishing each element of the trafficking in illegal drugs, including Appellant's knowledge of illegal drugs.

Looking to the evidence presented during trial, the State presented direct and circumstantial evidence establishing that Appellant had knowledge of the illegal drugs, which was all that was required to satisfy the knowledge element of the offense. See Attardo, 263 S.C. at 549, 211 S.E.2d at 869 ("This language evinces a legislative desire to fasten a general, but not a specific, criminal intent as an element of the offense."). Specifically, Appellant acknowledged multiple times that he knew the package contained illegal drugs. When initially approached by law enforcement, Appellant indicated the package likely contained illegal drugs. (R. 95, 170). Then, Edmonson read Appellant his rights pursuant to Miranda and Appellant orally waived his rights and again acknowledged the package likely contained narcotics. (R. 9-11, 94-95). After Arcos, the trained canine, positively identified drugs in the package and Edmonson opened the package, Appellant yet again provided an oral statement that he knew the package contained illegal drugs and then gave a written statement that he was picking up the package for one-hundred dollars, was to deliver it to its owner, and knew it contained illegal drugs. (R. 103, 106-07, 343-46, State's Ex. No. 10-11). Furthermore, Appellant acted in an inculpatory manner when confronted by officers, throwing the package near a vehicle and looking for an escape route. Thus, the evidence and testimony presented during trial established Appellant had knowledge of the package's contents. Critically, viewing that evidence and testimony in a light most favorable to the State as required, the jury could have rationally and logically concluded Appellant knew the package contained the requisite amount of illegal drugs when possessing it, satisfying the requisite elements

necessary to convict him of trafficking in illegal drugs pursuant to Section 44-53-370(e)(3).

In arguing the trial court erred in denying his motion for a directed verdict, Appellant contends the State's evidence merely raised the suspicion of Appellant's guilt, as the State failed to present any substantial circumstantial evidence that Appellant knew the package specifically contained Oxycodone.³ (App. Br. 24-25) However, Appellant's argument is flawed for several reasons. Initially, Appellant's assertions that the State needed to establish he knew the identity of the particular illegal substance he was possessing to satisfy Section 44-53-370(e)(3) is incorrect, as trafficking in illegal drugs, like all trafficking offenses in South Carolina, is a general intent crime requiring knowledge that the substance is illegal. See Attardo, 263 S.C. at 549, 211 S.E.2d at 869 ("This language evinces a legislative desire to fasten a general, but not a specific, criminal intent as an element of the offense."). Additionally, as discussed above, Appellant's argument ignores the multitude of cases establishing that possession gives rise to an inference of the possessor's knowledge of the character of the substance. See e.g., Mollison, 319 S.C. at 45, 459 S.E.2d at 91 (holding possession gives rise to an

³In support of this position, Appellant argues the State must establish Appellant knew the specific illegal drug—Oxycodone—in the package and that "if there is a reasonable doubt as to whether [he] was aware of the nature of the substance possessed . . . he would not be guilty of the offense." Appellant appears to be using the incorrect standard for when a trial court is ruling on a directed verdict motion. As our Supreme Court stated in Bennett, when ruling on a directed verdict motion, the trial court must view the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." Bennett, 415 S.C. at 236-37, 781 S.E.2d at 354. This is a different analysis than when a jury is determining if there is any reasonable doubt as to whether Appellant is guilty. See Id. ("[T]he lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury. . . Within the jury's inquiry, it is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. . . . However, when ruling on a directed verdict motion, the trial court must view the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.") (internal citations omitted).

inference that the possessor knows the character of the substance); Attardo, 263 S.C. 546, 211 S.E.2d 868 (same). Furthermore, Appellant's deliberate and willful ignorance of the specific substance he was possessing, despite knowing it was illegal, amounts to guilty knowledge. See Freeland, 106 S.C. 220, 91 S.E. 3 (holding intentional ignorance is not an excuse to relieve liability from criminal acts).

