ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

vs.

DINAL WAYNE KEITH,

Appellant.

Appellate Case No. 2017-001088

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Keith was tied and convicted by a jury for possession with intent to distribute (PWID) buprenorphine and trafficking hydrocodone on April 24-27, 2017. The Honorable J. Derham Cole sentenced Keith to twenty-five years imprisonment and a hundred thousand dollar fine for trafficking and a concurrent sentence of twenty years for the PWID offense.

STATEMENT OF FACTS

On April 28, 2016, Appellant Keith and his live-in girlfriend, Sherry Brandon, sold thirty-three hydrocodone pills to a confidential informant, Bryan Sullivan, in a controlled buy. Shortly after, law enforcement executed a search warrant and arrested Keith with seven Buprenorphine pills, also known as subs or subutex, in his pocket.

Lieutenant James Ligon of the York County Drug Enforcement Unit described the events of the April 28 controlled purchase. The informant was searched both before and after the sale to ensure the informant did not bring contraband to the sale. After the informant made a purchase from Keith, he returned to the predetermined site. Law enforcement recovered thirty-eight Hydrocodone pills from the informant and took control of the evidence. Law enforcement then attained a search warrant for Keith's house. R. p. 144, lines 14-25.

The drug enforcement officers dressed in raid gear, including bullet proof vests and took three vans to the house to execute the search warrant. Lieutenant Ligon was the last officer in the house. By the time he reached the living room, Keith was sitting on the couch. Keith was advised of his Miranda[1] rights and Keith indicated he understood them. While law enforcement completed the search, Lieutenant Ligon sat on the porch with Keith and Brandon. He did not ask any drug-related questions. Keith was transported to the Moss Justice Center. R. pp. 145-148; p. 170.

Keith was startled when officers raided his house, but he calmed down by the time the search warrant was read to him. Keith appeared sober and was coherent. At the Moss Justice Center, he told law enforcement he was selling "scripts" to live and said "it was his fault, no one else." R. pp. 152-54.

Investigator Leland Harrelson explained why law enforcement needs confidential informants. Rock Hill is a small community and it is hard for officers to go out and buy drugs undercover. R. pp.

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

289-90. He explained when carrying out controlled purchases, law enforcement searches the informants "from top to bottom" to make sure they are not bringing contraband to the sale. R. p. 293. They met Sullivan at a church near Keith's house in Hickory Grove and searched Sullivan and his car. They monitored the drug deal on audio. After the sale, they recovered the hydrocodone pills from the informant. They reviewed the video of the drug deal the next day. R. pp. 297-98.

When the search warrant was executed, law enforcement found seven Buprenorphine pills, also known as subs or subutex, in Keith's pants pocket. They also found $300 cash on Keith. The serial numbers on the bills matched the serial numbers on the money law enforcement gave to Sullivan to complete the purchase. R. pp. 301-02. Both cell phones recovered from Keith's residence showed text messages referring to selling drugs. R. p. 305.

Investigator Harrelson confirmed Keith admitted selling scripts to live. Keith admitted everything was his fault. Keith admitted he does not use subs or Dilaudin pills. He admitted he obtained the pills with a prescription from a doctor in Charlotte. Brandon did not talk to law enforcement. Keith's interview lasted only fifteen or twenty minutes. R. pp. 306-08.

Officer Robin Gauder testified she read Keith his Miranda rights and presented Keith with the waiver form. Keith signed the form. R. pp. 340-41. She found drugs in Brandon's purse. R. p. 354.

Brandon testified she met Keith through a friend of hers when she was buying some pain pills. It was the day before Thanksgiving in 2014. They went on a date that night and moved in together in April or May 2015. She was addicted to pills and worked at IHOP to support her habit. Keith was not employed. R. pp. 241-43.

