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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from York County Court of General Sessions
The Honorable Brian Gibbons, Circuit Court Judge

Appellate Case No. 2018-000423

State of South Carolina,.....Respondent,

v.

Jonathan Ostrowski,.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In June 2017, Appellant Jonathan Stanley Ostrowski was indicted for trafficking meth ("meth") 28 grams or more; possession of a weapon during the commission of a violent crime; possession with intent to distribute ("PWID") a quantity of alprazolam, possession of a handgun by a person convicted of a crime, and possession of a handgun with its serial number obliterated. (Indictments, 2017-GS-46-02573, 73A; 74-76). The offenses were alleged to all have occurred on January 25, 2017. (Indictments 2017-GS-46-02573–76). Dayne C. Phillips, Esq. represented Appellant. Assistant Solicitor Aaron J. Hayes prosecuted the case. Appellant was tried before the Honorable Brian Gibbons on February 27, 2018 to March 1, 2018 on all charges but for PWID alprazolam, which was dismissed. Prior to trial, Appellant moved to suppress all evidence seized from the search of his residence. (Trial Tr. p. 90, ln. 20 – p. 91, ln. 7). After a *Franks v. Delaware* hearing, the trial judge denied the motion. (Tr. p. 92 – p. 120, ln. 7). *See infra* pp. 9-10. Appellant also moved to exclude evidence of his alleged prior drug transactions and subsequent drug possession under Rule 404, SCRE. (Trial Tr. p. 144, ln. 4-18). The trial court granted the motion in part and trial proceeded thereafter. (Tr. p. 240). *See infra* pp. 34-36, fn. 9. The jury ultimately found Appellant guilty on all charges. (Tr. p. 530, ln. 10-18). Judge Gibbons sentenced Appellant to eighteen years on the trafficking charge and a five year concurrent sentence for each weapon charge. (Tr. p. 551, ln. 23 – p. 552, ln 1-12; Sentencing sheets) Appellant timely filed a notice of his intent to appeal. (Notice of Appeal). This appeal follows.

STATEMENT OF THE FACTS

The charges arose from the seizure of 31.66 grams of meth during the execution of a warrant to search the Appellant's residence, 162 Bailey Avenue, Rock Hill in York County ("the residence") on January 25, 2017. The search came about as part of an ongoing investigation and surveillance conducted by the MJDEU and the DEA (Ct. Ex. 3 – 5 ; Trial Tr. p. 140, ln. 20-22; p. 159; p. 174,

ln. 1-7). Various individuals including codefendant Alexandria Peters, Appellant,[1] and still unidentified individuals apparently all became subjects of the investigation. (Ct. Ex. 4-5). Unrelated to the charges on trial, Peters sold alprazolam to a confidential informant ("CI") during a controlled buy in Fort Mill four months prior to the search warrant in September 2016. (Ct. Ex. 4). Arrests warrants for distribution of alprazolam and distribution of alprazolam within proximity of a school were obtained as a result. (Ct. Ex. 4).

On the morning of the search, Peters was arrested on the outstanding warrants for the alprazolam charges while at a nearby bank, and one alprazolam pill and one clonazepam pill were found in her purse during a search incident to arrest (Ct. Ex. 4; Tr. p. 205, ln. 1-6; p. 460, ln. 4-10). Peters was charged possession of alprazolam and clonazepam as a result. (Ct. Ex. 4). She was subsequently also charged with trafficking meth and a weapons charge in connection with the search of the residence. (Ct. Ex. 4).

Notwithstanding the investigation and surveillance of the residence, Investigator Burkhart testified when the search warrant was issued, there was no evidence of drug distribution occurring at the residence or involving Appellant, and there was no evidence Peters intended to distribute the pills found in her purse. (Tr. p. 99, ln. 8-20; p. 104, ln. 3-13). Because Peters and others were living at the residence and visiting frequently, the State was to prove the charges against Appellant through constructive possession through circumstantial evidence. (Tr. 146, ln. 19-22; p. 162; p. 173, ln. 19-21; Ct. Ex. 4-5). MJDEU Investigator Leland Harrelson and DEA Agent Jason Satterwhite, who had been assisting with the investigation, both testified they personally only sporadically conducted surveillance and did not know whether any individuals or whom may have staying at the residence or coming or going from the residence in the days before the search. (Tr. p. 287, ln. 4 – p. 288, ln.

[1] Appellant and codefendant Peters were dating and living together at the time.

5; p. 321, ln. 14-17). Any other surveillance conducted at the residence other than the day of the search was not recorded in any report or other discovery. (Tr. p. 287, ln. 4-p. 288, ln. 5). Agent Satterwhite did testify that he saw five different cars at the residence on one previous occasion, and specifically recalled an unidentified man come and go from the residence in a vehicle subsequently identified during the investigation. (Tr. p. 305-307; p. 324, ln. 9-15).[2] Further, Peters testified that Appellant would have friends and family members, "not just people", come over and visit for a night or stay there for extended periods of time. (Tr. pp. 452-453). Peters also explained that several people would come to the home at any one time to pick up machinery and equipment, such as leaf-blowers from Appellant's previous landscaping business, which she would list for sale online on his behalf while he was at work as a painter and drywall installer. (Tr. p. 447, ln. 15 – p. 448, ln. 22). Likewise, Appellant explained that he often had anywhere from eight to twelve friends, family members and their friends staying at his home. (Tr. p. 464, ln. 1-21). Others' belongings were consequently left behind or stored at his home. (Tr. p. 466, ln. 16-19).

The State presented bills and other forms listing the residence as Appellant's address and Appellant testified he lived at the residence. (Tr. p. 463). Appellant had never denied that the meth pipes found were his and testified at trial that items found during the search, like tinfoil with meth residue inside resulted from his own personal use. (Tr. p. 470, ln. 10-16). Appellant also admitted that he struggled with drug addiction for quite some time, but stated he was not a trafficker and as he has maintained from the day of his arrest, the bag of meth found did not belong to him, (Tr. p. 470, ln. 17-18; p. 463).[3]

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[2] Apart from general physical descriptions, the man and the car remained unidentified at trial; his identity and license plate number had been redacted from investigative reports to protect a larger unrelated investigation by the DEA and other agencies.(Tr. pp. 305-310).

[3] Investigator Harrelson testified Appellant said the bag of meth was not his but was forthright that some of the pipes did belong to him. (Tr. p. 260, ln. 10-18).

The 31.66 grams of meth was found in a plastic bag in the pocket of a folded pair of men's size 38 pants. (Tr. pp. 205, ln. 18 --207; p. 363, ln. 10-12; St. Ex. 2(I)). Investigators found the pants inside an armoire placed in a corner area off the residence's entrance and feet away from a bedroom.[4] (Tr. p. 205, ln. 18 – p. 207; p. 283). The armoire was packed to the brim with both men's and women's clothes in various sizes. (Tr. p. 469, ln. 19—p. 470, ln. 4). A makeshift dressing area with a vanity table was positioned next to the armoire. (Tr. p. 205, ln. 10-25; St. Ex. 2(C)) Cosmetics, purses, ash trays, and a roll of tin foil were strewn atop the table. Tr. p. 202; p. 204, ln. 17 – p. 206; St. Ex. 2C, 2D, 2T).). In another bedroom on the other side of the home, officers found a .32 caliber pistol and box of ammunition inside a nightstand. (Tr. p. 204; St. Ex. 2(G)). Investigators also found cosmetics, purses, a display of high heels, and both men's and women's clothing and other personal items in the closet and other areas of the bedroom. (Tr. p. 204, ln. 17 – p. 205, ln. 25; St. Ex. 2H, 2M, 2T). Photos of Appellant and Peters, taken alone, together, and together with other individuals were displayed in the bedroom as well as throughout the kitchen and living room. (Tr. pp. 194-195; p. 205, ln. 7-9; p. 283). Also throughout the living room, kitchen, and garage, investigators found: both visibly used and unused meth pipes; razor blades; one marijuana pipe; pieces of tinfoil, one of which contained 0.03 grams of meth inside its crinkles; and other makeshift and small objects used in smoking meth. (Tr. p. 201, ln. 14-15; p. 247). On top of the refrigerator, a box of great value plastic wrap was found. (Tr. p. 197; St. Ex. 2R, 2S). A digital scale was found in the living room in a basket with a small piece of tin foil and various mundane items. (St. Ex. 2O, 2P; Tr. pp. 198-199; p. 256). Investigators found another meth pipe, box of plastic sandwich bags, and razor blades, and scale amidst dozens of tools in a shed near the garage.

[4] Officers did not know whom was staying in that bedroom and no pictures were taken of it. (Tr. p. 286, ln. 3-7; p. 345, ln. 23-25).

(St. Ex. 2AA, 2Y, 2Z; Tr. pp. 201-202). Over objection, Investigator Harrelson testified extensively regarding the common uses of some of the items when smoking meth, as well as the common uses and significance of the other items to selling meth. *See infra* pp. 23-24.

The altered pistol and the bag of meth found were not tested for DNA, and unbeknownst to Appellant prior to trial, neither were tested for fingerprints until January 2018 after both were handled by various investigators. (Tr. pp. 423 – 424, ln. 1-13; Tr. p. 432, ln. 10-14). Consequently, the fingerprint technician was unable to lift an identifiable fingerprint off the pistol, and testified that contamination or improper evidence handling was a possible reason no identifiable fingerprint could be obtained.[5] (Tr. p. 427, ln. 13 – p. 429, ln. 12). No identifiable fingerprints could be lifted off the plastic ziplock bag of meth found either even though such a plastic bag "is an excellent surface for fingerprints normally...The surface itself [] typically reveals good impressions" (Tr. p. 431 – p. 433, ln. 8-15). Another investigator and forensic technician concluded it was highly likely a fingerprint could have been lifted off either item had they been soon after collection; but handling by ungloved or even gloved hands would have removed any fingerprints. (Tr. p. 433, ln. 19—p. 434, ln. 16). Investigator Harrelson testified that DNA testing or fingerprinting is conducted to prove ownership in some cases where ownership is indeterminable. (Tr. p. 285, ln. 17-21).

The trial judge charged the jury on constructive possession, third party guilt, mere presence, expert testimony, and instructions using truth language. (Tr. p. 516, ln. 3-11 – p. 522). Shortly into deliberations, the jury submitted two questions: (1) "How do they tie the weapon to the defendant?", and (2) "Why were DNA or fingerprints not protocol at the very beginning or for any case for that matter?" (Tr. p. 528, ln. 4-7). The trial judge then instructed the jury it was to consider the evidence

[5] Investigator Rainier testified that contrary to his evidence collection training, he may have handled the pistol and box of ammunition with his bare hands before it had the opportunity to be fingerprinted or tested for DNA. (Tr. p. 332, ln. 15 – p. 334, ln. 5; p. 336, ln. 9 – p. 338, ln. 12).

presented and not to speculate. (Tr. p. 529, ln. 1-14). The jury returned verdicts of guilty on all charges shortly thereafter. (Tr. p. 529, ln. 15-22).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT AFFIDAVIT CONTAINED FALSE AND MISLEADING FACTS, AND OMITTED MATERIAL AND EXCULPATORY INFORMATION, AND THE REMAINING INFORMATION FAILS TO PROVIDE A SUBSTANTIAL BASIS FOR THE MAGISTRATE TO FIND PROBABLE CAUSE.

