STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
The Honorable Brian M. Gibbons, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-000423

THE STATE, Respondent,

v.

JONATHAN OSTROWSKI, Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge properly declined to suppress the results of the search warrant executed upon Appellant's house when the search warrant affidavit did not contain false or misleading information and when it provided a reliable basis for the magistrate to find probable cause? And whether even if false information was included in the search warrant affidavit or exculpatory information was excluded, there was still a substantial basis for the magistrate to determine probable cause if the alleged false information was excluded or if exculpatory information was included?

II.

Whether the trial judge properly allowed Investigator Leland Harrelson and Investigator Ryan King to offer their opinions as lay witnesses respectively on the significance of items found in Appellant's home and messages found on his phone? And whether even though both Harrelson and King had the relevant training and experience to be tendered as experts, but because they were not labeled as experts, their opinions did not prejudice Appellant? And if Harrelson and King's testimonies were admitted in error, whether any error would have been entirely harmless because of the overwhelming evidence presented against Appellant at trial?

III.

Whether the trial judge properly admitted Appellant's text messages into evidence where they were relevant for the jury to determine whether Appellant owned the methamphetamine found inside his house and when the State sufficiently proved the messages belonged to Appellant because they were extracted from a phone Appellant possessed?

IV.

Whether Appellant's text messages were properly admitted into evidence when they were not hearsay because Appellant's outgoing text messages were admissions by a party opponent and the incoming text messages to Appellant were not hearsay because they were not offered for the truth of the matter asserted?

V.

Whether Appellant's text messages were properly admitted as an invited response after Appellant claimed in opening statement that the methamphetamine found in his house belonged to Heather Westerfield and where even if Appellant's text messages were not properly admitted as an invited response, whether they were properly admitted as prior bad acts under Rule 404(b) to prove who owned the methamphetamine and to show Appellant's intent in possessing the drugs?

VI.

Whether Appellant failed to appropriately preserve the issue of whether the trial judge used the correct standard of review and whether the trial judge made specific findings for the record for appellate review and if so whether the trial judge did use the correct standard of review in determining Appellant's text messages were admissible and did make specific findings on the record?

VII.

Whether the trial judge's jury instructions, which mentioned the word "truth" on two occasions improperly shifted the burden of proof to Appellant or whether, when read as a whole, did the jury instructions properly explain that the State had the sole burden of proof to prove every element of each crime charged beyond a reasonable doubt?

STATEMENT OF THE CASE

In January 2018, the York County Grand Jury indicted Appellant for one count of trafficking methamphetamine greater than twenty-eight grams but less than one hundred grams and possession of a weapon during the commission of a violent crime (2017-GS-46-2573). In June 2017, the York County Grand Jury indicted Appellant for one count of possession of a weapon by someone convicted of a crime of violence (2017-GS-46-2575) and possession of a handgun with an obliterated serial number (2017-GS-46-2576). On February 27-March 1 2018, a jury trial was held in the York County Court of General Sessions with the Honorable Brian M. Gibbons, presiding. Appellant was represented by Dayne Phillips, Esq., and Judah VanSyckle Esq. Respondent (the State) was represented by Assistant Solicitors Aaron Hayes and Marina Hamilton of the Sixteenth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of all counts. Following the verdict, the trial judge sentenced Appellant to a term of eighteen years' imprisonment for trafficking in methamphetamine greater than twenty-eight grams but less than one hundred grams, and five years' imprisonment on each weapons charge. All sentences ran concurrently with each other resulting in an aggregate sentence of eighteen years' imprisonment for Appellant. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On January 25, 2017, agents with the York County Multi-Jurisdictional Drug Enforcement Unit executed a search warrant on 162 Bailey Avenue in York County. Law enforcement engaged in surveillance of the residence for six months prior to obtaining the search warrant. (Tr. 101, Court's Exhibit #5). During the period of surveillance, law enforcement observed Alexandria Peters living at the residence with Appellant. (Tr. 100-01, Court's Exhibit #5). Peter's had pending arrest warrants for distribution of Alprazolam for a previous sale made to a confidential informant.