Brandon and Keith started selling pills together on a daily basis. Keith called Brandon his secretary. Brandon would text customers. Keith would tell her how much they had to sell, and

dictate where to meet the customers and the selling price. R. pp. 243-45. They used both of their phones to arrange transactions. Brandon testified she had no input on the prices. Keith kept all the money. She never sold pills without Keith present. R. p. 244. Not only did she use Keith's phone for transactions, Keith used her phone too. R. p. 247. Brandon identified State's Exhibits Nos. 9 and 12-17 as texts between Brandon and their customers attempting to arrange transactions. R. pp. 260-67.

She testified about the last transaction, on April 28, 2016. Brian Sullivan arrived at their house to purchase pills. Brandon counted out thirty-three Hydrocodone pills for Sullivan, and five more for someone else, at Keith's direction. R. pp. 267-71. She testified Keith occasionally took pills while partying and drinking after they got hold of a new prescription, but otherwise, Keith only kept pills to sell. R. p. 93.

Sullivan worked as an informant for law enforcement. He mainly bought pills from Appellant Keith – Xanax, Percocet, Hydrocodone, and Dilaudid. R. pp. 179-81. On April 28, 2016, he bought Hydrocodone pills from Keith while working for law enforcement. He was working for law enforcement as an informant because of his pending charges. Keith noted it is not easy being a confidential informant. R. pp. 181-82. He explained he was addicted to pain killers. He agreed he used drugs since entering into a written agreement with law enforcement to work as an informant. R. pp. 206-08.

Sullivan testified he first met Keith about a year before the April 2016 bust. Their relationship consisted of Sullivan buying drugs from Keith. R. p. 179, line 17 – p. 180, line 9. Sullivan explained that in his time with Keith, he never knew Keith to take a lot of pills, maybe every now and then to relax. Sullivan described Sherry as more of a pill taker. R. p. 203, lines 16-

22.

The first time he bought from Keith while undercover was on April 8 at Sound on Wheels. At Sound on Wheels, he purchased the suboxone strips directly from Keith. The next time he purchased ten Dilaudid pills at Home Depot. The third time he purchased Alprazolam (Xanax) at Keith's house. In his statement, he said he handed Sherry $40 and received four pills from Sherry before Sullivan took Keith to the store. When he brought Keith back, Keith sold him three more pills for $10. The last controlled purchase was the April 28 purchase of Hydrocodone pills, also at Keith's house. R. p. 184; p. 232, lines 10-19; p. 234, line 25 – p. 235, line 9.

Sullivan testified that when he purchased pills from Keith, Keith's girlfriend Sherry was usually with him. Usually he would text or call Keith and Sherry to set up transactions. He typically would text which of the two he last dealt with, but might text them both and deal with whichever one communicated back with him first. Keith and Sherry would use each other's phone. He could tell which phone he was communicating with by the signature. If it was Keith's phone, the signature would be "Denny and Sherry," and if Sherry's phone, the signature would be "Sherry and Denny." R. p. 185-87. When he made the April 28 purchase from Keith and Sherry, he purchased thirty-three pills for $300. He gave the cash to Keith and received thirty-three pills from Sherry. R. p. 201-02. He returned to the arranged meeting place with law enforcement. R. p. 203.

Describing the April 28 transaction, Sullivan testified Keith and Sherry were sitting together in the living room. Sherry counted the pills and Sullivan gave the money to Keith. Sullivan testified Keith interacted with him on each of the four controlled purchases. R. p. 188. State's Exhibit No. 5 shows the transaction. Sherry is seen counting out pills. Keith is shown holding money. Sullivan asks him when they will have "subs" and Keith tells him when. State's Ex. No. 5 (11:50 to 14:10).

The footage from State's Exhibit No. 5 was from a camera on a key chain that Sullivan placed in his pocket. So the picture moves around a lot, and the transaction is depicted at a sideways angle through much of the video. R. p. 210 (noting the camera was on a key chain and he placed it in his pocket). A juror might get motion sick from watching the video.