Relevant facts

Appellant moved to suppress evidence seized during the search based upon the deliberate, misleading allegations and omissions in the affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); the overbreadth the authorization to the search in the search warrant; insufficient facts to support probable cause or lack of nexus to Appellant or drug distribution. (Tr. p. 90, ln. 20 – p. 91, ln. 9). In the search warrant at issue, the description of the property authorized to be seized lists the following:

> Alprazolam, Clonazepam, marijuana, and marijuana paraphernalia any currency, records, receipts, to include written records, computers, computer software, hard drives, cell phones, and any data stored on these devices. Also any packaging materials, scales, any other equipment or materials used in the use, sale, and/or distribution of Alprazolam, Clonazepam and Marijuana.

(Ct. Ex. 5). For the reasons supporting affiant Investigator Daniel Burkhart's belief the aforementioned items would be at the residence, an ongoing narcotics investigation and surveillance of Appellant by the YCMDEU and DEA; Peters's outstanding arrest warrants for alprazolam distribution charges; and Peters's statements about marijuana in the residence are described. (*See* Ct. Ex. 5 in full). The affidavit goes on to state:

> Based on the affiant's training and experience in narcotic investigations, it is believed that drug dealers keep contraband, proceeds of drug transactions, and records of drug transactions that may include written records, photographs, video tapes, audio tapes, computer hard drives and disks, and cellular phones within the

> secure locations of their residence, out buildings, and vehicles owned and operated by the residents.

(Ct. Ex. 5). Appellant's name, birthdate, race and gender are listed in a section describing the premises, person, or thing to be searched. (Ct. Ex. 5). Peters is not listed at all in this section yet the specific facts provided to obtain the warrant involve Peters only. (Ct. Ex. 5). Investigator Burkhart did not give oral testimony to supplement the affidavit. (Tr. p. 94, ln. 8-21;p. 102, ln. 19-20).

The *Franks* hearing revealed that Peters's outstanding arrest warrants stemmed from controlled buys with a CI that took place at her "secondary residence" in Fort Mill on September 15, 2016, months prior to the application of the search warrant. (Tr. p. 98; p. 106, 11-16; Ct. Ex. 4). Investigator Burkhart admitted that at the time of Peters's arrest, and at the time he applied for the search warrant, *there was no evidence that Peters was distributing the pills found in her possession following her arrest on January 25, 2017* on the outstanding warrants. (Tr. p. 99, ln. 8-14).[6] Investigator Burkhart also admitted *there was no evidence of any type of drug distribution occurring at the residence or evidence that Appellant was involved in drug distribution at the time he applied for the search warrant.* (Tr. p. 99, ln. 8-20; p. 104, ln. 3-13). The trial court nonetheless found no issue with the search warrant or the magistrate's determination of probable cause. (Tr. p. 127). This was reversible error.

Standard of Review

When considering "appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). This is a two-part analysis: "'(1) whether the record supports the trial court's factual findings and (2) whether those factual findings

[6] In contrast to the affidavit, he also stated two (2) pills were found in her purse during the search, one (1) clonazepam and one (1) alprazolam. (Tr. p. 99, 12-14; Ct. Ex. 4, p. 2).

establish reasonable suspicion or probable cause.'" *State v. Johnson*, 410 S.C. 10, 18, fn. 3, 763 S.E.2d 36, 40, fn. 3 (Ct. App. 2014). Further, the deferential standard of review "does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." *Id.*

A. A *Franks* analysis of the affidavit was warranted.

In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments afford a defendant the right in certain circumstances to challenge the veracity of a search warrant affidavit after the warrant has been issued and executed. *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999) (adopting the *Franks* test). This challenge may be based on false information in the affidavit or the omission of exculpatory material from the affidavit. *Id.* at 554, 524 S.E.2d at 397. In order to obtain relief, the defendant must prove the affiant knowingly and intentionally, or with reckless disregard for the truth, included false statements in the search-warrant affidavit. *State v. Robinson*, 415 S.C. 600, 606, 785 S.E.2d 355, 358 (2016). As for an omission, the challenger must make a preliminary showing that the information was omitted with the intent to make, "or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." *Missouri*, 337 S.C. at 554, 524 S.E.2d at 398. Upon this showing, the false or misleading information is stricken from the affidavit and the omitted facts are injected into the affidavit and the affidavit is then reviewed to determine if probable cause exists (the "*Franks* analysis"). *See Id.* at 155–156. If the court determines no probable cause exists, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id. See also Robinson*, 415 S.C. at 609, 785 S.E.2d at 359-60 ("[T]he good faith exception [to suppression] is not available where "the warrant issued is based on a search-warrant affidavit of the officer which contained representations known to be false."))

Investigator Burkhart's admissions that (1) there was no evidence of drug distribution occurring at or involving the residence; and (2) there was no evidence Appellant was involved in drug distribution at the residence to be searched or elsewhere; which were a were omitted from the affidavit, are certainly material and exculpatory, as well as reveal that the affidavit's representation that there was evidence of drug distribution at the residence was false or in the least, misleading. Investigator Burkhart's admissions also demonstrate the references to an "ongoing investigation of Jonathan Ostrowski in reference to narcotic violations" by the YCMDEU and DEA are also false. Coupled with the false references to an ongoing investigation, the references to the surveillance of the residence together are equally as misleading. The affidavit as a whole was materially misleading because taken together, the logical resulting inference is law enforcement actually had evidence of ongoing drug distribution at the residence involving Appellant, Peters, or others such that evidence of drug distribution was expected to be found there. The affidavit is rendered even more misleading by the omission of the date and location of Peters's distribution charges. Without including the fact that Peters's offenses occurred more than four (4) months prior and at a different location, the logical inference is that Peters's distribution offenses occurred at or were connected to the residence or Appellant, and were contemporaneous with the now revealed as false "ongoing investigation" of Appellant's "narcotic offenses". As a result of the misleading information and omissions, the logical interpretation of the entire affidavit is that Peters committed the distribution offenses at that residence, Peters and Appellant were engaged in drug distribution at that residence, and the YCMDEU and DEA had evidence of this from their ongoing investigation and surveillance. In reality, the surveillance revealed nothing of drug distribution at the residence, there was otherwise no drug distribution at the residence or involving Appellant to support the "ongoing investigation" noted in the affidavit. All law enforcement knew was Peters stayed at the residence "on and off"

and had sold clonazepam and alprazolam to an uncover informant at a different location in a different town four (4) months prior in September 2016.

Magistrate Loneran's testimony that she determined probable cause encysted from the affidavit and the evidence of "drug distribution" "that was presented in [the affidavit]" was "absolutely" "part of [her] determination for probable cause" (Tr. p. 95, ln. 4-8) makes clear that she was misled by the omissions and the false and misleading information contained in the affidavit. *See State v. Jones*, 331 S.C. 228, 500 S.E.2d 499 (Ct. App. 1998) (holding that the magistrate's understanding of the facts and circumstances in the affidavit can be paramount), *aff'd.,,* 342 S.C. 121, 535 S.E.2d 675 (2000).

Moreover, the record makes clear that Investigator Burkhart at least acted recklessly in making the false statements and in omitting the material and exculpatory information. He unequivocally testified that there was no evidence of drug distribution involving Appellant, the residence, or Peters in connection to the residence or that time. Although Investigator Burkhart testified he was not aware that the outstanding warrants stemmed from controlled buys between Peters and a CI occurred a different location, Peters's "secondary residence"; he acted with a reckless disregard to the truth because the location of the controlled buys were listed on the outstanding arrest warrants and in the YCMDEU case file summary (Ct. Ex. 4). *Missouri* is instructive on this issue. In that case our Supreme Court recognized that an officer's intent may not be overt as "police officers routinely leave out facts they believe are immaterial to the probable cause determination" but intentional misleading may be found regardless because "when an omission is combined with an affirmative falsehood, it reveals that the affiant not only believed the omitted information was critical, but that a statement in the affidavit to the contrary was necessary for establishing probable cause." 337 S.C. at 556-57, 524 S.E.2d at 397.

B. After the false and misleading information is removed and the omitted material and exculpatory information is inserted, the affidavit still fails to provide a substantial basis for the magistrate to have found probable cause because the remaining information consisted of conclusory statements, fails to furnish a link or nexus to the residence or drug distribution at the residence, and is otherwise too broad and insufficient.

South Carolina Courts have held that a search warrant fails to support the finding of probable cause when the affiant's belief as to why the search sought will produce evidence of some crime consists of mere conclusory statements, the facts or circumstances indicative of criminal activity are not close in time, or there is no sufficient nexus. *Infra.*

First, the affidavit is still insufficient because it contains conclusory statements. In *State v. Smith*, the affidavit in pertinent part read: "Smith went into the Master Inn...and he then robbed the manager at knife point. Smith has been staying at The Host of America Room 216...and there is every reason to believe the weapon and clothes used in the robbery will be located in the room." 301 S.C. 371, 372, 392 S.E.2d 182, 183 (1990). The Supreme Court held the warrant was defective on its face due to the lack of facts as to why Smith committed the robbery. *Id.* at 373. The Court explained, "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient...'[H]is action cannot be a mere ratification of the bare conclusions of others.'" *Id.* at 373 *(quoting Illinois v. Gates*, 462 U.S. 213, 239 (1983)). The affidavit referring to Appellant's drug dealing and the representation of an "ongoing investigation of [Appellant] in reference to narcotic violations" are merely conclusory statements. The affidavit fails to state why police believed Appellant dealing drugs, had committed one or more "narcotic violations", or why he was believed to be engaging in this drug activity at the residence. No evidence was presented to the magistrate that Appellant engaged in drug activity or committed narcotics violations, let alone to establish him as drug dealer. The conclusory statements fail to support the belief evidence of drug distribution would be found at the home.

Further, even with the remaining information about Peters's arrest warrants and statements to law enforcement that there was marijuana in the house, there was not a substantial basis for the magistrate to find probable cause to issue the search warrant. *Missouri* is again instructive. In that case, the affidavit was considered within a *Franks* analysis, and what remained consisted of a CI's statement that he had been buying a large quantity of cocaine from the defendant every two weeks and outlined a series of chronological events occurring within a few days before the issuance of the search warrant to support the affidavit's allegations that the defendant and others were manufacturing and distributing crack cocaine. 337 S.C. at 550-51, 555-56, 524 S.E.2d at 398. Specifically, the affidavit provided that the day before the warrant was issued the suspects had arranged to sell some crack cocaine to the CI, then purchased the cocaine in Atlanta and transported it to Greenville for that purpose. *Id.* at 551-52, 524 S.E.2d at 395-96. One suspect stated he did not want to cook it into crack cocaine notwithstanding two suspects bringing cutting and drying agents into the residence that same night. *Id.* at 552, 337 S.C. at 396. Also, the defendant had the cocaine in his possession but he was not at the apartment that afternoon, but returned to the apartment later on the same night the arranged sale of crack cocaine was to occur. *Id.* at 551-53, 337 S.C. at 395-97. The Court found that these facts standing alone made it a fair probability that crack cocaine or evidence of drug distribution was in the home, but inclusion of the omitted information eroded the basis for the determination of probable cause. *Id.* at 556, 337 S.C. at 398. Thus like *Missouri*, Peters's statements about marijuana being in the home and her four month old arrest warrants are insufficient for the magistrate to have found probable cause. The inclusion of Investigator Burkhart's admission that there was no evidence of drug distribution taking place at the residence or involving Appellant negates the little if any value from conclusory, unsubstantiated statements as well as the value of the two (2) pills found in Peters's purse, arrest warrants, and statements about marijuana. The inclusion of this exculpatory omission to the analysis also extinguishes any nexus

between the contraband sought and the residence. Overall, the inclusion of the admitted information and removal of false information renders the affidavit as failing to support a substantial basis for the magistrate to have found probable cause.