At 7:00 AM on January 25, Investigator Leland Harrelson observed Appellant leave his residence. (Tr. 173). Peters left the residence sometime after Appellant and was arrested by law enforcement a short distance away from the home on her outstanding warrants. (Tr. 101, Court's Exhibit #5). After being placed under arrest, Peters told law enforcement that there was marijuana inside the residence. (Tr. 102, Court's Exhibit #5). Law enforcement obtained a search warrant for the residence and they executed the search warrant at approximately noon on January 25. (Tr. 173-74). Inside the residence, officers located methamphetamine, pipes used for smoking methamphetamine, a digital scale, razor blades, sandwich bags, and tin foil. (Tr. 196-99, 206, Court's Exhibit #5). Officers located a package of suspected methamphetamine inside a pair of men's pants. (Tr. 206). That substance was later analyzed and weighed and determined to be 31.66 grams of methamphetamine. (Tr. 363). Officers also located a .32 caliber handgun with the serial number obliterated. (Tr. 334, 420).

Appellant was arrested in Chester County by the Chester County Sheriff's Office. (Tr. 131). Harrelson interviewed Appellant at the Chester County Sheriff's Office. Before invoking his Miranda rights, Appellant admitted the methamphetamine pipes found during the search of

his residence belonged to him. (Tr. 135). After Appellant was placed under arrest, a cell phone was seized from his person. (Tr. 293). The contents of Appellant's phone were downloaded by law enforcement. (Tr. 377). A number of text messages from Appellant's phone were entered into evidence at trial that implicated Appellant as being involved in the sale of methamphetamine. One of the text messages featured Appellant telling an unknown individual:

> Appellant: So ur not gonna finishwhat u started well dont ask me for dope anymore find u a new dealer. (sic)

(State's Exhibit # 45). An additional text exchange between Appellant and an unknown individual was also entered into evidence which read:

> Unknown: Hey u home (sic)
>
> Appellant: No buti need mycock sucked (sic)
>
> Unknown: Well I need some dope on front
> MomaB (sic)
>
> Appellant: U already own me one (sic)
>
> Unknown: Yeah but not cash
> MomaB
>
> Appellant: I know
>
> Unknown: I need some fucking dope I get u when I puck if up (sic)
>
> Appellant: I need my fucking cock sucked

(State's Exhibit # 37).

At trial, Appellant testified in his own defense. Appellant admitted that he was a drug addict and his drug of choice was methamphetamine. (Tr. 469). Appellant also admitted that his house was a party house for people who use methamphetamine. (Tr.469). Appellant acknowledged ownership of the methamphetamine pipes found in his residence but denied

ownership of the drugs found in the residence. (Tr. 468). At the conclusion of trial, Appellant was convicted on all counts.

STANDARD OF REVIEW

I.

When reviewing a decision to issue a search warrant, the reviewing court should decide whether the issuing judge had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the issuing judge, the court should base its determination on the totality of circumstances. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The issuing judge's probable cause determination should be afforded great deference on appeal. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007).

II-IV.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

V.

"Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2009).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the

admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008).

VI.

If "an on-the-record Rule 403 analysis is required, [an appellate court] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct.App.2002).

VII.

"Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). "A trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. 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. We instruct 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." State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018).

ARGUMENT

I.

The trial judge properly declined to suppress the results of the search warrant executed upon Appellant's house because the search warrant affidavit did not contain false or misleading information and it provided a reliable basis for the magistrate to find probable cause. Even if false information was included in the search warrant affidavit or exculpatory information was excluded, there was still a substantial basis for the magistrate to determine probable cause if the alleged false information was excluded or if exculpatory information was included.