Because the testimony and evidence the State presented during trial established each element of the offense of trafficking in illegal drugs, the trial judge was required to deny Appellant's directed verdict motion and submit the charge to the jury. See Attardo, 263 S.C. at 550, 211 S.E.2d at 869 (holding Attardo's actual possession of narcotics supported an inference of his knowledge in regards to the character of the substance and made the knowledge element a question for the jury to resolve). Accordingly, the trial judge properly denied Appellant's directed verdict motion, and his ruling was supported by the evidence. See Gaster, 349 S.C. at 555, 564 S.E.2d at 92 ("On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling."). Appellant's convictions should be affirmed.

III. The trial court properly admitted Appellant's statements to law enforcement into evidence.

When Edmonson and Bass approached Appellant in the parking lot of the Villas Court apartment complex, Appellant threw the package near a vehicle and began looking around as if he was trying to find an escape route. (R. 92-94, 122, 187-88). Bass drew his weapon and ordered Appellant to the ground. (R. 121, 187-88). When Appellant failed to comply, Bass assisted Appellant to the ground and placed him in handcuffs. (R. 94, 121, 188). Edmonson identified himself as law enforcement and asked Appellant what was in the package. (R. 94-95). Appellant indicated the package likely contained illegal drugs. (R. 95, 170). Edmonson then read Appellant his rights pursuant to Miranda and Appellant orally waived his rights. (R. 9-10, 94-95). Appellant acknowledged the package likely contained narcotics and gave consent to open the package. (R. 11, 95). Edmonson elected to call a canine unit trained to identify narcotics before opening the package. (R. 95). After the canine indicated the package contained a controlled substance, Edmonson called his partner, who obtained a search warrant to open the package. (R. 46-47, 54-61, 96-97, 125-26, 146-47, 223-24).

Edmonson then opened the package and discovered three-hundred tablets of Oxycodone hidden inside a wax candle. (R. 99-101, 133-35, 224-25). After discovering the pills, Edmonson asked Appellant what was going on and Appellant agreed to give a statement. (R. 100-01). Edmonson advised Appellant of his Miranda rights for second time and Appellant acknowledged in writing he understood those rights and wished to waive them. (R. 101-02, 106-08). Appellant gave a written statement that he was picking up the package for one-hundred dollars, was to deliver it to its owner, and knew it

contained illegal drugs. (R. 106-07). Following his statement, Edmonson transferred Appellant to the Lexington County Detention Center. (R. 110).

During the Jackson v. Denno hearing, the State presented testimony from Edmonson, Miramontes, and Bass. Edmonson testified he and Bass ordered Appellant to stop and placed him in handcuffs before they asked Appellant what he was doing. (R. 9-10, 20-21). Edmonson testified Appellant initially denied being in possession of the package or knowing what was inside the package, but eventually indicated the package likely contained narcotics. (R. 10-11, 19-21). Edmonson then read Appellant his rights pursuant to Miranda. (R. 10-11). After Edmonson informed Appellant of his rights, Appellant indicated again the package likely contained illegal drugs—likely narcotics—and agreed to waive his rights and speak with law enforcement. (R. 10-12). Appellant agreed to give a written statement and Edmonson advised him of his rights pursuant to Miranda for a second time. (R. 12-13, 345-46, Court's Ex. No. 1). Appellant signed a written waiver of his rights and provided a written statement that he knew drugs were in the package and he was picking it up for money. (R. 12-15, 345-46, Court's Ex. No. 1). Miramontes testified he watched Appellant pick up the package from the doorstep, but was not present when Appellant gave any statements. (R. 28-33). Bass testified similarly to Edmonson to the events surrounding Appellant's statements, but recalled Appellant receiving Miranda warnings before giving his initial oral statement that the package likely contained drugs. (R. 34-39).