Further, Peters's statements that marijuana would be found in the home or her outstanding arrest warrants, individually and together with the affidavit as a whole fail to constitute as a substantial basis for the magistrate to find probable cause. In *State v. Thompson*, the Supreme Court concluded an affidavit stating: "[I]n the past six months law enforcement observed Thompson stop at 120 River Street' 'just before making cocaine deliveries throughout Spartanburg County'" was insufficient to establish a fair probability that the evidence of drug trafficking sought would found at the residence. 419 S.C. 250, 258, 797 S.E.2d 716, 720 (2017). The Court reasoned that although there was extensive, corroborated information provided by several CI's, the information was stale and the remaining information failed to demonstrate "a sufficiently specific indication that the drugs Thompson was selling were being accessed at that address" on or near the issuance of the search warrant. *Id.* The statement the Court held insufficient in *Thompson* to establish a timely and direct nexus between the contraband sought and the location to be searched is as insufficient and unspecific as the statements referring to the "ongoing investigation of Jonathan Ostrowski in reference to narcotic violations" and references to the surveillance as a part of that purported investigation in the affidavit here. Further, Peters's statements about marijuana in the home and the pills found on her person do not otherwise reach the level of probable cause in light of *Thompson.* In that case, the Court concluded there was no substantial basis for probable cause even though in the midst of other events and circumstances commonplace in drug distribution, a CI had arranged a controlled buy in which the CI paid the defendant $9000.00 for cocaine to be delivered the next day, the same day as the application and issuance of the search warrant. *Id.* at 419, S.C. 255-56 797 S.E2d 719-20. Indeed, Peters's statement that there was some marijuana in the house does not render the revitalize

or overcome the defective search warrant. In *State v. Dill*, the Supreme Court held the affidavit and the oral testimony were insufficient for the magistrate to conclude there was a fair probability that evidence of meth manufacturing would be found at his residence although the affidavit conveyed that the CI informed law enforcement he saw "'numerous items that are used in the manufacture of methamphetamine.'" 423 S.C. 534, 543-44, 816 S.E.2d 557, 562-63 (2018). Nevertheless, the affidavit was insufficient to support a substantial basis for probable cause because the affidavit "does not relate what those items were, nor does the affidavit relate *what was being done with the items*. It simply relates there were unnamed items that can be used in the manufacture of meth [and] supplies no information supporting the initial mere conclusory assertion that there was "an active methamphetamine lab ... in operation." *Id.* (italics added). Similarly, Peters's statement that there was some marijuana in the home fails to support the conclusory assertion that evidence of drug distribution or trafficking would be found at Appellant's residence and there is no information as to what was being done with the marijuana.

Further, even if Peters's distribution offenses were connected to the residence or Appellant, her offenses are too far removed in time to furnish even a partial basis for probable cause. In order for an affidavit to support probable cause, "it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *State v. Winborne,* 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979). "An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient." *Id.* Further, a warrant may become "stale" and thus invalid if the items sought are of the kind "one would expect to be removed or consumed in the interim" between the events giving rise to probable cause and the issuance of the search warrant. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 193, 525 S.E.2d 872, 881 (2000). Here, even if evidence had been presented to the magistrate that Peters's distribution offenses occurred at or were connected to the residence, due to the nature of narcotic use and distribution, it

is readily expected that such evidence would have already been consumed and removed in the span of four (4) months. Further, courts are cautioned against "'hypertechnical, rather than commonsense'" interpretation of affidavits, such as overly scrutinizing the omission of dates or timing. *See Id.* at 194, 525 S.E.2d at 881. However, in this case, Peters's four (4) month old "active distribution of alprazolam" arrest warrants were and remains[7] the *only* evidence to support Detective Burkhart's belief evidence of drug *distribution* would be found at the residence in light of his admission that there was no evidence or indication the pills found on Peters after her arrest were intended for anything more . *See Id.* at 194, 525 S.E.2d at 881-882. *Cf. Id.* ("The substantial basis for the magistrate's finding of probable cause was not defeated by the affiant's failure to state the precise date of the investigation"). Thus, the lack of nexus between Peters's alprazolam offenses and Appellant or the residence, and this information's staleness renders this information of little, if any, value to form a substantial basis for the magistrate's finding of probable cause.

There is also no connection to Appellant or the residence with the offenses underlying Peter's arrest warrants from September 2016. *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997) is instructive. In *Weston*, the affidavit provided in relevant part:

> On March 18, 1994 at approx 2245 hours...[Claude Crumlin] was the victim of an armed robbery and assault with intent to kill at [address]. The defendant in this incident is a Kelvin Weston. Kelvin Weston...is the registered owner of the above listed vehicle. Also investigation revealed through witness in this matter that defendant was driving above vehicle at the time of the incident.

Id. at 289, 494 S.E.2d at 802. The Supreme Court held the warrant defective for the same reasons present here in that there are no facts as to why Weston committed the crime and the affiant provided conclusory information. *Id.* at 291, 494, S.E.2d at 803. The affidavit in *Weston* also linked Weston to the car suspected to be involved in the incident, but still provided no link from Weston or the car

[7] *I.e.*, remaining after the false information is removed from the affidavit and the omitted information is inserted.

to the crime itself. *Id.* at 291-92. Similar to *Weston*, the affidavit's provision of facts as to Peters and Appellant living at the address may connect them to the residence to be searched, yet no fact alleged links Appellant or the residence to drug distribution or to the crimes underlying Peters's months old arrest warrants. The affidavit repeatedly references the surveillance at the residence as part of a narcotics investigation of both Appellant and Peters; but the surveillance merely established that both lived there in the last six months and provides nothing more. The "narcotics investigation" is likewise insufficient to describe or provide sufficient timely facts that drug distribution was occurring at that residence and evidence of such would be found there.

In addition to the bare bones argument that the *Franks* analysis was inappropriate (Tr. p. 113-15), the State argued the affidavit was sufficient pursuant to cases that addressed the sufficiency of an affidavit within the four corners: *State v. Scott*, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991) and *State v. Keith*, 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003). Pursuant to subpart A, a *Franks* analysis, *i.e.*, evaluating the affidavit with the false information removed and the omitted information included was appropriate in this case. The State's reliance upon these cases is not only misplaced but these cases are also otherwise materially distinguishable. In *Scott*, the affidavit for the warrant to search the defendant's home for evidence of drug distribution alleged that officers found more than twenty (20) grams of cocaine on the defendant's person in a search incident to arrest on warrants for distribution of cocaine. 303 S.C. at 362, 400 S.E.2d at 785-86. Law enforcement observed the defendant drive away from his residence and maintained visual contact until he was stopped and arrested. *Id.* In *Keith,* the information presented to the magistrate consisted of the accounts from three (3) CI's and a DEA agent regarding drug activities and transactions occurring in the home to be searched, a recorded telephone conversation and surveillance results that corroborated their information, and the evidence of the recently smoked marijuana seized during the traffic stop. 356 S.C. 219, 588 S.E.2d 145. The defendant challenged the search warrant

of his residence for lack of probable cause ultimately on the basis that the veracity or reliability of confidential informants had not been established. *Id.* at 223, 588 S.E.2d at 147. This Court found suppression unwarranted because the information regarding the traffic stop, the seizure of recently smoked marijuana from the defendant's car, in addition to other information supported the probable cause finding and issuance of warrant. *Id.* at 224-25, 588 S.E.2d at 147-48.

In finding *Scott* and *Keith* controlling, both the State and the trial court overlook the significant distinctions that set the present case apart. The paramount distinguishing factor being that in denying the motion to suppress, the trial court in neither case had been informed that law enforcement had no evidence of any drug distribution occurring at the residence to be searched. The testimony at the *Franks* hearing that there was no evidence of drug activities in the residence, let alone the absence of evidence of Appellant's involvement in drug activities at the home, is a powerful consideration in the face of any fact weighing in favor of probable cause. Moreover the two (2) pills found in Peters's purse during the traffic stop otherwise fail to revive an insufficient warrant in light of *Franks* hearing testimony and other material differences between this case and either *Keith* or *Scott,*. The State was keen to quote *Scott* during the hearing that "'In the case of drug dealers, evidence is likely to be found where the dealers live.'" (Tr. p. 116, ln. 15-16; p.125, ln. 12-15). What the State and ultimately the trial court failed to consider was that Detective Burkhart essentially testified that there was no evidence that Appellant had been dealing drugs, and there no evidence Peters had been dealing drugs since her arrest four months prior, let alone any evidence of drug dealing at the residence. *Scott* is also materially different from this case because the *Scott* defendant was found with cocaine in an amount well within the requisite range to find him guilty of trafficking; the twenty (20) grams or more quantity far exceeds the few pills found Peters in a search incident to arrest. The presence of these pills in her purse hardly support the leap to the conclusion that evidence of drug distribution or trafficking was likely to be found at the home. (Ct.

Ex. 4, p. 2; Ct. Ex. 5; Tr. p. 99, 12-14). Moreover, Detective Burkhart testified there was no evidence that the two pills found in Peters's purse were intended for distribution; rather, the evidence at most indicated Peters possessed the two (2) pills for personal use. Additionally, unlike Appellant's case, there is no indication in either *Scott* or *Keith* that the challenger of the search warrant had a secondary residence, and in Appellant's case, there is no surveillance to show that Peters did not already have the pills in her purse prior to arriving and then leaving the residence the day of her arrest. Moreover, unlike *Scott*, the distribution charges underlying Peters's outstanding arrest warrants offer little to the probable cause finding due to staleness. Also unlike Appellant's case, all of the information provided to the magistrate in *Keith* related to events that had occurred or were corroborated *within 72 hours* of the search warrant being issued and the surveillance furnished evidence of drug activity or corroborated other evidence. Whereas the surveillance of the residence in Appellant's case revealed no evidence of drug activity or corroborated other information. Moreover, any similarity between the present case and *Keith* are overshadowed by disparities in the quantity, type, and strength of information provided to support probable cause.

In finding *Keith* and *Scott* applicable, the trial court disagreed with Appellant that Peters's arrest aligned with *State v. Gentile*, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007) on the basis that Peters was a resident, as were the defendants in *Keith* and *Scott*, as opposed to a visitor of the residence in *Gentile*. (Tr. p. 127, ln. 1-14). The fact that Peters had a secondary residence and lived there "on and off", and the absence of surveillance in the several days prior to the officers observing Peters arrive and drive away from the residence the morning of her arrest brings this case closer to *Gentile* than the trial judge found. Similar to the visitor in *Gentile*, whom was found to have marijuana on his person during a traffic stop after leaving the defendant's residence, law enforcement here had no knowledge that Peters retrieved the pills from Appellant's home, or whether Peters came to Appellant's residence at any time prior to that morning with the pills already

in her purse or vehicle. Additionally, neither Peters nor her vehicle were searched prior to entering or exiting the residence. Thus, the link between the pills and the residence here is just as tenuous and speculative as in *Gentile*, and Peters was more like the "third party" in this way in *Gentile* as opposed to either defendant in *Keith* or *Scott*.