Appellant initially argues the trial judge erred by denying his motion to suppress the results of the search warrant executed upon Appellant's house because the search warrant affidavit contained false information. Appellant also argues that Investigator Daniel Burkhart intentionally omitted exculpatory information from his search warrant affidavit which rendered the affidavit misleading. Appellant asserts that if the false information were removed from the affidavit, there would not be a substantial basis for the magistrate to find probable cause. Appellant's arguments are without merit. The trial judge properly declined to suppress the results of the search warrant executed on Appellant's residence because the search warrant affidavit did not contain false or misleading information and it contained a reliable basis for the trial judge to determine probable cause. Even if we assume that false information was included in the affidavit or exculpatory information was omitted, there was still sufficient information in the affidavit to establish probable cause if the exculpatory information was added to the affidavit or if the alleged false information was subtracted from the affidavit.

In order to justify the issuance of a search warrant, the affiant must present a sworn affidavit establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). A search warrant affidavit must contain sufficient underlying facts upon which an issuing judge can base a probable cause determination. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). The facts contained in the affidavit must be so closely related

to the time of the issuance of the warrant 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). When reviewing a decision to issue a search warrant, the reviewing court should decide whether the issuing judge had a substantial basis for concluding probable cause existed. Dupree, 354 S.C. at 683, 583 S.E.2d at 441. The evidence presented to a judge issuing a search warrant "need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive" but rather it is sufficient if the evidence "is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist." State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), Applying the same standard as the issuing judge, the court should base its determination on the totality of circumstances. Keith, 356 S.C. at 223, 588 S.E.2d at 147. The issuing judge's probable cause determination should be afforded great deference on appeal. Rutledge, 373 S.C. at 316, 644 S.E.2d at 791.

When false or misleading information is included in a search warrant affidavit or exculpatory material is omitted from it, an accused person has a right to challenge the sufficiency of the affidavit. Franks v. Delaware, 438 U.S. 154 (1978). "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." Franks 438 U.S. at 171. At the evidentiary hearing, the accused has the burden of proving the allegations of perjury or reckless disregard of the truth by a preponderance of the evidence. Franks, 438 U.S. at 156. If a deliberate falsehood or reckless disregard for the truth is established, "the court must exclude the false material and consider the remainder of the affidavit to determine if it is sufficient to establish probable cause." State v. Gore, 408 S.C. 237, 245, 758 S.E.2d 717, 721

(Ct. App. 2014). A Franks analysis is applicable when false information is knowingly included in a search warrant and when exculpatory material is left out of an affidavit. State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). When exculpatory material has been omitted from an affidavit, there is no Franks violation if the affidavit along with the omitted data still contains sufficient information to establish probable cause. Id.

Here, Appellant moved to suppress the results of the search warrant executed on Appellant's residence before trial on the grounds that misleading information was included in the search warrant affidavit. (Tr. 91). An *in camera* hearing took place where Appellant called Magistrate Judge Tanesha Lonergan and Investigator Burkhart to testify. Lonergan determined that there was probable cause to search Appellant's residence based on the written affidavit. (Tr. 94-95). Burkhart typed the affidavit to obtain the search warrant after Peters had been arrested and given a statement to law enforcement. (Tr. 97). The affidavit states that law enforcement had observed Appellant and Peters living at the residence for the previous five months, but acknowledges that Peters lived there "off and on." (Court's Exhibit #5). Burkhart's affidavit stated that Peters had outstanding warrants for distribution of Alprazolam and that she was seen leaving the residence on January 25. Peters was arrested with Alprazolam and Clonazepam in her possession. Peters acknowledged after her arrest that there was marijuana inside the residence. (Court's Exhibit #5). Accordingly Burkhart drafted a warrant which sought to discover evidence of alprazolam, clonazepam, and marijuana within Appellant and Peter's residence. (Court's Exhibit #5). Law enforcement executed the search warrant the same day it was drafted and presented to Lonergan. (Tr. 173-74).