Appellant moved to suppress his oral and written statements and argued he was under duress when he made the statements. (R. 40). Appellant also argued there was conflicting testimony as to whether Edmonson questioned Appellant prior to giving any Miranda warnings. (R. 40). The State conceded Appellant's statements made pre-

Miranda warnings were inadmissible and it would not seek to introduce those in its case in chief. (R. 41). The trial court ruled Appellant's oral and written statements made following the advisement of Miranda warnings were given knowingly, freely, and voluntarily, and therefore, were admissible. (R. 42). However, the trial court determined the portions of Appellant's statements pertaining to his prior involvement in retrieving packages for money must be redacted. (R. 41-43).

During Edmonson's trial testimony, the State presented Appellant's oral and written statements establishing Appellant knew the package contained illegal drugs. (R. 95-110). During cross-examination, Appellant's counsel questioned Edmonson if Appellant initially denied knowing what was in the package. (R. 23). Following cross-examination, the State argued Appellant had opened the door to allow it to question Appellant on his pre-Miranda statements to law enforcement by questioning Edmonson if Appellant initially denied knowing the package's contents. (R. 146-49). The trial court allowed the State to proffer its intended line of questioning, which was intended to elicit testimony regarding Appellant's recent release from prison, his inability to find employment, and his previous involvement picking up packages he knew contained illegal drugs. (R. 148-56). After argument from both parties, the trial court ruled the preferred testimony was more prejudicial than probative, but did allow the State to elicit testimony from Edmonson that Appellant knew the package contained illegal drugs and was picking it up for payment. (R. 152-63, 169-70).

On appeal, Appellant contends the trial court erred in admitting his statements to law enforcement prior to and after he was administered Miranda warnings. Appellant argues his pre-Miranda statements were unconstitutionally taken while he was in custody and therefore are inadmissible. However, Appellant fails to make any argument

challenging the trial court's ruling that defense counsel opened the door to these statements through his cross-examination of Edmonson, and therefore, has waived this issue on appeal. Additionally, Appellant avers his post-Miranda statements were inadmissible because they were tainted by the initial violation and the product of an involuntary waiver. Appellant argues both statements therefore should have been suppressed and the trial court's refusal to do so is reversible error. To the contrary, Appellant's post-Miranda statements were made following a knowingly, voluntarily, and intelligently waiver and Appellant's pre-Miranda statements were admissible after Appellant opened the door. Accordingly, the trial court properly admitted the statements into evidence during trial and his ruling was fully supported by the evidence and testimony presented during trial. Appellant's convictions should be affirmed.

- A. **The trial court's ruling that Appellant's pre-Miranda statements were admissible once the door was opened is not challenged on appeal and, therefore, is now the law of the case and not preserved for review. Regardless, the trial court did not abuse its discretion in admitting into evidence Appellant's initial statements to law enforcement regarding his knowledge that the package contained illegal drugs because defense counsel opened to door to such testimony.**

Following the Jackson v. Denno hearing, the State conceded Appellant's pre-Miranda statements were inadmissible and that it would not seek to introduce them during its case in chief. However, following Edmonson's cross-examination, the State argued defense counsel had opened the door by questioning Edmonson as to whether Appellant had denied knowing the package's contents initially. After allowing the State to proffer its intended line of questioning, the trial court allowed the State to elicit testimony from Edmonson that Appellant knew the package contained illegal drugs and was picking it up for payment, ruling defense counsel had opened the door.

- i. **The trial court's ruling that Appellant's pre-Miranda statements were admissible once the door was opened is not challenged on appeal and therefore, is now the law of the case and not preserved for this Court's review.**

On appeal, Appellant argues the trial court erred in admitting his statements to law enforcement prior to receiving his Miranda warnings because he was "clearly in custody based upon the totality of the circumstances." (App. Br. 28). However, he fails to make any argument as to the trial court's ruling that the door had been opened. Because he has failed to present any argument as to why the trial court erred in ruling the door was opened, but instead, presents argument on a different alleged error, the trial court's ruling is the law of the case and this issue is not preserved for appellate review. See State v. Fripp, 396 S.C. 434, 441-42, 721 S.E.2d 465, 468-69 (Ct. App. 2012) (finding Fripp's argument not preserved for appellate review and the trial court's ruling was the law of the case where Fripp did not dispute the correctness of the trial court's ruling that he opened the door to Officer Heany's hearsay testimony, but challenged it on other grounds); Burton v. Cnty. of Abbeville, 312 S.C. 359, 363, 440 S.E.2d 396, 398 (Ct. App. 1994) (stating the appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case). See also State v. McCray, 332 S.C. 536, 542, 506 S.E.2d 301, 303 (1998) (finding where an appellate argument differs from the argument made at trial, the argument is unpreserved for appeal). Because Appellant did not dispute the correctness of the trial court's ruling that he opened the door to his initial statements to law enforcement before he received Miranda warnings, this ruling is the law of the case and not preserved for this Court's review.