Here, the trial court erred in denying the Appellant's motion to suppress because the affidavit was misleading, contained false information, and omitted material and exculpatory information. When considering the affidavit with the omitted information included and with the false information removed, the search warrant falls to provide a substantial basis to support the magistrate's finding of probable cause on several fronts.

II. THE TRIAL COURT ERRED IN ALLOWING A NARCOTICS INVESTIGATOR AND AN INVESTIGATOR THAT MERELY EXTRACTED DATA FROM A CELLPHONE TO OPINE, RESPECTIVELY, ON THE DRUG-DEALING RELATED USES AND SIGNIFICANCE OF ITEMS FOUND DURING THE SEARCH, AND OPINE AND TRANSLATE THE TEXT MESSAGES AS RELATING TO DRUG-DEALING BECAUSE NEITHER INVESTIGATOR WAS QUALIFIED AS AN EXPERT WITNESS, AND SUCH OPINION TESTIMONY REQUIRED SPECIAL KNOWLEDGE, SKILL, EXPERIENCE OR TRAINING.

Standard of Review [8]

The decision to admit or exclude evidence or testimony is within the trial court's sound discretion and will not be reversed on appeal absent an abuse of discretion. *E.g., Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (2002); *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004). An abuse of discretion is a ruling based on an error of law or a factual conclusion that is without evidentiary support. *E.g., Johnson*, 410 S.C. 10, 763 S.E.2d 36. On review, our appellate courts generally will decline to set aside a conviction due to insubstantial errors not affecting the result. *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In applying the harmless error rule, the court must be

[8] This standard of review also applies to issues III - VI and subparts.

able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Spears*, 403 S.C. 247, 258-59, 742 S.E.2d 878, 884 (Ct. App. 2013). This determination considers the entire record. *See e.g., State v. Brooks*, 341 S.C. 57, 62, 533 S.C. 325, 328 (2000).

Relevant facts

After voir dire of Investigator Harrelson following Appellant's objections, the trial court refused to qualify him as an expert but stated he could testify as to:

> "what he saw", "the way the house was", "what he found [in it]", "what a pipe looks like", "the significance of a sandwich bag"...He can testify all about that in his experience and knowledge and skill as an officer, an investigating officer with the DEU without attaching the label of an expert.....Certainly as an investigator he can testify both to what he saw and the significance of what he saw....I think he has the particularized skill, knowledge, and expertise – Well, I won't say expertise. Skill, knowledge, and ability to testify about the significance of a glass pipe with residue on it. Or the significance of finding...a bunch of sandwich bags at a place that's suspected of suspicious drug activity.

(Tr. p. 184, ln. 24 – p. 185, ln. 10; p. 188, ln. 19 – p. 189, ln. 1-4). In refusing to qualify Investigator Harrelson as an expert, the trial judge agreed that the expert label would be more prejudicial than probative. (Tr. p. 185, ln. 11-15). The trial judge later explained, "I've allowed under Rule 701 him to offer - - I wouldn't want to call it opinion testimony. I've allowed him as a lay witness and based upon" "what he does for a living to identify things to say what it is and what he knows them to be." (Tr. p. 212, ln. 3-7). Over Appellant's objections, Investigator Harrelson testified that "in his experience" the typical dose of meth is .5 grams and at a cost of $100.00. (Tr. p. 190, ln. 1-13). "As a drug investigator", he explained that digital scales are used to weigh out drugs when selling them to ascertain that the purchaser gets no more than they paid for. (Tr. p. 195, ln. 15 – p. 197, ln. 10). In regard to the tin foil found, Investigator Harrelson explained tin foil was often used to store meth and to smoke out of. (Tr. p. 197, ln. 18-20; p. 244 ln. 8-11). According to Investigator Harrelson, in his "business", the "significance" of razor blades is for the chopping up of meth. (Tr. p. 199, ln. 10-

16; p. 242, ln. 21-22; p. 244, ln. 9-10). As for the "significance of sandwich baggies", he explained they are "used to package drugs." (Tr. p. 202, ln. 10-12; p. 245, ln. 13-20). "Based on [his] experience as a law enforcement officer in methamphetamine investigations," Investigator Harrelson summarized the contents of the search as: "Clearly somebody who was using, and also selling methamphetamine, due to the methamphetamine pipes, the digital scales to weigh out the drugs, and also the sandwich baggies and tinfoil also to package drugs for sale to another individual." (Tr. p. 245, ln. 24 – p. 246, ln. 11). In regard to the photographs of the text messages Investigator Harrelson stated he took pictures of text messages that he found were "in reference to drugs." (Tr. p. 273, ln. 11-14; (St. Ex. 13-26). Investigator Harrelson also testified that "Ice, crystal, clear" were common slang terms for meth. (Tr. p. 274, ln. 8-11).

Investigator King recovered and downloaded twenty-two (22) text messages and one (1) photo of Appellant from the cellphone. (Tr. pp. 377-379). His role in the investigation was limited to the extraction of the data on the cellphone, he did not conduct any additional investigation and was not involved with the search or evidence gathering. (Tr. p. 397, ln. 4—p. 398, ln. 2; p. 399, ln. 4-6, 13-15). The State argued the text messages demonstrated Appellant had been dealing meth and admitted them into evidence for that purpose. Over Appellant's objections, Investigator King testified, in addition to other instances, that within the meaning of the text messages: "clear" was a slang term for meth; "bowl" was a smoking device; and "no green, just clear" translated to "I don't have any marijuana, all I have it meth", respectively. (Tr. p. 390, ln. 5-6; p. 393, ln. 20- p. 394, ln. 1-8). Investigator King also explained "cash or front" and "re-up" as referenced in a text message exchange on January 19, 2017 as:

> A lot of times, drug dealers will front out their drugs. If it's somebody they trust they will give 'em the drugs,, and then once that person sells those drugs, then they'll bring the money back..Just kind of like a loan....Re-up means to get more drugs. So if someone is low or out of drugs that they're sell[ing] then they'll say ["]I need to re-up.["] It means they need to get more of what they're trying to sell.

(Tr. p. 394, ln 16-25). He also stated the text messages' references to a gram would be about the size of a sugar packet for coffee. (Tr. p. 398, ln. 3 – p. 399, ln. 3).

Argument

It was an error of law to permit the investigators to opine on these matters because neither investigator testified as an expert witness, and thus they could only testify on matters that were within their personal knowledge and render only opinions or inferences that did not require specialized knowledge, skill, or expertise. Lay witnesses are permitted to testify to their opinion or an inference that are rationally based on the witness's perception when the opinion or inference will aid the jury in understanding testimony, and do not require special knowledge, training or skill. Rule 701, SCRE; Rule 602, SCRE. From the record it is clear that both investigators were permitted to render the opinions of an expert but as lay witnesses. Our Supreme Court ruled this was reversible error in *State v. Kelly*. In *Kelly*, the defendant was charged with the failure to stop at a stop sign, resulting in a car accident. 285 S.C. 373, 374, 329 S.E.2d 442, 442-43 (1985). At trial, the investigating officer was not qualified as an expert but was nevertheless permitted to draw conclusions from his direct observations and opine on the cause of the accident. *Id.* The Supreme Court reversed because it was clear the officer gave his opinion, as opposed to merely explaining his "direct observations", and the opinion was prejudicial because it dealt with the ultimate issues at trial. *Id.* at 374–75. *Cf. State v. McClinton*, 265 S.C. 171, 176-77, 217 S.E.2d 584, 586 (1975). Similarly, in *Fowler v. Nationwide Mut. Fire Ins. Co.*, this Court held a fire chief's testimony was improper opinion testimony under Rule 701 because although he was not qualified as an expert, he was permitted to opine on the location of the fire's origin and whether the fire was accidental. 410 S.C. 403, 410, 764 S.E.2d 249, 252 (Ct. App. 2014).

Here, it was an error of law to allow both investigators to testify in a manner only an expert is permitted to testify. Similar to the improper lay witness opinions in *Kelly* and *Fowler*, the portions of the investigators' testimonies summarized above were not permissible perceptions or inferences based upon their observations, but rather constituted opinions that required specialized knowledge, skill, experience, or training. It is apparent the investigators' opinions and insight were not based solely on their observations of these items or review of the texts, respectively. Rather, the investigators explicitly drew upon their experience and knowledge working on past meth investigations when giving their opinions. Additionally, the subject matter of their opinions was outside the realm of a layperson and required specialized experience, training, or skill.

This error was not harmless as both investigators ultimately opined on an issue that became pivotal to the outcome of the case. The State relied upon both investigators' opinions to portray Appellant as a drug dealer whom operated out of his home using text messages as a means of transacting in order to prove the trafficking charge beyond a reasonable doubt, as well as extinguish any doubt that someone else possessed or intended to control the disposition of the meth. *See infra* pp. 44-45. (Tr. p. 494, ln. 14-20; p. 495, ln. 2-8; p. 497, ln. 2-4; p. 500, ln. 16-25). *See Fowler*, 410 S.C. at 413, 764 S.E.2d at 254 (finding prejudice when the improper lay witness opinion was threaded throughout the questioning of other witnesses and relied upon in closing). Moreover, because the investigators' opinions insinuated that Appellant was a drug dealer, their testimony raised the inference of Appellant's propensity to commit the crimes charged. The repeated inescapable insinuation of drug dealing presented by both investigators' improper opinion also eroded any legitimate explanation offered for the mundane items at the residence, as well as the circumstances that supported the possibility someone else alone was trafficking the meth found. Indeed, some of the mundane items such as sandwich bags and tin foil were found in common areas or expected and unsuspicious places in the residence. Investigator Harrelson was unaware at the

time that Appellant paints and installs drywall for a living and the razors found were actually packets of industrial razor blades used in that trade as opposed to shaving razors. (Tr. p. 199, ln. 8-6; p. 284, ln. 19 – p. 285, ln. 7; p. 286, ln. 22-25). Their improper opinions were particularly prejudicial because the verdict largely depended on whether the jury believed Appellant's assertions that he was not a drug dealer and only a personal user, and that he neither owned the meth found nor was aware it was tucked away in the armoire. Additionally, the testimony of each investigator both bolstered and converged with one another, compounding the resulting prejudice. Further, as the trial judge explicitly recognized in regard to Investigator Harrelson, the veil of an expert would be more prejudicial than probative. Not only did his testimony align with that of an expert in every sense but for the label, but also the trial judge gave a standard jury instruction on expert witnesses after voir dire, which was not retracted upon the in camera ruling Investigator Harrelson would not be permitted to testify as an expert witness. (Tr. p. 178, ln. 11 – 25). The ruling was not heard before the jury and for all the jury knew, he was deemed an expert and testified as an expert. *See generally, State v. Kromah,* 401 S.C. 340, 737 S.E.2d 490 (2013) ("[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."). Further, this discussion of prejudice adopts and incorporates the discussion on pages 43-46.

III. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TEXT MESSAGES AND PHOTOGRAPHS THEREOF THAT PURPORTEDLY WERE EXCHANGED BETWEEN APPELLANT AND UNIDENTIFIED INDIVIDUALS AND ALLEGEDLY DEPICT APPELLANT'S PRIOR DRUG TRANSACTIONS, BECAUSE THE STATE HAD NOT SATISIFIED CONDITIONAL RELEVANCE AND THE TEXT MESSAGES WERE NOT PROPERLY AUTHENTHICATED.