At Home Depot, Sullivan exchanged the drugs and money directly with Keith. He purchased ten dilaudid pills for $130. He identified State's Exhibit No. 2 as the video of that purchase. R. pp. 188-89. The video shows Sullivan arriving and having a discussion with Sherry and Keith. At one point, Keith and Sullivan are heard discussing the price: ten for 130. State's Ex. No. 2 (2:00-2:10). The video also shows Sherry using two cell phones, one with a green case, and one with a pink case. State's Ex. No. 2 (1:20-1:30). Defense counsel pointed this out while cross-examining Sullivan. R. p. 216, lines 22-24.

Sullivan identified State's Exhibits Nos. Three and Four as texts from Keith's phone and texts from Sherry's phone. R. p. 192-95. Sullivan published and explained the texts in State's Exhibit No. 3. The texts start with Sullivan asking, "How much are they[?]" The reply from "Denny & Sherry" is "20." Sullivan asks, "Dang. What happened to 15?" and Keith's phone replies "15 went ta hell[.]" Sullivan muses, "Haha i guess so. I[']ll ask and check tho." The answer is "K" with the "Denny and Sherry" signature below. Three hours later, Sullivan asks, "How many can you get[?]" He follows with, "And if i get 10 or 20 can u do cheaper?" Keith's phone responded "8eacj" to which Sullivan complained about no price break. Keith's phone responded that Sullivan already got a price break. At 5:01 p.m., Keith's phone indicated the sellers were ready and at 5:04 advised Sullivan "38 left." Sullivan asked "Hydro tens right[?]" Keith's phone subsequently confirmed this. State's Exhibit No. 3. Sullivan confirmed that Hydro tens is slang for 10mg Hydrocodone pills. R.

p. 198, lines 13-15.

At 5:19 p.m., Sullivan asked if he could get them all for $300. Keith's phone responded, "Yes come." The last text from Sullivan at 5:53 p.m. advises he has the money and is headed their way. State's Exhibit No. 3. Sullivan admitted to defense counsel that he would not know who was really on the phone regardless of the signature on the texts. R. p. 216, line 25 - p. 217, line 12.

State's Exhibit 4 is a series of texts between Sullivan and Sherry's phone. State's Exhibit No. 4. Sullivan read and explained the texts, which were setting up a transaction to purchase six 2mg pills of Xanax for $20. R. p. 200-01.

ARGUMENT

I.

Evidence supports the trial court's determination that Appellant's statement was freely and voluntarily made because law enforcement provided warnings meeting the requirements of Miranda and its progeny, and Appellant spoke freely and voluntarily with law enforcement without coercion or promises.

One of the most significant of Miranda's progeny is on point with the first issue and yet omitted from Keith's initial brief. Keith argues the Miranda warnings provided to him were diluted and confusing. Nearly identical warnings were found sufficient in Duckworth v. Eagan, 492 U.S. 195 (1989). Duckworth is binding authority Keith neglects to cite in his brief. Evidence supports that the statement provided law enforcement was freely and voluntarily made.

Keith also argues he did not waive the Miranda rights because the acknowledgement provision of the Miranda rights form only acknowledges the signee read the statement of rights and understood them. Keith complains the acknowledgement form does not state the signee waived the signee's Miranda rights. The short answer to this argument is a written waiver is not required. North Carolina v. Butler, 441 U.S. 369, 373-74 (1979) (finding an express statement of waiver is not required to find a statement is voluntary; appellant refused to sign waiver form but indicated he was willing to cooperate). The trial court heard testimony that Keith was provided his Miranda warnings, he appeared to understand them, and was willing to talk to law enforcement. Accordingly, the trial court's ruling is supported by evidence.

Law enforcement advised Keith of his rights as follows:

> You have [the] right to remain silent. Anything you say can be used against you in Court. **You have the right to talk to a lawyer for advice before answering questions and have your lawyer present**

> **during questioning.** You have the right to have the advice and presence of a lawyer even if you cannot afford to hire one. **We have no way of appointing you a lawyer but one will be appointed by the court for you if you wish.** If you wish you may answer questions without the presence of a lawyer and you may stop answering any time you desire.

R. p. 52, lines 4-12.

The warnings closely track the language in Duckworth, the most notable difference is that in Duckworth, the warnings noted that an attorney would be appointed "if and when you go to court." That language is not present in the instant case.