Appellant contends the affidavit was misleading because Burkhart did not include within the affidavit that law enforcement did not have evidence of drug distributions occurring at

Appellant's residence nor did they have any evidence that Appellant had sold drugs from that residence. Appellant contends this omission is not only an omission of exculpatory evidence but also an inclusion of false or misleading information. It is instructive to address Appellant's allegations separately.

False or Misleading Information

Appellant's allegation that Burkhart included false or misleading information in the search warrant affidavit is meritless. There are no false statements within the affidavit. Burkhart never claimed that drugs were sold at Appellant's residence, nor did he claim that Appellant had sold drugs from his residence. Burkhart merely said law enforcement was conducting an ongoing investigation of Appellant "in reference to narcotic violations", and as part of that investigation they had conducted surveillance of Appellant's house for the preceding six months. (Court's Exhibit #5). This is a true statement. Law enforcement was engaged in a long term narcotics investigation that involved them conducting surveillance of Appellant and Peter's residence. It is also a true statement that Peters had outstanding warrants for distribution of Alprazolam and that she was arrested that same day in possession of Alprazolam and Clonazepam. Furthermore, it is true that Peter's said there was marijuana in Appellant's residence on the day the search warrant was executed. That Burkhart did not specify that there were no controlled buys made from Appellant's residence in the affidavit does not render any information in the affidavit false. The burden was on Appellant at the Franks hearing to prove by a preponderance of the evidence that Burkhart included a deliberate falsehood in his affidavit or made statements in the affidavit with a reckless disregard for the truth. Appellant failed to meet his burden.

Exculpatory Information

The next step in the Franks analysis is to determine whether there was any exculpatory information withheld from the search warrant. If so, the court must add the omitted information and determine whether probable cause still exists. Here, there was no exculpatory information withheld from the warrant. Law enforcement is only required to present sufficient information in an affidavit for an issuing judge to determine probable cause. A law enforcement officer need not include every piece of information obtained during the course of an investigation. Here, Burkhart testified that he did not know the controlled buys from Peters had occurred at a different residence (Tr. 98). However, Burkhart acknowledged that Peters had multiple residences and she only lived at Appellant's residence "off and on." (Court's Exhibit #5). If we assume for the sake of argument that exculpatory information was left out of the affidavit, the next appropriate step in the Franks analysis is to add the omitted information to the affidavit and determine if the issuing judge would still have probable cause to issue the search warrant.

Here, Appellant claims that Burkhart omitted from the affidavit that no controlled buys had been made from Appellant's residence and that no controlled buys had been made from Appellant. If that information were added to Burkhart's affidavit, there would still be probable cause to issue the search warrant. The added information would not negate the fact that a known drug distributer had been living at Appellant's residence "off and on" for the previous five months. Nor would the added information change the fact that Peters told law enforcement that there was currently marijuana inside the residence on the day (January 25) that the search warrant was sought and executed. Therefore, the information presented to Lonergan-that Appellant resided with someone who law enforcement bought drugs from previously and who also told law enforcement that there were currently drugs inside the house-was sufficient for her

to determine that probable cause existed for a search warrant. That law enforcement never bought drugs from Appellant or from Appellant's residence does not diminish the basis for probable cause to search Appellant's residence. Therefore, the trial judge properly denied Appellant's motion to suppress the results of the search warrant.