Relevant facts

The trial court allowed into evidence both the downloaded text messages and photographs of the text messages displayed on the cellphone's screen. (Tr. p. 238; St. Ex. 13-26, 27-48). The text

messages were exchanged weeks to a month prior to the offense charged in the indictment. (St. Ex. 13-26, 27-48). The State argued the text messages described various drug transactions involving Appellant, and called Investigator Michael King to testify to the manner in which the text messages were downloaded, as well as decipher words and phrases allegedly used to describe drugs and other activities used in drug dealing. (Tr. pp. 376 -399); *see infra* pp. 44-45. Over Appellant's objections, Investigator Harrelson identified the photographs he took of the cellphone before Investigator King ever testified to the download. (Tr. p. 273).

In addition to objecting to this evidence under Rule 404(b) and as hearsay, Appellant objected to this evidence on authentication grounds under Rule 901. (Tr. p. 230, ln. 22-25; p. 380, ln. 4 – p. 382, ln. 21; pp. 385 - 387, ln. 10). Due to the lack of South Carolina precedent on this issue, Appellant referred to cases from other states and argued that authentication of this evidence required proof that the phone number belonged or was registered to the person alleged and required the custodian of such records to testify; the State here failed to either. (Tr. p. 380, ln. 4 – p. 382, ln. 21). *See State v. Thompson*, 777 N.W.2d 617 (N.D. 2010); *State v. Taylor*, 632 S.E.2d 218 (N.C. App. 2006). Appellant also repeatedly argued that regardless of the chain of custody, the text messages were not relevant because there was no evidence that Appellant was the author of each of text message in the same way mere presence at the scene of a crime does not make one guilty of that crime. (Tr. p. 385, ln. 20 – p. 386, ln. 10). The State countered that a chain of custody of the cellphone was sufficient for authentication, in that the State could establish the handling of the cellphone from the point it was taken from the Appellant's person and downloaded. (Tr. p. 383, ln. 1-15; p. 384, ln. 20-21; p. 386, ln. 16 – p. 387, ln. 10). The trial court overruled all objections to the admission of the text messages. (Tr. p. 387, ln. 23 – p. 388, ln. 2). This was reversible error.

A. The State did not present sufficient proof that Appellant authored, received, or was the intended recipient of each of the text messages.

Assuming *arguendo* the text messages were relevant, they were only made by relevant upon the State's showing that the Appellant sent the outgoing messages, received and read the incoming messages, and was the intended recipient of the incoming messages. Without such evidence, the text messages were irrelevant and inadmissible. *See* Rule 104, SCRE. Appellant referred to the State's failure to provide such proof several times during objections to the text messages. (Tr. p. 381, ln. 19-24, 385, ln. 20 – p. 386, ln. 10). In response, the State could only point to tenuous links between the text messages and Appellant, and none of these links establish conditional relevancy to *each and every* single text message, which were exchanged over a time period of weeks to a month. There is one incoming text message that addressed "John", which is spelled differently than Appellant's name. There was a photograph of Appellant downloaded from the cellphone but no information was provided as to whether the photograph was taken with the cellphone or sent to the cellphone, let alone when the photograph was taken or where. The State also highlighted the fact that an outgoing text message, sent on January 25, 2017, stated that the sender was in Great Falls, as Appellant was that same day. One or more text messages were established as sent from 162 Bailey Avenue, where Peters and one to more other possible individuals lived. However, this one text about Great Falls and the location of a few text messages still do not furnish the necessary link for each and every single text message sent and received. Moreover, the State may not bootstrap inadmissible evidence into admissible evidence by simply claiming it is offered to authenticate other evidence. *State v. Lawson*, 424 S.C. 51, 62, 817 S.E.2d 509, 515 (Ct. App. 2018) ("The State may not bootstrap improper character evidence into admissible testimony by simply claiming it is offered to authenticate other evidence."). Further, the State did not even try to verify whom the cellphone number or cellphone itself was registered to with the phone company, or try to identify, let alone

call to testify, any of the senders of the incoming messages. There is simply insufficient if any evidence to establish Appellant sent the outgoing messages, received and read the incoming messages, and was the intended recipient of the incoming messages—the very links necessary to make each and every text message relevant. *See* Rule 401, SCRE. For if it cannot be established that Appellant sent and received each of the text messages, then the text messages do not make it more probable that Appellant was drug dealing by texting, which was the State's very purpose in seeking to admit them into evidence. Because the text messages constitute as propensity evidence, the prejudice resulting from this error is adopts and incorporates the discussion on pages 43-46.

B. The text messages were not properly authenticated.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. Thus, if the evidence is not properly authenticated or identified, it does not meet the requirement for admissibility. *State v. Adkins*, No. 2014–001668, No. 2017–UP–295, 2017 WL 4812819 (Ct. App. 2017). Though evidence may be evaluated to determine its admissibility on various different grounds, it still must meet the requirement of authenticity in order to be admissible. *See State v. Anderson*, 386 S.C. 120, 127, 687 S.E.2d 35, 38 (2009). In *Adkins*, this Court held the trial court erred in finding text messages were inadmissible on authenticity grounds when the phone numbers that sent the incoming and outgoing text messages were identified and other factual context was established. *Adkins*, at *1-2.

Here, the State heavily relied upon: the cellphone being found on Appellant during his arrest, the photograph found on the cellphone, and the one text message about being Great Falls to authenticate the text messages. This argument fails for the same reason it does for conditional relevance under Rule 104: none of these things speak to *each and every* text message, and the State

may not use these text messages as a means of authentication when they are inadmissible as hearsay and under Rule 404(b). *See Lawson*, *supra*. Also, the chain of custody may have been fine to authenticate the cellphone itself, but was not a suitable or sufficient means of authentication in and of itself for the text messages downloaded off the phone. *Cf. Brockmeyer*, 406 S.C. at 352-53, 751 S.E.2d at 660-61. Although Rule 901(b), SCRE sets forth examples of authentication "[b]y way of illustration only, and not by way of limitation", the State failed to properly authenticate the text messages in any manner. No witness had personal knowledge as to whom sent and received the text messages. *See* Rule 901(b)(1); *Woodward v. Norfolk Southern Corp.*, No. 2010–173687, No. 2012–UP–638, 2012 WL 10864190, *1 (Ct. App. 2012) (holding a receipt from an auto mechanic not properly authenticated because no affidavit or authentication method accompanied it even though the appellant took the car to the auto mechanic). The State did not even verify the cellphone number of the incoming text messages or the outgoing text messages. *See* Rule 901(b)(6), SCRE. The State did not call a custodian of the records from the cellphone company to testify to the authenticity of the downloaded records or to verify the cellphone number was registered or otherwise belonged to Appellant. *Cf. Adkins* (proper authentication found where the cellphone numbers and voice were identified). Little if no information was given as to the record of transmission of the texts being sent and received (cell tower information, date, time, cell phone numbers, etc.). *See State v. Jordan*, No. 2014–002554, 2018–UP–098, 2018 WL 1180563 (Ct. App. 2018) (no authentication issue where custodian of records from Verizon testified about the database for every call or text message, the text content, cell tower information, and web pages accessed). Establishing a chain of custody from Appellant's pocket to the download means nothing if each and every text message went unverified in any manner. Likewise, despite the assumedly proper download of the cellphone and Investigator Harrelson's testimony about taking the photos of the text messages, both mean nothing if the text messages could not be shown as what the State claimed them to be, particularly when conditional

relevance remained to be satisfied. Because the text messages constitute as propensity evidence, the prejudice resulting from this error is adopts and incorporates the discussion on pages 43-46.

IV. THE TRIAL COURT ERRED IN ADMITTING THE TEXT MESSAGES INTO EVIDENCE BECAUSE THEY WERE INADMISSIBLE HEARSAY.

Relevant facts

The State argued that there was no hearsay issue because the outgoing messages were "arguably the Defendant's statements", and the State argued the received or incoming messages were not going to be offered for the purposes of the truth but rather to show Appellant's response. (Tr. p. 383, ln. 16 – p. 384, ln. 19). The trial court overruled Appellant's objection to the text messages as inadmissible hearsay (Tr. p. 380, ln. 10-17). This was reversible error.

Argument

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Rule 801(c), SCRE. A statement is not hearsay if it is offered against a party and is the party's own statement. Rule 801 (d)(2)(A). *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000). If the statement is non-hearsay or is an exception to the hearsay rule, it still "must meet the threshold test of admissibility, i.e., relevance." *State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000). This is where the State went wrong regarding the outgoing messages because as Issue III discusses, it was not sufficiently established that Appellant sent each of the outgoing text messages, and thus the outgoing messages do not fall under an exception or non-hearsay for being the defendant's own statement. As for the State's argument for the incoming messages as not violating the rule against hearsay, the remaining portion of the State's argument says it all. Despite the State's claims that the text messages would not be used to prove the matter asserted —to prove Appellant was drug dealing as presented the text messages— the State explained (using a specific text message): "We're trying to prove *that [Appellant] has a gram of meth and will travel.*" (Tr. p. 384, ln. 14-19). The State's

arguments as to how the texts were not prohibited prior bad acts under Rule 404(b) because they prove the "The disposition that this Defendant intended just happens to be selling" within the meaning of constructive possession equally demonstrates how the text messages were intended and ultimately were used to prove the truth of matter asserted. The State's eliciting of testimony as to what the slang terms in the text messages meant in the context of drug dealing is also as telling. Even if it were not already clear, the State's reliance upon the text messages in closing argument to prove Appellant was selling meth and it was his business further demonstrates that the text messages were used to prove the truth of what each text said. Thus, the trial court erred because the text message were inadmissible hearsay. Because the text messages constitute as propensity evidence, the prejudice resulting from this error is adopts and incorporates the discussion on pages 43-46.

IV. THE TRIAL COURT ERRED IN ADMITTING THE TEXT MESSAGES INTO EVIDENCE BECAUSE IT CONSTITUTED AS IMPERMISSIBLE CHARACTER EVIDENCE.

Evidence of prior bad acts has been limited to established and codified exceptions and is strictly scrutinized before it is admitted due "to the inevitable tendency" "to raise a legally spurious presumption of guilt" in the jurors' minds. *State v. Lyle*, 125 S.C. 406, 412, 118 S.E. 803, 807 (1923). Before considering whether one of the exceptions is applicable, a prior bad act must first be established by clear and convincing evidence. *See State v. Weaverling*, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999). Prior bad acts that are proven by clear and convincing evidence may be used to prove: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; (5) the identity of the person charged with the commission of the crime tried; and res gestae. *Lyle*, 125 S.C. at 416, 118 S.E. at 807; Rule 404(b). For any of these exceptions, the prior bad act must be relevant to prove the crime on trial; there must be some legal connection between the crime charged and prior bad act more than just a general similarity; there must be a close degree

of similarity or a connection between them. *State v. Carter*, 323 S.C. 465, 467, 476 S.E.2d 916, 917-18 (1993). Even if the prior bad act evidence meets all of the aforementioned, it will be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210, fn. 6 (2018). Unfair prejudice is the undue tendency to suggest a decision on an improper basis, such as an emotional one. *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). This Court has acknowledged that determining the admissibility of a prior bad act is difficult. *Carter*, 323 S.C. at 469, 476 S.E.2d at 918-919. It is for this reason "*Lyle* is intended only to provide an exception to the general rule of inadmissibility", and thus, "'if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.'" *Id.* at 919 (quoting *Lyle*, *supra*).