The United States Supreme Court found, "We think the initial warnings given to respondent touched all of the bases required by Miranda." Duckworth at 203. The United States Supreme Court noted the police told Duckworth "that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had 'this right to the advice and presence of a lawyer even if [he could] not afford to hire one' and that he had the 'right to stop answering at any time until [he] talked to a lawyer.'" Id. The Supreme Court then focused on the "if and when you went to court" language, finding the Seventh Circuit Court of Appeals misapprehended the language and that the instruction "accurately described the procedure for the appointment of counsel in Indiana." Id. at 203-04. The Supreme Court surmised, "We think it must be relatively commonplace for a suspect, after receiving Miranda warnings, to ask when he will obtain counsel. The 'if and when you go to court' advice simply anticipates that question." Id. at 204. The Supreme Court noted Miranda does not require attorneys be producible on call, but only that a suspect be informed the suspect has a right to the presence of an attorney before and during interrogation, and that an attorney would be appointed if the suspect could

not afford one. Id.

The Supreme Court then addressed Duckworth's reliance on California v. Prysock, 453 U.S. 355 (1981), in which the Supreme Court found the reference to the right to appointment of counsel was linked to a point in time after the police interrogation. Id. at 204-05 (quoting Prysock, 453 U.S. at 360). The Supreme Court found, "The warnings in this case did not suffer from that defect. Of the eight sentences in the initial warnings, one described respondent's right to counsel 'before [the police] ask[ed] [him] questions,' while another stated his right to 'stop answering at any time until [he] talk[ed] to a lawyer.'" Id. at 205 (quoting Prysock, 453 U.S. at 1555-56). The Supreme Court concluded the warnings to Duckworth were sufficient. Id.

In the instant case, the warnings were nearly identical to the warnings in Duckworth and were not erroneous. Therefore, the trial court did not err in admitting Keith's confession to law enforcement.

Keith also generally complains the State did not meet its burden to prove his statement to law enforcement was not voluntary. However, probative evidence supports the trial court's ruling. "When reviewing a trial [court's] ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of evidence, but simply determines whether the trial [court's] ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007). "Coercive police activity is a necessary predicate to finding a statement is not voluntary." Id. at 386, 652 S.E.2d at 452; see also State v. McClure, 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (Ct. App. 1994) (noting the question of the voluntariness of a confession can come down to a question of credibility, which the trial court may resolve in favor of the officers).

Lieutenant Ligon testified he observed Investigator Gander advise Keith of his Miranda rights after Keith was served with the search warrant. R. pp 28-29. Keith signed the acknowledgement of rights form. R. pp. 30-31. However, Keith did not give a statement at that time. Lieutenant Ligon explained Keith and Brandon were brought out on the porch and Lieutenant Ligon and Commander Brown made small talk with Keith and Brandon. R. p. 31, lines 14-20. Lieutenant Ligon testified neither Keith nor Brandon appeared nervous to him while speaking on the porch. R. p. 39, lines 22-23.

Following execution of the search warrant, Keith was transported to the Moss Justice Center and Keith was interviewed in an interview room by Ligon and Investigator Harrelson. Keith did not ever invoke his right to remain silent or request an attorney. R. pp. 31-32. Keith testified that neither he nor Investigator Harrelson ever made any threats or promises, and neither attempted to coerce Keith into speaking with them. R. p. 32, lines 14-17.

Lieutenant Ligon explained Keith was not in handcuffs during the interview. R. p. 47, lines 9-15. The officers' guns were holstered. R. p. 47, lines 16-21. Lieutenant Ligon explained Keith's demeanor was calm, but agitated. R. p. 48, lines 2. Keith appeared sober and coherent. He seemed to understand what law enforcement told them. He agreed to speak with the officers and never indicated he wished to stop the interview. R. pp. 32-33.