Outside of the Franks analysis, the search warrant still provided a sufficient basis for Lonergan to determine there was probable cause to search Appellant's home. The search warrant affidavit attested that Peters, a known drug dealer, was living at Appellants home for five months. Peters was then seen exiting Appellant's home and was arrested shortly thereafter and had Alprazolam and Clonazepam in her possession. Peters then told law enforcement there was currently marijuana inside Appellant's home. The factual scenario presented in this case is similar to cases where this Court has upheld the sufficiency of search warrant affidavits. See State v. Scott, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991). (Holding a search warrant for Scott's home was properly issued when law enforcement conducting surveillance of Scott's house and having outstanding warrants for Scott's arrest for cocaine distribution, observed him leave his home and then arrested him with cocaine in his possession); See also State v. Keith, 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003) (holding a search warrant for Keith's home was properly issued when law enforcement, conducting surveillance of Keith's home, discovered marijuana in Keith's car after it was stopped shortly after leaving the residence). Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly allowed Investigator Leland Harrelson and Investigator Ryan King to offer their opinions as lay witnesses respectively on the significance of items found in Appellant's home and messages found on his phone. Both Harrelson and King had the relevant training and experience to be tendered as experts, but because the witnesses were not labeled as experts, their opinions did not prejudice Appellant. Even if Harrelson and King's testimonies were admitted in error, any error would have been entirely harmless because of the overwhelming evidence presented against Appellant at trial.

Appellant next contends the trial judge erred by allowing two law enforcement witnesses to offer opinions on the significance of drug paraphernalia found at Appellant's home and text messages extracted from Appellant's phone. Appellant argues that such opinions were improper as lay witness testimony under Rule 701 SCRE and would only have been proper as expert witness testimony under Rule 702 SCRE. Appellant's argument is meritless. The State appropriately attempted to tender Investigator Leland Harrelson as an expert in drug investigations, but the trial judge ultimately declined that request. (Tr. 184-85). Both Harrelson and Investigator Ryan King had the appropriate expertise to testify to the significance of the items they found, but because they were not tendered as experts, Appellant was not prejudiced by their testimony because no extra credibility was assigned to it by attaching the label of expert. If the trial judge properly declined to tender Harrelson as an expert, then he and King's testimony was properly admitted as lay witness testimony because their opinions were rationally based upon their perception and did not require special knowledge, skill, or training. Even if the testimony of both investigators was improperly admitted under Rule 701, any error was entirely harmless because of the overwhelming evidence presented against Appellant at trial.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." Pagan, 369 S.C. at 208, 631 S.E.2d at 265. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are

controlled by an error of law." McDonald, 343 S.C. at 325, 540 S.E.2d at 467. Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. However, the South Carolina Rules of Evidence also allow lay witnesses to give their opinion under the following circumstances:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE. "It is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013). "Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge." State v Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009).

Here, Appellant contends the trial judge erred in allowing particular testimony from Investigator Harrelson and Investigator King. In regard to Harrelson, Appellant complains that Harrelson offered his opinion on the significance of various items found in Appellant's home including digital scales, tin foil, sandwich bags and razor blades. In regards to King, Appellant contends King improperly offered his opinion on slang terms for different drugs found in text messages from Appellant's phone. Contrary to Appellant's assertion, both King and Harrelson

would have properly offered their opinions as expert witnesses, but in light of the trial judge's ruling their opinions were also admissible as lay witnesses rather than experts because their opinions were rationally based on their observations and did not require special knowledge, skill, experience, or training.

Prior to Harrelson's testimony, the trial judge ruled Harrelson would not be tendered as an expert, but that he could testify regarding the significance of what he found inside Appellant's house as a narcotics officer. (Tr. 185). Perhaps in light of the trial judge's ruling on Harrelson, the State did not attempt to tender King as an expert witness. Harrelson offered his opinion on the significance of a scale, tin foil, and razor blades as they related to a drug investigation. (Tr. 195-99)[1]. King testified about the significance of slang words found in the text messages extracted from Appellant's phone and how they related to drugs. (Tr. 388-96). Both witnesses had the proper training and experience to render expert opinions on the significance of their findings. However, their testimony was also properly admitted as lay witness testimony, because the subject matter they testified about was not beyond the understanding of an ordinary lay juror. Harrelson's testimony was helpful for the jury to clearly understand what he found, but his testimony did not require special training and experience. Likewise, the substance of Harrelson's testimony was not outside the understanding of an ordinary lay juror. The jury did not require an expert to explain that a drug dealer may use a digital scale to weigh drugs or use plastic baggies to package drugs. Similarly, King's knowledge of drug slang terms was acquired from his experience as a drug investigator and was helpful to explaining to the jury what Appellant's text