As discussed in the following sections, the text messages purported to describe previous drug transactions involving Appellant fail each prong of the admissibility determination. This evidence does not serve a permissible purpose under Rule 404(b) or res gestae and only served to communicate to the jury that Appellant was a drug dealer, and he thus is most likely guilty of trafficking the meth found at the residence.

Relevant facts

Over Appellant's objections, the State admitted text messages and photographs of text messages that supposedly discuss Appellant's prior drug dealing and were exchanged between Appellant and unidentified persons days to a month prior to the offense charged in the indictment. (Tr. pp. 213-214; pp. 219-239). The State argued the text messages were admissible under Rule 404(b) as a common scheme or plan, to show intent, or under a res gestae theory because the text messages proved his knowledge, or the intent to sell or transport. (Tr. pp. 213-214; p. 222, ln. 9-24;

pp. 219-239). The trial judge expressed concern about this evidence on several fronts. (Tr. p. 221, ln. 17-18, 23-25; p. 222, ln. 1-2). *See infra* p. 38. In response, the State explained: "Trafficking...could be proven through multiple avenues [*i.e.*] selling...like we would think of [it as] a distribution trafficking or a PWID trafficking just for lack of a better term... which would certainly go towards the text messages showing intent to sell, intent to transport." (Tr. p. 222, ln. 3-11). However, as conceded by the State, the meth for which Appellant was charged with trafficking was to be proven on a constructive possession theory. (Tr. p. 222, ln. 12-13). The State argued the evidence of past drug dealing was also admissible to prove that he had the intent to control the disposition of specifically the meth found in his home through selling it. (Tr. p. 222, ln. 14-22). The State added, "The disposition that this Defendant intended just happens to be selling" and argued precedent gave the State "the green light" to introduce this evidence.[9] (Tr. p. 222, ln. 23 – p. 225, ln. 1). In addition to intent, the State provided conclusory reasons for the admissibility of the text messages under res gestae (Tr. p. 227, ln. 6-9).[10] Appellant countered that the text messages fail to prove he had intent to possess or control the disposition of, specifically, the bag of meth found during the search. (Tr. pp. 228-232). Appellant further argued the supposed drug transactions described in the text messages were not proven by clear and convincing evidence, and there was no connection between the activity described in the text messages with specifically the meth found on

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[9] Shortly after the State's summary of *State v. Gore*, 299 S.C. 368, 384 S.E.2d 750 (1989), the trial judge interjected about the "Chester evidence"—the small amount of meth found on Appellant's person during his arrest hours after leaving the residence and the search.(Tr. p. 224, ln. 9-18). At this point, the State appears to switch gears to the admissibility of the Chester evidence under a string of cases. (Tr. p. 224, ln. 19 – p. 227, ln. 1). The trial judge properly excluded the Chester evidence. (Tr. p. 234, ln. 22- p. 235, ln. 2). The record is unclear as to whether the State argued these cases applied to the text messages as well. The cases cited to support the State's position on the Chester evidence nonetheless do not support admissibility of the text messages. *See infra* pp. 38-46 .

[10] The record is unclear as to whether the State sought to admit the text messages under a res gestae theory or whether the res gestae discussion pertained only to the Chester evidence. Regardless, the text messages are inadmissible under a res gestae. *See infra* pp. 38-40.

the property. (Tr. pp. 228-230). Appellant argued the evidence was inadmissible under any *Lyle* exception and any probative value was substantially outweighed by its prejudicial effect; this evidence would rather only serve as prohibited character evidence in presenting Appellant as a drug dealer. (Tr. p. 227, ln. 17 – p. 232, ln 14).

The trial judge ultimately ruled the text messages were admissible under Rule 404(b) , finding that the evidence clear and convincing and passed the probative value versus unfair prejudice balancing test. (Tr. p. 234, ln. 1-13). *But see* Issue VI.

A. The evidence was not clear and convincing.

Dubose is instructive on this point. In *Dubose*, aerial photos of the defendant's farmland in 1981 to 1983 were admitted to show his dominion and control over the farmland at trial on charges for manufacturing and trafficking marijuana for a period of time in 1984. 288 S.C. at 228, 341 S.E.2d at 786-87. The Supreme Court rejected the State's argument the photos showed a pattern of growing marijuana, *i.e.* a common scheme or plan, due to the absence of proof the defendant grew marijuana as supposedly indicated in the photos from 1981 to 1983. *Id.*, 228 S.C. at 230. The photos merely showed that some patches of the farmland where marijuana was found growing in 1984 changed over time from 1981 to 1983, which only indicated that something could have been growing there before 1984 and as early as 1981. *Id.*, 228 S.C. at 229, 341 S.E.2d at 787. This was insufficient for the State to elicit testimony on this point and improperly hypothesize that marijuana has been growing in the patches from 1981-1983 to argue: "Why would anyone but a fool go to all that work and then not plant marijuana in there until 1984?...The only reason would be is because they were going to grow marijuana in 1981, in 1982, 1983 and 1984." *Id.* at 229-30.

Similar to the wholly speculative evidence in *Dubose*, there is insufficient proof that Appellant sent and received these test messages, sold the narcotics or partook in the activities as described therein. Although the State could prove the cellphone was found on Appellant's person

the day of his arrest, nothing established Appellant had the cellphone when any of the prior text messages were received. Additionally, as discussed throughout the preceding sections, there was insufficient evidence that Appellant himself authored the outgoing text messages, or that the unidentified senders sent the incoming text messages intending Appellant receive and read them. The individuals on the other end of each text did not testify and even their identities remained unknown apart from their first name. No evidence was provided to support the State's position that the slang words used in many text messages referred to selling marijuana and meth. Most importantly, there is no proof that any of the purported drug sales ever materialized, let alone proof that Appellant took part in the activities described in the text messages. Rather than clear and convincing, the evidence is unsubstantiated and speculative. *See Smalls v. State*, 422 S.C. 174, 186, 810 S.E.2d 836, 842 (2018) (trial counsel was ineffective for failing to object to testimony that the defendant stole the handgun used in the crime charged during a prior burglary because there was no proof the defendant committed the burglary); *State v. Conyers*, 286 S.C. 276, 233 S.E.2d 95 (1997) (holding the defendant's poisoning of her first husband was inadmissible at trial for her second husband's murder with the only evidence being arsenic as her first husband's cause of death and the defendant was the life insurance beneficiary even though there was evidence of the defendant's other victims by the same means); *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245 (1989) (holding evidence of a homicide was not clear and convincing where only circumstantial evidence raised the suspicion the defendant committed it and no evidence established he was at the scene or wrote the note found near the body).

The trial court's finding of clear and convincing evidence is thus an error of law and clearly erroneous because a firm belief that Appellant engaged in the prior drug transactions described in the text messages cannot be established without any proof that the drug transactions actually took place or involved Appellant. *See State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441, fn. 14

(2009) ("Clear and convincing' evidence is an intermediate degree of proof 'which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established."). The text messages thus fail the threshold test for admissibility and should have been excluded for this reason alone. As explained herein, the trial court otherwise erred in admitting the text messages.

B. The text messages are inadmissible because they were not relevant to the crime charged and the connection between the two was insufficient.

Before ultimately finding the text messages admissible, the trial judge expressed concern over admission of this evidence on several fronts:

> What I'm concerned about is prejudicial versus [ ]probative...I want to know what the relevance is and what's the connection between all these text messages which report to drug dealing going on. I mean there's some weight stuff on there, the text messages, but tell me how that's connected to trafficking.[12]

(Tr. p. 221, ln. 17-18, 23-25; p. 222, ln. 1-2). It is well-settled the "evidence should not be admitted *unless the trial judge can clearly perceive a connection* between the extraneous bad acts and the crime for which the defendant is being tried." *State v. Douglas*, 302 S.C. 508, 397 S.E.2d 98 (1990) (italics in original); *see also Lyle, supra.* The text messages were thus inadmissible on the basis of an insufficient connection. Even if the trial judge's concern about the connection between text messages and the trafficking offense were deemed nondeterminative on this issue in and of itself, this was nevertheless reversible error due to the absence of relevancy or a sufficient connection.

Implicit in the rules of evidence which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish some element, i.e., intent or motive, of the crime charged. *See, e.g.,. Lyle, supra; State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987) ("[E]vidence of other crimes is never admissible unless necessary to establish a material fact or element of the

[12] Note the weights mentioned in the text messages were not included in the approximately 31.69 grams charged in the indictment and but for a few of the text messages, the messages were exchanged prior to the date of the offense prior to the indictment.

crime charged."); *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990) ("[W]e define 'necessary' as synonymous with 'relevant'.")); *but see Carter*, 323 S.C. at 467-68, 476 S.E.2d at 918 (holding the prior bad act was not necessary to prove identity because identity was not a fact in issue and other evidence already established identity). Pursuant to *Carter*, the text messages were not necessary to prove Appellant's intent to control the disposition, *i.e.,,* the intent to sell, as argued by the State, because the State need only prove Appellant was in constructive possession of the requisite weight of meth. *See* S.C. Code Ann. § 44-53-370(e).

Further, even with the scant details known about the alleged prior drug transactions described in the text messages, this evidence was simply not relevant or connected to the crime charged. Courts have found the relevance or connection insufficient even in cases where, like here according to the State's argument, the same object and means were used and the same *mens rea* was present in the prior bad act evidence and the crime charged. *See State v. Bright*, 323 S.C. 221, 473 S.E.2d 851 (1996) (holding previous fires that financially benefitted the defendant through insurance payouts were not relevant because "[s]howing Bright had an illegal motive to commit the crime in question would be relevant evidence" "but showing he had experienced two fires in the past" is not relevant to prove he committed arson or burning personal property to defraud insurer); *State v. Davenport,* 321 S.C. 134, 467 S.E.2d 258 (Ct. App. 1996) (holding previous attempted sexual assault not close in similarity and unconnected to sexual assault charged despite the similarities in the weapon used and relationship between the defendant and both victims); *see also infra State v. Brooks; State v. Campbell; State v. Carter; State v. Tuffour.* Moreover, Appellant's admission about meth for his personal use does not furnish the legal relevance or connection to the otherwise irrelevant prior bad act evidence because small increments of meth for personal use involves a different mental state than dealing or trafficking. *See State v. Summersett*, No. 2008-MO-025 (2008) (holding there was no logical relevance between a prior shooting in which the defendant

accidentally shot and injured the victim and the murder charged); *Douglas*, 302 S.C. at 511, 397 S.E.2d at 99 (prior bad act committed the night before the crime charged did not establish the defendant's mental state for the crime charged).

Moreover, without such necessary connection or logical relevance, the text messages are inadmissible as part of the res gestae. *See State v. King*, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999) ("The evidence of a prior bad act is inadmissible as part of the res gestae, where the record does not support any relationship between the crime and prior bad acts").