Investigator Leland Harrelson testified similarly, noting Keith appeared to understand his rights and was coherent. He did not invoke his right to remain silent or ask for an attorney. R. pp. 50-51. At the Moss Judicial Center in the interview room, Investigator Harrelson explained to Keith that he executed several undercover purchases and had a video of his sale to a confidential informant. R. p. 53, lines 17-24. Keith never indicated he did not want to speak with the officers. Investigator

Harrelson confirmed that the officers did not make any threats or promises during the interview. R. pp. 54-55.

The officers' testimony that Keith was read his rights and appeared to understand his rights, plus the testimony that he was not coerced or promised anything, and never asked to stop the interview or ask for an attorney, is evidence supporting the trial court's determination the statement was freely and voluntarily made. Miller.

II.

The trial court did not err in admitting prior bad acts that were probative of Appellant's intent to distribute pills in his possession and to show the existence of a conspiracy to traffic pills. The evidence was also admissible as res gestae. Any danger of unfair prejudice was diminished by the trial court's limiting instruction.

Keith complains the trial court erred in admitting evidence of other prior bad acts which includes: (1) testimony and evidence of Sullivan's prior purchases of pills from Keith; and (2) testimony and evidence, particularly texts, of transactions arranged by Keith and Brandon. The trial court did not err in admitting evidence of the prior bad acts because it was part of the *res gestae* of the crime, was probative on intent as to the PWID charge, and was proof of the conspiracy between Keith and Brandon to sell the hydrocodone.

Evidence must be relevant to be admissible at trial. Rules 401 & 402, SCRE. Evidence is relevant if it tends to establish, or make more or less probable, some matter in issue on which it directly or indirectly bears, even if the inference sought does not necessarily follow from the fact proved. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is admissible if it is "'logically relevant'" to a material fact or element to be proved. Id. (quoting State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)).

Relevancy of evidence is a matter committed to the discretion of the trial judge. Sweat, 606 S.E.2d at 513. The trial judge's decisions regarding relevancy of evidence should be reversed only for abuse of discretion. Id. "'If there is any evidence to support the admission of prior bad acts evidence, the trial judge's ruling will not be disturbed on appeal.'" Id. at 514 (quoting State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)).

Evidence of prior bad acts may "be admissible to show motive, identity, the existence of a

common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE; Wilson, 345 S.C. at 5, 545 S.E.2d at 829; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

If not the subject of a conviction, prior bad acts must be shown by clear and convincing evidence. Wilson, 345 S.C. at 5, 545 S.E.2d at 829; State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119, 123 (2000); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002). Note Keith makes little attempt to challenge the evidence on the basis it was not clear and convincing. Sullivan and Brandon both testified to the ongoing relationship between Brandon and Keith, who sold pills together, and Sullivan, who was a repeat customer. They testified from direct knowledge which is sufficient to satisfy the clear and convincing standard. State v. Ford, 334 S.C. 444, 453, 513 S.E.2d 385, 389 (Ct. App. 1999) (finding the clear and convincing standard was met because the victim testified from direct knowledge that the defendants robbed and attempted to rob him and his testimony was partially corroborated by a detective).

The evidence was probative on the issue of intent.

First, the evidence at issue was directly relevant to the issue of Thompson's intent on the PWID charges. When a defendant is charged with possessing a controlled substance with the intent to distribute it, evidence of a prior drug transaction is relevant on the issue of intent. Wilson, 545 S.E.2d at 830; State v. Gore, 299 S.C. 368, 384 S.E.2d 750, 751 (1989); King, 349 S.C. at 153; 561 S.E.2d at 645-46.

In this case, Sullivan's history of purchases from Keith and his purchase of pills from Keith three times in the twenty day period before pills were found in Keith's possession went directly to the issue of whether he possessed the drugs with the intent to distribute them.

The South Carolina Supreme Court explained application of the intent exception from Lyle in

two drug cases. The Supreme Court noted, "We have held that evidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing State v. Gore, 299 S.C. 368, 384 S.E.2d 750 (1989)). In Gore, the Court held that evidence of prior sales by defendant was admissible on the issue of intent where the prior sale occurred one month before the charged offense. Gore, 299 S.C. at 370, 384 S.E.2d at 751 ("The evidence that appellant sold cocaine from the trailer on two occasions only one month earlier tends to establish his intent regarding the cocaine in his possession at the time in question.").