- ii. **Regardless, the trial court did not abuse its discretion in admitting Appellant's initial statements to law enforcement regarding his knowledge that the package contained illegal drugs into evidence after defense counsel opened to door to such testimony.**

Assuming this issue was properly preserved for appellate review, the trial court properly admitted Appellant's initial statements to law enforcement regarding his knowledge that the package contained illegal drugs into evidence after defense counsel opened to door to such testimony.

The admissibility of evidence is within the trial judge's discretion, and, therefore, evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of a prejudicial legal error. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); Likewise, a decision as to whether a party opens the door to the admission of otherwise inadmissible evidence during a trial is left to the sound discretion of the trial judge. State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008); see State v. Adcock, 194 S.C. 234, 239-240, 9 S.E.2d 730, 732 (1940) ("It appears that counsel opened wide the door for the presentation to the Court of the facts touching appellant's connection with the slot machine. . . . [T]his Court will not interfere with the trial Judge's exercise of his discretion, unless there is a manifest abuse of it[.]").

It is firmly established that otherwise inadmissible evidence can be properly admitted after opposing counsel opens the door to that evidence. Page, 378 S.C. at 482, 663 S.E.2d at 359. "[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999); see State v. Young, 364 S.C. 476, 485, 613 S.E.2d

386, 391 (Ct. App. 2005) (“The jurisprudence of this State contains a plethora of enlightening cases establishing and explicating the proposition that a defendant may open the door to what would otherwise be improper evidence.”). “[A]n appellant cannot complain of prejudice resulting from the admission of evidence to which she opened the door.” State v. Rice, 375 S.C. 302, 329, 652 S.E.2d 409, 422 (Ct. App. 2007).

During trial, Appellant’s counsel questioned Edmonson if Appellant initially denied knowing what was in the package. (R. 123). Following cross-examination, the State argued Appellant had opened the door to allow it to question Appellant on his pre-Miranda statements to law enforcement by questioning Edmonson if Appellant initially denied knowing the package’s contents. (R. 146-49). The trial court allowed the State to proffer its intended line of questioning, which was intended to elicit testimony regarding Appellant’s recent release from prison, his inability to find employment, and his previous involvement picking up packages he knew contained illegal drugs. (R. 148-56). After argument from both parties, the trial court ruled the preferred testimony was more prejudicial than probative, but did allow the State to elicit testimony from Edmonson that Appellant knew the package contained illegal drugs and was picking it up for payment based on a finding that Appellant had opened the door based on his cross-examination of Edmonson. (R. 152-63, 169-70).

By asking Edmonson about whether Appellant initially denied knowing what was in the box, Appellant opened the door for the solicitor to inquire into his initial statements to law enforcement before he was read his Miranda rights. Appellant was not permitted to introduce only the portion of his initial statement beneficial to himself and then bar the State from presenting a full and complete explanation of all of the details of those statements. See State v. Kennedy, 143 S.C. 318, 321-322, 141 S.E. 559, 560 (1928)

(finding previously inadmissible testimony elicited during redirect examination was properly admitted in response to questioning by the appellant of the same witness along similar lines during cross-examination). The additional testimony related to Appellant's initial statement to law enforcement was necessary for a complete presentation of the context of his statements and was merely offered to explain the testimony elicited by Appellant. Therefore, the trial court did not abuse his discretion in admitting the previously inadmissible testimony regarding Appellant's initial pre-Miranda statement. See State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) ("Given that [the defendants] maintained that PPS did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry."). Appellant's conviction should be affirmed.