C. The text messages are not admissible for the purpose of proving Appellant's intent.

State v. Brooks is instructive on this issue. In *Brooks*, the defendant was found guilty of forgery in which she tried to use a check from a closed account, which was signed by the deceased account owner. 424 S.C. at 60, 818 S.E.2d at 327. The trial court found evidence the defendant had committed a forgery the year before by writing a check on a closed account admissible to prove intent, absence of mistake, or knowledge because the two were "similar in that both accounts were closed [] and either she knew, or should have known that the account was closed." *Id.* at 61-2. The Supreme Court reversed because there was no logical relevance between them because her defense was the account holder's widow had given her mother the check and the prior forged check failed to disprove that, and failed to prove the defendant forged the check or knew it was forged. *Id.* 533 S.E.2d at 328. The prior forged check rather served only as prohibited propensity evidence. *Id.*

As patent as it was in *Brooks*, the prior drug transactions do not prove that the specific bag of meth found during the search was Appellant's or that he knew it was there, let alone prove that he possessed it with the intent to sell it. Further, In *State v. Tuffour,* this Court reversed the trafficking conviction due to the improper admission of a CI's testimony about buying crack cocaine from the defendant on numerous prior occasions. 364 S.C. 497 613 S.E.2d 814 (Ct. App. 2005),

vacated on other grounds, 371 S.C. 511, 641 S.E.2d 24 (2007) In holding the prior drug dealings were erroneously admitted under *Lyle*, this Court differentiated the 404(b) rationale from cases[13] that held prior drug transactions were relevant to prove the defendant's intent in PWID cases:

> The nature of the charges—and the related bad act evidence—in *Wilson*, *Raffaldt* and *Moultrie* present circumstances far removed from those before us today, for Tuffour's alleged single act of drug trafficking requires no showing of intent and is otherwise unrelated to his purported prior dealings with [the CI].

Id. at 505, 613 S.E.2d at 818, fn. 6. Hence, the State here mistakenly relied upon *Wilson*, *Gore*, and *King* in arguing that text messages were admissible to prove intent because like *Tuffour*, the trafficking charge against Appellant requires no showing of intent, especially under a constructive possession theory, and the meth found has no relation to the activities described in the text messages. *Raffaldt* is also distinguishable because there, the bad act evidence gave rise to the charged offense.

D. The text messages are inadmissible to prove a common scheme or plan.

When the common scheme or plan exception is "invoked by the State, it is important to recognize that a close degree of similarity between the prior bad acts and the crime charged, by itself, does not satisfy *Lyle*... [T]he mere presence of similarity only serves to enhance the potential for prejudice." *Tuffour*, 364 S.C. at 503, 613 S.E.2d at 818. Rather, "some connection between the crimes is necessary" more than some mere general similarity. *Id.*

As Appellant argued, the present case is strikingly similar to *State v. Carter*, and several other patently comparable cases, each of which call for reversal of Appellant's conviction and sentence on this issue. In *Tuffour*, the CI's testimony about prior drug dealing with the defendant was also admitted to prove a common scheme or plan. *Id.* at 504-06, 613 S.E.2d at 818-20. This Court found the testimony improperly admitted for this purpose due to the lack of connection and

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[13] *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001); *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995); *State v. Moultrie*, 316 S.C. 547, 451 S.E.2d 34, (Ct. App. 1994).

logical relevancy because: "Tuffour was charged with a single charge of trafficking. His alleged prior drug dealings have no relevance whatsoever to the charged offense"; the CI's testimony that he "'just bought individually [from Tuffour] whenever [he] needed it'" further demonstrated that the past purchases were not connected for "there was never an agreement to 'buy more.'" *Id.* at n. 6. In *Carter* and *State v. Campbell,* this Court held it was reversible error for the trial court in both cases to admit evidence of prior crack cocaine sales between the defendants and CI's that occurred just days prior to the crack cocaine distribution charges tried in each case. *Carter*, 323 S.C. at 466-68, 476 S.E.2d at 917-18; *Campbell*, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), *cert. denied*, July 26, 1995. Just as in *Tuffour*, this Court held in both cases that even though the actors, sales methodology or technique, and the drug sold were same in both the crimes charged and the prior bad acts, there was no legal connection between them in order to be admissible under *Lyle*. *Carter*, at 468, 476 S.E.2d at 918; *Campbell* at 451, 454 S.E.2d at 901. In each of these three cases, the prior bad act evidence only served as impermissible propensity evidence. *Tuffour*, at 507, 613 S.E.2d at 820. ("The State here was not trying to prove a common scheme but to convince the jury that because Tuffour sold crack cocaine in the past, he was selling crack cocaine on this occasion. This is precisely the type of inference that *Lyle* prohibits."); *Campbell*, *supra* (holding same); *Carter*, *supra* (holding same).

Here, the purported drug transactions described in the text messages comprise essentially the same evidence ruled inadmissible in each of these cases, and there is no legal connection between the conduct portrayed by the text messages and the meth found. The case for inadmissibility of the text messages based upon an insufficient connection may be even stronger in Appellant's case than in *Tuffour*, and even *Carter* or *Campbell* because some of the text messages shown to the jury described events occurring weeks to a month prior to the crime charged. But like these cases, the only purpose the text messages served was to raise the precise type of inference prohibited by

Lyle: because the Appellant was dealing meth in the weeks prior, he possessed the meth found with the intent to sell it.

E. The text messages are inadmissible because their scant if any probative value was substantially outweighed by unfair prejudice.

Because there is little if any logical relevancy between the text messages and the trafficking crime charged, there is little if any probative value to this evidence. *See State v. Garner*, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (holding a future drug sale not probative to the purpose for which it was admitted, but it was harmless error because unlike Appellant's case, the purpose was not contested). As noted by Appellant in his objection, there is very little probative value in alleged activities taking place weeks to about a month prior to the offense charged and there is enhanced prejudice due to the similarity between the two. *See State v. Gore*, 283 S.C. 118, 322 S.E.2d 12(1984)

The prejudice here was overwhelming. Because the text messages so heavily insinuate that Appellant was an active drug dealer, the unavoidable inference to be drawn is the same improper inference raised by propensity evidence. *See Bright*, 323 S.C. at 225, 473 S.E.2d at 853 (holding the admission of the prior fires to show motive or intent was "simply an innovative way of circumventing" *Lyle* because regardless of the prosecutor's intent, the obvious inference is the defendant was connected to the fires and they were not accidental). The prejudice and the drug dealer connotation was magnified by the testimony about a "re-up" in an outgoing text message, which presented Appellant as a supplier a of network of dealers. (Tr. p. 394, ln 16-25). Moreover, the State's argument that the text messages would be used to prove he possessed the meth with the intent to control its disposition, *i.e.*, sell it, actually epitomizes the impermissible inference prohibited in *Lyle*: that because Appellant had been selling meth in the prior weeks, he must have possessed this specific bag of meth with the intent, *i.e.*, traffick, it as well. Indeed, there is no conceivable way to admit the text messages for this purpose or under any exception and avoid the effect of propensity

evidence or where its probative value is not substantially outweighed unfair prejudice. *See Tuffour*, at 507, 613 S.E.2d at 820 (this Court declared the prejudice resulting from the admission of testimony on the defendant's prior drug dealings was "manifest").

The prejudice resulting from this error is compounded due to the constructive possession theory of the case. Resolution of whether the State proved constructive possession, the admittedly dispositive issue, ultimately boiled down to whether the jury believed Appellant only smoked meth for personal use and neither knew the meth was in the armoire nor possessed it with an intent to control its disposition. *See State v. Reeves,* 301 S.C. 191, 391 S.E.2d 241 (1990) (holding an error that "substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense."); *State v. Smith*, 309 S.C. 442, 447, 424 S.E.2d 496, 499 (1992) (holding improper 404(b) evidence was not harmless because the verdict hinged on credibility and the evidence was destructive to the defendant's character). The inevitable insinuation that Appellant was a drug dealer raised by the text messages diminished if not destroyed credence in the reasons provided as to why Appellant may not have been aware the meth was in the shared residence. *See King*, 334 S.C. at 514. The unsavory insinuation of a drug dealer also extinguished credence in the Appellant's assertions he was not dealing and only used meth for personal use. The State argued as much during closing:

> The Defendant is either guilty beyond a reasonable doubt or the unluckiest person who has ever walked on the face of the earth....[H]e admitted to meth pipes in the house, it just so happens he has a bunch of meth text dealing?...It just so happens there's a pair of men's size 38 pants was found in his house?

(Tr. p. 501, ln. 16 – p. 502, ln. 5). *See Brooks*, 341 S.C. at 62, 533 S.C. at 328. Enhancing the prejudice was the State's reading of the text messages that discussed "dope", "clear" and "drugs on credit" and its reliance upon the text messages to prove the charges in closing arguments:

> Let's talk about the phone because that is the State's strongest evidence in this case and it will completely destroy the credibility of any defense argument because you

> take one look at that phone and you know the truth beyond a reasonable doubt... You've got your top two ways that you can prove trafficking. ...After you look through that phone you got both. You got somebody who's selling, and attempting to sell, and you got somebody who is in constructive possession....[T]his is his business on that phone....If you want fingerprints or DNA look at his cellphone. What a person says about what they do is more valuable than fingerprints or DNA.

(Tr. p. 496, ln. 2 – p. 498, ln. 14; p. 503, ln. 5-7). The State also argued the physical evidence proved the possession element of the offense and the text messages provided the proof necessary to convict him of trafficking. (Tr. p. 499, ln. 10-13). *See King* 334 S.C. at 514 (holding it was "impossible" to conclude the error was harmless where, like here, the prior bad act evidence proved little but the defendant's propensity to commit the crime charged and the State continuously stressed the improper evidence in its closing argument). *See also Douglas*, 302 S.C. at 511, 397 S.E.2d at 99.

Further, the prejudice resulting from this error is exacerbated due to circumstantial nature of the evidence. *See King*, 334 S.C. at 514 (reversing when all the evidence was circumstantial but pointed to the defendant's guilt, even blood evidence, due to the great prejudice from the prior bad act's insinuation of illegal activity). No fingerprints or DNA linked Appellant to the meth or pistol. *See generally Campbell, supra* (noting the State's lack of forensic or lab testing efforts in discussion on prejudice). Appellant was not found with the pistol or meth and no evidence directly proved he knew the pistol or meth were in the home, let alone that either belonged to him.

Furthermore, in light of the evidence that Peters and numerous other people recently and frequently lived, visited, and left belongings at the residence, the jury's questions demonstrate jurors debated whether the State proved Appellant was in constructive possession of the pistol. The subject of this question relating to constructive possession of the pistol only is telling that the jury's finding on whether Appellant was in constructive possession of the meth was impacted by the text messages. This is even more telling when considering that the pistol was in a nightstand in the bedroom; whereas the meth was in a folded pair of pants amongst others' clothes in an armoire, which was

located in a common area just feet from another bedroom. The jury's question on the failure to test for fingerprints or DNA is just as telling because it too demonstrates jurors doubted the identity of the pistol and meth's owner or possessor, a doubt that was ultimately resolved with the impermissible inference raised by the text messages that the Appellant was a drug dealer.

Moreover, the improper admission of this evidence is not rendered harmless by the fact that the meth or paraphernalia used for smoking meth were found at Appellant's shared residence, or by Appellant's admission he used meth himself. *See Brooks*, 341 S.C. at 63 (holding the improper prior bad act evidence not harmless despite conflicting testimony regarding the account holder giving the forged check to the defendant's mother and despite the defendant's inconsistent statements as to how she obtained the check and why).

VI. THE TRIAL COURT MISAPPLIED THE STANDARD WHEN DETERMINING THE TEXT MESSAGES WERE ADMISSIBLE UNDER RULE 404(b) AND FAILED TO MAKE SPECIFIC FINDINGS ON THE RECORD.