Similarly, in Wilson, the Court held evidence of a prior drug transaction was relevant to the issue of intent when the prior sale occurred only a few days earlier. Wilson, 345 S.C. at 7, 545 S.E.2d at 830. The Court also relied on circumstantial evidence to prove intent. Id. (finding the amount of baggies and cash found in hotel room, evidence of flushing before police entered the room, and testimony that defendant himself did not smoke crack was properly admitted by the trial judge to prove intent of prior bad acts exceptions).

In the instant case, the trial court made an in limine ruling, observing it went to the element of intent to distribute. "In the context of a criminal case, we have noted that while evidence of other crimes is generally inadmissible to show criminal propensity or to demonstrate that the accused is a bad individual, evidence of other crimes is admissible if necessary to establish a material fact or element of the crime charged." In re Corley, 353 S.C. 202, 205-06, 577 S.E.2d 451, 453 (2003). The trial court found this probative value was not substantially outweighed by the danger of unfair prejudice. R. p. 108, line 25 – p. 109, line 21. Responding to defense counsel's argument that the video of the Home Depot transaction was not probative because it was a different drug, the trial court

observed it shows the relationship between Keith and Sullivan and shows Keith's intent to distribute the drugs in his possession at the time of arrest. R. p. 109, line 22 – p. 110, line 3.

The evidence was admissible under the common scheme or plan exception to prove the existence of a conspiracy to prove trafficking.

Additionally, Keith was charged with trafficking Hydrocodone. The trafficking statute prohibits both conspiracy to sell prohibited substances and aiding and abetting to sell prohibited substances. The prior sales, texts, and Brandon's testimony all were probative to establish Keith and Brandon conspired to sell Sullivan Hydrocodone and aid and abetted each other to sell Hydrocodone.

"Although the offense of conspiracy may be complete without proof of overt acts, such acts may nevertheless be shown, since from them an inference may be drawn as to the existence and object of the conspiracy. It sometimes happens that the conspiracy can be proved in no other way." State v. Condrey, 349 S.C. 184, 192, 562 S.E.2d 320, 323 (Ct. App. 2002) (internal quotations and citation omitted).

In State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995), Raffaldt was indicted for trafficking cocaine. The indictment alleged Raffaldt conspired to bring 100 grams or more of cocaine into South Carolina between December 1989 and March 14, 1991. The evidence principally involved Raffalt's purchase from Jesus Jiminez of a kilogram of cocaine on January 30, 1991. Jiminez provided the cocaine to William Kelly who delivered the cocaine to Raffaldt and brought back the $26,000 Raffaldt paid to Jiminez. Kelly testified he first met Raffaldt in 1990 at a cock fight and sold Raffaldt four ounces of cocaine. Kelly engaged in two similar transactions in 1990 before the final January 30, 1991 transaction. Burchett, who set up transactions between Kelly and Raffaldt, corroborated other witnesses' accounts of the January 30, 1991 transaction. Id. at 112, 456

S.E.2d at 392.

Kelly and Burchett also testified Raffaldt sold marijuana to Burchett, who in turn sold it to Kelly. Raffaldt objected to this testimony. However, the Supreme Court found the evidence of the marijuana transactions admissible because it was quite similar to the cocaine conspiracy and was admissible under the common scheme or plan exception. Id. at 113-14, 456 S.E.2d at 392.

Under Rule 404(b), evidence of common scheme or plan may be found admissible. "Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine if there is a close degree of similarity." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-278 (2009) (citation omitted).