- B. The trial court properly admitted Appellant's post-Miranda statements into evidence after determining the statements were knowingly, intelligently, and voluntarily made under the totality of the circumstances and because the trial court's ruling was supported by the undisputed testimony and evidence presented during trial establishing Appellant knowingly, intelligently, and voluntarily waived his rights before making his statements.**

Appellant argues the trial court erred in finding his oral and written statements made after he received Miranda warnings were voluntary and admissible because they were tainted by the initial violation where Edmonson questioned Appellant prior to advising him of his rights. In support of his argument, Appellant cites to Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), both of which he asserts are factually similar to his case. However, this is unpersuasive, as Appellant's case is readily distinguishable from both Seibert and Navy. The trial court properly admitted Appellant's post-Miranda statements into evidence after determining

the statements were knowingly, intelligently, and voluntarily made under the totality of the circumstances. Appellant's conviction should be affirmed.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

The admission or exclusion of evidence rests on the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995).

Under Miranda v. Arizona, 384 U.S. 436, 444 (1966), prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, and he has a right to an attorney. A defendant can waive these constitutional rights with a knowing and voluntary waiver. Id.

A confession or statement by a defendant is not admissible unless voluntarily made. State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). If a defendant is advised of his constitutional rights and then chooses to make a statement, the burden is on

the State to prove by a preponderance of the evidence the defendant voluntarily waived his rights. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990). When considering the admissibility of a defendant's statements, the trial judge should examine the totality of the circumstances surrounding the incident to determine whether the State has met its burden of proof. State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980). On appeal, the trial judge's decision as to the voluntariness of a statement will not be reversed unless the ruling was so erroneous it constituted an abuse of discretion. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009).

In Missouri v. Seibert, 542 U.S. 600, 604 (2004), the United States Supreme Court determined incriminating statements elicited prior to the recitation of the constitutionally-required warnings were not admissible even if the statements were repeated after the appropriate warnings. In Seibert, the police arrested Seibert at 3:00 a.m. and took her to the police station for an interview. Seibert at 604. The arresting officer deliberately refrained from providing Miranda warnings and left Seibert alone in an interview room. Id. After fifteen to twenty minutes, a different officer arrived and questioned Seibert for thirty to forty minutes while squeezing her arm and encouraging her to admit her role in the crime. Id. at 604-605. After Seibert finally admitted her guilt, she was permitted a twenty-minute coffee and smoke break. Id. Following this break, the officer turned on a tape recorder, gave Seibert her Miranda warnings, and obtained a signed waiver of those rights. Id. He then resumed questioning by confronting Seibert with the incriminating statements she made prior to the break and rehashed all of the same incriminating information. Id.

The United States Supreme Court held that the "question-first" procedure employed by the police in Seibert's case was constitutionally infirm because the

“midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda’s constitutional requirement.” Id. at 604. In reaching this conclusion, the Court pointed out the following relevant factors that bear upon whether “midstream” Miranda warnings could be effective enough to accomplish their object:

- (1) The completeness and detail of the questions and answers in the first round of interrogation;
- (2) The overlapping content of the two statements;
- (3) The timing and setting of the first and the second rounds of interrogation;
- (4) The continuity of police personnel; and
- (5) The degree to which the interrogator’s questions treated the second round as continuous with the first.

Id. at 615. In Seibert’s case, the unwarned interrogation occurred in the station house, and the questioning was “systematic, exhaustive, and managed with psychological skill.” Id. In fact, when the police were finished with this first round, “there was little, if anything, of incriminating potential left to be said.” Id. at 616. The warned phase of the questioning proceeded after only a short break and took place in the same location. Id. The same officer conducted the first and second rounds of questioning. Id. The officer did not advise Seibert that her prior statement might be inadmissible in court and in fact made the second round of questioning seem like two sessions that were parts of a “continuum”; under these circumstances it would be “unnatural” to refuse to repeat during the second round what had already been said before. Id. at 616-17. Accordingly, the Court found that a statement repeated after Miranda warnings in such circumstances is inadmissible. Id. at 617.