"After conducting a *Lyle* analysis and finding evidence both relevant and admissible as a prior bad act, the trial court must conduct a Rule 403, SCRE analysis to determine whether or not the evidence is unduly prejudicial." *Beck*, 342 S.C. at 136, 536 S.E.2d at 683. The Supreme Court recently clarified the balancing test because it is so often misstated, "The correct test is...whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *King*, 424 S.C. at 200, 818 S.E.2d at 210, n. 6. Remand on this issue is appropriate for misapplication or the absence of this analysis only where the trial judge does not otherwise indicate he or she was cognizant of the evidentiary rule when admitting the prior bad act evidence. *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). In *State v. Spears*, this Court reversed because the trial court did not properly conduct the balancing test or make all necessary findings. 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). This Court reasoned that although "the trial court did spend time

expressing its concerns and questioned the solicitor on the prior [bad act]"; apart from finding it was clear and convincing evidence and that the evidence was admissible, the trial court did not make specific findings on its probative value, the nature of the unfair prejudice, or whether the probative value was substantially outweighed by the danger of unfair prejudice." *Id.* Conversely, in *King*, the trial judge's ruling the prior bad act testimony was admissible entailed:

> [The testimony] goes to the sense he's charged with [PWID] the drugs found right there, it's establishing his nexus or contact with that and [the witness has] been there, seen that and all that. To my mind, it's fair.

349 S.C. at 157, 561 S.E.2d at 647. This Court declined to remand because "[w]hile the trial court's ruling is a compressed Rule 403/404(b) analysis, it is some indicia of his consideration of whether admission of the testimony was fair to King (*i.e.,* more probative than prejudicial)." *Id.*

Here, the trial judge ultimately ruled the text messages were admissible, finding that the evidence "appear[s] to be clear and convincing...as well as logically relevant to the issue...of trafficking." (Tr. p. 234, ln. 1-4). The trial judge also stated the question was: "whether or not its more []probative than prejudicial", and found: "Clearly these text messages are prejudicial to the Defense and there is no question about that. However, they are substantially []probative to the State's case." (Tr. p. 234, ln. 5-13). The trial judge materially misapplied the balancing test and failed to make specific findings. Additionally, like the *Spears* ruling, the trial judge here found the evidence was clear and convincing but did not make any specific findings on any element of the 403 or 404(b) admissibility test for any exception for which the State sought to admit the evidence. Further, unlike the ruling in *King*, the trial judge here gave no reason as to why any of the text messages were probative on any *Lyle* exception so that the probative value was not substantially outweighed by unfair prejudice. The trial judge also did not explain the nature of the prejudice to Appellant or why the probative value nonetheless outweighed the prejudice. Therefore, if this Court were to find reversal on any of the other issues unwarranted, Appellant respectfully urges that

remand is nevertheless appropriate because the trial judge's ruling on the text messages does not satisfy even the low threshold set forth in *King*.

VII. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ITS DUTY WAS TO DETERMINE THE TRUTH OF THE EVIDENCE, AND DEFINING A REASONABLE DOUBT FROM THE PERSPECTIVE OF A JUROR IN SEARCH OF THE TRUTH BECAUSE THE INSTRUCTIONS UNCONSTITUTIONALLY SHIFTED THE BURDEN TO APPELLANT AND WERE AMBIGUOUS AND CONFUSING.

Standard of Review

The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) (citing *Estelle v. McGuire*, 502 U.S. 62 (1991)).

Relevant facts

The trial judge charged the jury, in relevant part:

> It is your duty to determine the effect, the value, the weight, and truth of the evidence presented during this trial.....A reasonable doubt is a doubt which makes an honest sincere conscientious juror in search of the truth to hesitate to act.

(Tr. p. 510, ln. 14-16; p. 514, ln. 22-24). Appellant objected to this truth language in the jury charges and oath and moved for a mistrial on the grounds that it improperly shifted the burden and invaded the province of the jury pursuant to *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) and *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), which was denied. (Tr. p. 525, ln. 16 –p. 526, ln. 23).

Argument

In *Beaty*, the Supreme Court addressed the propriety of similar language in the trial judge's opening remarks. The Court found no reversible error because the truth language was contained in a mere statement to the jury, rather than a charge on the law, and was not attached to reasonable doubt or circumstantial evidence. *Id.* at 34, 813 S.E.2d at 506. The Court nonetheless agreed:

> These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime

> and from those facts alone render the verdict the jury believes best serves its perception of justice.

Id. Accordingly, the Court instructed trial judges "to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt." *Id.*

Here, the truth language in the jury charges and jury's oath, particularly in the instruction that defined reasonable doubt from a juror's perspective in search of the truth, tainted the overall jury instructions. The truth language comprised essentially the same language the Court found improper and erroneous, although harmless error, in *Beaty*. However, unlike *Beaty* and unlike *Aleksey*, the truth language here constitutes reversible error because it was used to describe the jury's purpose, the definition of a reasonable doubt, and the State's burden of proof beyond a reasonable doubt. *Cf. Beaty, supra* (truth language in opening remarks); *Aleksey*, 343 S.C. at 28-29, 538 S.E.2d at 252-53 (improper language linked to credibility of witnesses). Because the jurors were to follow the remaining instructions as per their understanding of their role and gauge all witness credibility and evidence with the definition of a reasonable doubt and the State's burden as benchmarks, the truth language in the charges and oath tainted the jury instructions as a whole. *Cf. Aleksey*, at 28–29, 538 S.E.2d at 252. The other repeated references to a "reasonable doubt" and the presumption of innocence are nonconsequential because the jury was improperly instructed on their role and the manner in which they were to evaluate whether reasonable doubt existed. *Cf. State v. Pradubsri*, 420 S.C. 629, 803 S.E.2d (Ct. App. 2017) (finding no reversible error partly because the charges referenced "beyond a reasonable doubt" 26 times overall), cert. granted Feb. 16, 2018. The truth language was also unconstitutional because the jury was to decide whether to accept or reject an inference for various elements and sub-issues, for which there was no direct evidence in an already exclusively circumstantial case. In turn, the truth language caused the jury to readily accept

the inferences without full evaluation of the evidence, *i.e.*, assume, as well as decide the facts based upon what they believed to be true rather than upon the evidence presented and not to the degree of beyond a reasonable doubt. This eroded the presumption of innocence and unconstitutionally shifted the burden to Appellant. The verdict largely hinged upon the jury believing Appellant's testimony, and he thus needed to overcome what may have merely appeared true or could easily be assumed true from the State's evidence and the inferences raised and too readily accepted. Ultimately, the truth language rendered the jury charges confusing and ambiguous, and unconstitutionally burden-shifting. Appellant's conviction and sentence should be reversed because there is a reasonable likelihood that the jury applied the instruction in an unconstitutional way.

CONCLUSION

For the foregoing reasons, the Appellant Jonathan Ostrowski respectfully urges this Honorable Court to reverse his convictions and sentence or in the alternative, remand for a hearing on Rule 403.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from York County Court of General Sessions
The Honorable Brian Gibbons, Circuit Court Judge

Appellate Case No. 2018-000423

State of South Carolina,.....Respondent,

v.

Jonathan Ostrowski,.....Appellant.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellant's opening brief, designation of matter, and motion to allow late filing were mailed by US mail for filing and service upon Respondent respectively, with sufficient postage attached and addressed as follows:

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The undersigned further certifies that all parties required to be served under the South Carolina Appellate Rules have been served.

This 30th day of November, 2018

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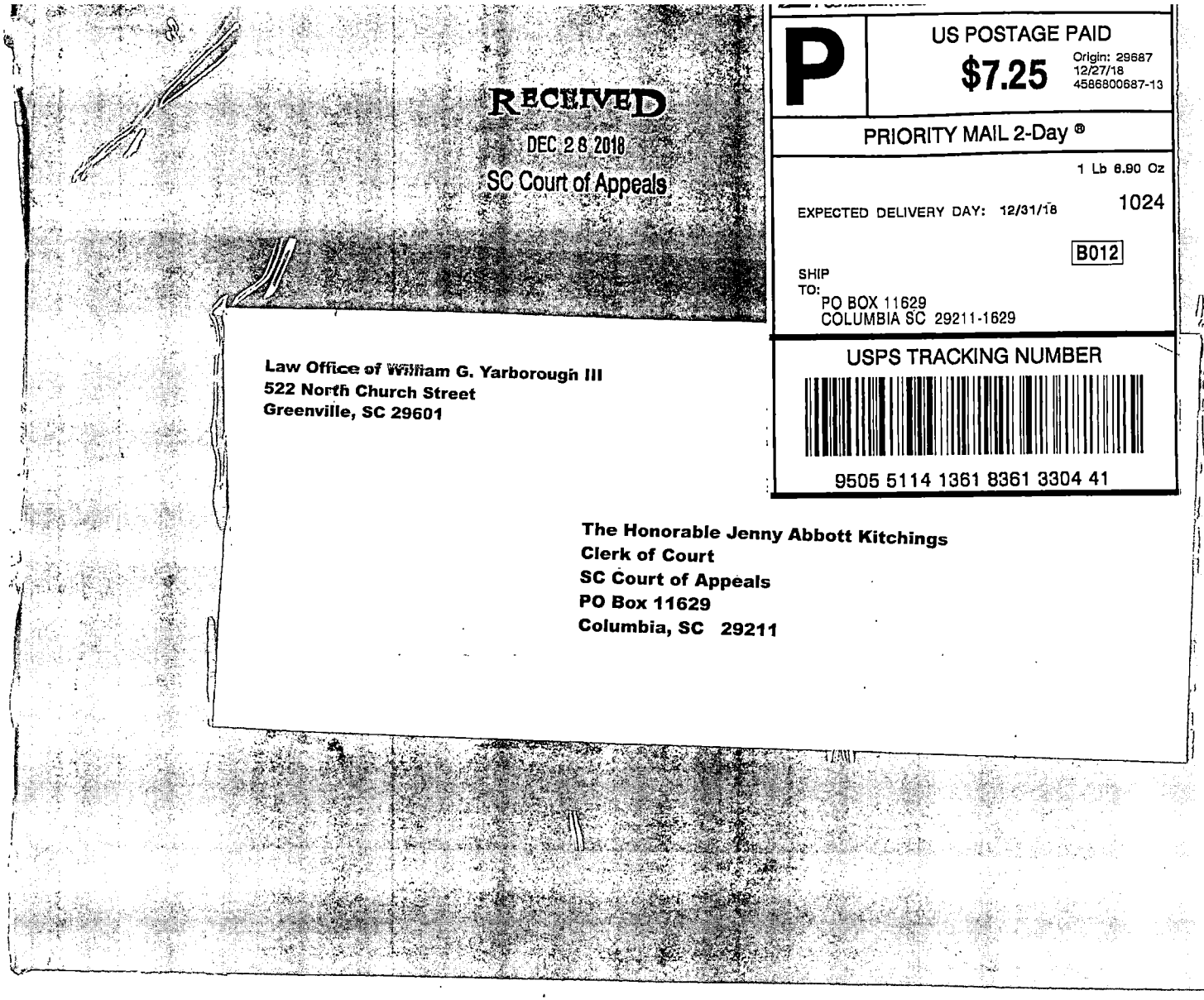

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