Evidence of prior bad acts must logically relate to the charged offense, and the probative value of the evidence must outweigh any danger of unfair prejudice. State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). "The acid test of admissibility is the logical relevancy of the other crimes." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

"In other words, the law permits proof of a plan or scheme to commit a series of crimes including the one for which the accused is being tried, and, as tending to show the existence of such plan or scheme, it allows testimony of the commission of crimes other than the one charged, but so related in character, time, and place of commission as to tend to support the conclusion that there was a plan or system which embraced both them and the crime which is charged." Webster v. State, 425 S.W.2d 799, 811 (Tenn. Crim. App. 1967) (quoting 20 Am.Jur., Evidence, sec. 314, page 296).

In the present case, the prior transactions between Keith, Brandon, and Sullivan are similar.

They were arranged by texts between Sullivan and Keith or Brandon for the purchase of prescription drugs. Additionally, the texts between Brandon and other customers are similar to how the transactions were arranged in the present case, they were arranged by text by Brandon but approved by Keith. All the texts bore the "signature" of "Dennie and Sherrie" which provides further evidence of the conspiracy or agreement between Keith and Brandon to sell prescription drugs together.

The probative value of the prior bad acts was not outweighed the danger of unfair prejudice.

Evidence of prior bad acts, even if relevant and clear and convincing, must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See Rule 403, SCRE; State v. King, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999). Prejudicial evidence is still proper unless it amounts to unduly or unfair prejudice. See State v. Beck, 342 S.C. 129, 136-37, 536 S.E.2d 679, 683 (2000) ("We find that evidence of the [prior bad act], although certainly prejudicial to Appellant, is not unduly so under our previous decisions.). In the instant case, the prior bad acts were probative of Keith's intent to distribute subotex and to prove he aided and abetted, and conspired with Brandon to sell the thirty-three hydrocodone pills Brandon counted out for Sullivan. The trial court specifically found the probative value of the evidence was not outweighed by the danger of unfair prejudice. R. p. 109; p. 112.

The evidence is admissible under the res gestae theory.

Further, all the transactions arranged together by Keith and Brandon are admissible *res gestae*. Specifically, it constituted part of the *res gestae* of the trafficking and intent to distribute charges, since this "evidence ... is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context." State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370– 71 (1996) (alterations in

original) (internal quotation marks omitted), *overruled on other grounds*, State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999).

In the instant case, the evidence is admissible because it gives the full picture of the pill-selling business Keith and Brandon operated and aids in establishing the requisite elements of both trafficking (conspiracy, aiding and abetting) and PWID (intent). For the same reasons the trial court in its Lyle analysis determined the danger of unfair prejudice from the prior bad acts did not outweigh their probative value, the danger of unfair prejudice did not outweigh the probative evidence in the present case.

Any danger of unfair prejudice was extinguished by the trial court's thorough limiting instruction.

Any danger of unfair prejudice was eliminated with the trial court's limiting instruction. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (noting the jury is presumed to follow the law as instructed to them in the trial court's jury charge). Because of the limiting instruction, Keith was not prejudiced by the prior bad acts. The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985).

The trial court gave the following limiting instruction:

> In this case you have heard certain evidence introduced into the trial of the case relating to the defendant's commission of a prior bad act constituting a crime. This evidence was offered by the State to prove

> an essential element of one or more of a crimes [sic] for which the defendant now stands charged. This evidence may be considered by you if you find it probative on that point and you find it credible only as it relates to the proof of some essential element that the State must prove in order for the defendant to be found guilty of a particular crime for which he now stands charged. **But such evidence may not be considered by you simply as evidence that the accused acted in conformity with any prior conduct. In other words, such evidence may not be considered by you as evidence that the defendant must be guilty of the crimes for which he now stands charged simply because he has previously engaged in similar conduct.**

R. p. 431, lines 1-18.

This instruction ensured that the jury would not consider the prior bad acts for propensity purposes, but only as to his intent and as to whether he aided and conspired with Brandon to distribute Hydrocodone.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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July 27, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

vs.

DINAL WAYNE KEITH,

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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Appellate Case No: 2017-001088

THE STATE,

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v.

DINAL WAYNE KEITH,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by delivering two copies of the same to his attorney of record, Laura R. Baer, Esquire, SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 27th day of July, 2018.

Anne Mueller

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