In 2010, our Supreme Court analyzed Seibert in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). In the case, Navy's son was rushed to the hospital after being found unresponsive in his crib. After the death of his son, Navy gave a statement to law enforcement while he was still at the hospital, but because he was "so upset and distraught," officers thought the statement was incomplete. Officers later learned from the pathologist who performed the autopsy that the cause of death was smothering or suffocation. Id. at 297, 688 S.E.2d at 839.

The following day, officers went to Navy's home with the intent of transporting him to the sheriff's office for further questioning. Thereafter, Navy gave a statement in which he described noticing the child having breathing problems and his subsequent panic. Id. at 297-298, 688 S.E.2d at 839. Thereafter, officers informed Navy his son had suffocated and there was evidence of broken ribs. Navy asked if he was under arrest and was told he was not. The officers then engaged in follow-up questioning. "At this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this first statement, Navy admitted to popping the child on the back and possibly patting the child on the mouth. After this statement, Navy received another smoke break. Id. at 298-299, 688 S.E.2d at 840.

Officers then advised Navy of his Miranda warnings. Afterward, Navy gave his second statement, which was his first in writing. This statement echoed his previous oral statement except Navy admitted to placing his hand over his son's mouth to stop his crying multiple times, including possibly covering his nose area as well, popping him on the back causing the child to cry out loudly, and feeling frustrated because the child was crying. Id. at 299-300, 688 S.E.2d at 840.

Following this second statement, officers contacted the pathologist, who told them the description provided by Navy in his second statement could not have caused the child's death. In response to this information, officers obtained a third written statement from Navy. Navy then admitted that he could have held his hand over his son's nose and mouth for longer than he first said, possibly for up to two minutes. Id. at 300, 688 S.E.2d at 840-841.

Our Supreme Court held Navy's first statement was admissible because the record contained evidence to support the trial court's finding Navy was not in custody. The Court noted was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." Id. at 301, 688 S.E.2d 841. Conversely, the Court held Navy's second and third statements were obtained in violation of Seibert and were therefore inadmissible. The Court found:

The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having smothered him. Once those incriminating answers were given—i.e. after respondent admitted he had popped the child on the back and "patted" his mouth—respondent was permitted a supervised cigarette break, then given Miranda warnings, with interrogation by the same officer resuming immediately.

Navy, 386 S.C. at 303, 688 S.E.2d at 842. The Court concluded the Seibert factors were met and "none of the curative measures suggested by Justice Kennedy, i.e. an additional warning that the answers given after the first statement but before the administration of Miranda warnings may not be admissible, a substantial break in time, or change of circumstances, occurred here." Navy, 386 S.C. at 303, 688 S.E.2d at 842.

The present case is distinguishable from Seibert and Navy and a review of the five factors set forth in Seibert weigh in favor of admission of Appellant's post-Miranda statements. Appellant was approached by police while he had the package of Oxycodone in his possession and upon realization that he had been caught, he attempted to discard the package and find an escape route. (R. 19). At that time, Edmonson and Bass ordered Appellant to the ground and handcuffed him. (R. 9-10). Edmonson asked Appellant what was in the package and he initially denied knowing it contained contraband but quickly changed his story and admitted the package contained illegal drugs. (R. 10, 20-21, 149-50). Edmonson then administered Miranda warnings to Appellant and asked Appellant if he would like to talk. (R. 10-11, 21). Appellant acknowledged he understood his rights and agreed to waive them and talk to law enforcement. (R. 11-12). Appellant admitted he knew the package contained illegal drugs, he was picking up the package for money because he could not find a job because he had recently been released from prison, and gave consent to open the box in this second oral statement. (R. 11-12, 21, 150). After a drug-sniffing canine made a positive identification, a search warrant was obtained, and Edmonson opened the box to discover the three hundred tablets of Oxycodone, Appellant again indicated he would talk to law enforcement. (R. 12-13). Edmonson then re-administered Miranda warnings to Appellant and Appellant gave a written statement approximately forty-five minutes after first encountering police. (R. 12-15, 183).