[1] Appellant objected to Harrelson's testimony but did not do so on the grounds that it was improper opinion testimony, but rather on grounds of relevance under Rules 401 and 403 SCRE. (Tr. 196). See State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). (A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground). See also State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001) (A party may not argue one ground at trial and an alternate ground on appeal).

messages meant. Like Harrelson's testimony, King's knowledge of drug slang did not require special knowledge or training. The jury also likely could draw their own conclusions about the terminology contained in the text messages. Certainly some text messages contained self-explanatory terms such as Appellant referring to himself as a "dealer." (State's Exhibit #45).

If we assume the trial judge correctly declined to label Harrelson as an expert, then Appellant did not suffer any prejudice from his testimony. Indeed the trial judge was concerned about the weight that may be attached to the label of expert and expressed his concern in making his ruling. (Tr. 185). Certainly Appellant was able to vigorously cross examine Harrelson and question his conclusions regarding the significance he ascribed to certain items. (Tr. 284-85). Without the label of expert being attached to Harrelson, it was no doubt easier for Appellant to attack the credibility of his conclusions. Therefore, Appellant suffered no prejudice from the testimony of Harrelson or King.

Harmless Error

Assuming that Harrelson and King's opinions were admitted in error under Rule 701, any error was entirely harmless because of the overwhelming evidence presented against Appellant at trial.

An appellate court 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). "The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008). In ruling on the admissibility of evidence, the trial judge has considerable latitude and his ruling will not be disturbed absent a showing of probable prejudice. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). An "error without prejudice does not warrant reversal." State v. King, 367 S.C.

131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

The evidence presented against Appellant at trial was overwhelming. Appellant admitted ownership of drug paraphernalia found inside his residence. (Tr. 135, 468). Appellant also admitted that he was a methamphetamine addict and that his house was used by other people who also used methamphetamine. (Tr. 469). Text messages from Appellant's phone were entered into evidence that showed Appellant attempting to exchange drugs for sex and referring to himself as a "dealer." (State's Exhibit #37 and #45). Furthermore, the State was not even required to prove that Appellant was a drug dealer, but merely that Appellant was in actual or constructive possession of twenty eight grams or more of methamphetamine. S.C. Code Ann. § 44-53-375 (C). Therefore, it is likely the jury determined Appellant's guilt based on his own admissions and text messages rather than from the opinions of two officers about the significance of certain items found inside Appellant's residence and on his phone.

Furthermore, the opinions of law enforcement were entirely consistent with the defense Appellant presented at trial. Appellant claimed that he was a methamphetamine addict who opened his house to other methamphetamine users (Tr. 467, 469). Appellant further claimed the pipes found at his house were his, but the methamphetamine found was not his. (Tr. 468). Therefore, law enforcement's testimony about items related to using and dealing methamphetamine being found at Appellant's home are consistent with Appellant's defense;

namely that even though Appellant allows methamphetamine users to use his house, the specific drugs found belonged to a third party and not Appellant. Accordingly, even if the opinions of Harrelson and King were admitted in error under Rule 701, it is unlikely they prejudiced Appellant and the error was therefore harmless. Appellant's convictions and sentences should be affirmed.

III.

The trial judge properly admitted Appellant's text messages into evidence because they were relevant for the jury to determine whether Appellant owned the methamphetamine found inside his house and the State sufficiently proved the messages belonged to Appellant because they were extracted from a phone Appellant possessed.