Appellant's initial statement to law enforcement was brief and consisted of him denying then quickly admitting he knew the package contained illegal drugs. He did not provide any detail about why he had picked up the box or his role in previous drug transactions. In contrast, his second and third statements were much more detailed and lengthy, with Appellant again admitting to knowing the box contained illegal drugs, but

also informing law enforcement he was acting as a mule to support his family due to trouble finding work. Additionally, Appellant's final written statement was taken less than forty-five minutes after officers approached him and he gave his first oral statement. During this time, there was a significant break in questioning, where Edmonson called in a drug-sniffing canine that made a positive identification of drugs inside the box, obtained a search warrant from a magistrate, opened the box, and broke apart the candle to reveal the Oxycodone. These are all marked distinctions from Seibert and Navy and establish that Appellant's second and third statements were admissible. Cf. Seibert, 542 U.S. at 616 ("The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished, **there was little, if anything, of incriminating potential left unsaid.**" (emphasis added)) and Navy, 386 S.C. at 303, 688 S.E.2d at 842 ("**Once the incriminating answers were given**—i.e. after respondent admitted he had popped the child on the back and "patted" his mouth—respondent was permitted a supervised cigarette break, then given Miranda warnings, with interrogation by the same officer resuming immediately." (emphasis added)). Furthermore, unlike the defendants in Seibert and Navy, Appellant has a lengthy record and was familiar with law enforcement and the criminal justice system, thereby reducing the effect of taint from a failure to initially receive his Miranda warnings. Because Appellant's second and third statements were voluntarily made after an informed waiver of rights, the trial court did not err in admitting the statements. See, e.g., Myers, 359 S.C. at 44, 596 S.E.2d at 490 ("The totality of the circumstances does not demonstrate that Appellant's will was overborne by the police. As there is no evidence that the confession was not voluntary we therefore hold that the

trial court did not err in admitting Appellant's confession."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 8, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-000308

THE STATE,

Respondent,

vs.

LANCE LEON MILES,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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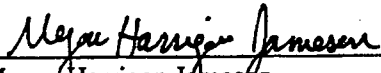
Appellant.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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APPELLANT

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ARGUMENTS IN REPLY

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

Any person who *knowingly* sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is *knowingly* in actual or constructive possession or who *knowingly* attempts to become in actual or constructive possession of:

- (3) four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as “trafficking in illegal drugs” and, upon conviction, must be punished as follows if the quantity involved is

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

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

Comparison of Jury Instructions: North and South Carolina.

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

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

For you to find the defendant guilty of [trafficking] the State must prove two things beyond a reasonable doubt: First, that the defendant knowingly⁴ possessed [name controlled substance]. A person possesses (name controlled substance) if the person is aware of its presence and has (either by oneself or together with others) both the power and intent to control the disposition or use of that substance.

And Second, that the amount of (name controlled substance) which the defendant possessed was (state amount).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The defendant in *Coleman* admitted that he knew of the box that contained marijuana and heroin. However, while he admitted that he thought that the box contained cocaine in addition to marijuana, he said that he did not believe that the box contained heroin. In this case, defendant denied any knowledge of either the gift bag located in the van that he was driving or its contents. . .

Thus, the basic pattern instruction given here, which required the jury to find that defendant “knowingly possessed” the drug,—that he was in fact “aware of its presence” and had the ability to exercise control over it—adequately informed the jury of the determination that it must make in light of the position that defendant asserted.

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

Conclusion

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,


John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

This 2nd day of June, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LANCE L. MILES,

APPELLANT

APPELLATE CASE NO. 2015-000308

CERTIFICATE OF SERVICE

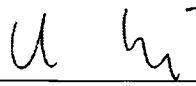
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of June, 2016.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2016.


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

My Commission Expires: May 12, 2025.