Appellant next argues the trial judge erred in admitting text messages into evidence from Appellant's phone because they were not properly authenticated and were irrelevant. Appellant's argument is without merit. Appellant's phone and the contents thereof were relevant to proving Appellant owned the drugs found in his residence. This is particularly true when Appellant maintained at trial the drugs did not belong to him. The State appropriately authenticated the text messages by establishing a satisfactory foundation for the jury to determine the text messages were what the State claimed them to be.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 SCRE. "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, SCRE. Evidence must be authenticated before it can be admitted State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003). "'The burden to authenticate . . . is not high', and requires only that the proponent 'offer a satisfactory foundation from which the jury could reasonably

find that the evidence is authentic.'" Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting United States v. Hassan, 742 F.3d 104, 132 (4th Cir. 2014)).

Appellant claims the State failed to establish that Appellant's text messages were relevant, and they failed to properly authenticate the messages as belonging to Appellant. It is instructive to address Appellant's allegations in order.

Relevance

Appellant's defense at trial was essentially a third party guilt defense. Appellant claimed the drugs found by law enforcement belonged to some other unknown methamphetamine user who Appellant allowed to use his home. Appellant also maintained he was a methamphetamine addict, but not a methamphetamine dealer. (Tr. 467-69). Therefore, text messages extracted from Appellant's phone that reference Appellant arranging drug transactions with unknown customers were relevant to proving the drugs inside Appellant's home belonged to him. The text messages made the existence of this fact more probable than it would be without the evidence. Thus, the text messages were properly admitted as relevant evidence.

Authentication

In addition to showing the relevance of Appellant's text messages, the State also properly authenticated the text messages as belonging to Appellant. Appellant's phone was taken from his person when he was arrested. (Tr. 293). After extracting the contents of Appellant's phone, law enforcement discovered a picture of Appellant on the phone. (State's Exhibit #27). Law enforcement also discovered two outgoing texts from Appellant's phone that acknowledged he lived at 162 Bailey Avenue. (State's Exhibit #31, #32). One of these text messages accurately described that 162 Bailey Avenue had a shed behind the residence. (State's Exhibit #31, Tr.

201). Appellant never contested that 162 Bailey Avenue was his residence. (Tr. 469). Another outgoing text message acknowledged the user of the phone was in Great Falls on January 25. (State's Exhibit #48). Appellant was in Great Falls when he was arrested on January 25. (Tr. 292-93). That law enforcement seized the phone in question from Appellant's person and then extracted the contents of that phone is by itself sufficient for the State to authenticate that the phone belonged to Appellant. However, when considering the existence of corroborating information found on the phone in addition to the fact it was seized from Appellant's person, the State produced more than enough evidence to support a finding that the messages on the phone where what the State purported them to be.

Appellant argues the only way the State could sufficiently authenticate the text messages from Appellant's phone would be to call a custodian of records from Appellant's cell phone provider. Although trial counsel for Appellant made this argument at trial, even he acknowledged there was no question who was in possession of the phone when he told the trial judge: "I don't believe identity would be that big of an issue if the phone is seized when he was arrested." (Tr. 235, lines 21-23). To call a records custodian to testify about cell phone records would do less to prove the phone belonged to Appellant than merely showing, as the State did at trial, that Appellant was in possession of the phone. A records custodian may be able to testify about who pays the bill on a particular account or where a phone was located when a particular message was sent, but they could not identify who was in possession of the phone or who sent messages from it. The only authority Appellant cites to support his position is from unpublished opinions of this Court and opinions from other states. (Initial Brief of Appellant p. 28, 30-31). Such authority has no precedential value and thus should not be considered by this Court. Rule 268(d)(2) SCACR. Appellant's convictions and sentences should be affirmed.

IV.

The trial judge properly admitted Appellant's text messages into evidence because they were not hearsay. Appellant's outgoing text messages were not hearsay because they are admissions by a party opponent and the incoming text messages to Appellant were not hearsay because they were not offered for the truth of the matter asserted.

Appellant next argues the trial judge erred in admitting text messages into evidence from his phone because they are inadmissible hearsay. Appellant's argument is without merit. The outgoing text messages on Appellant's phone are not hearsay because they are admissions by a party opponent. The incoming text messages on Appellant's phone are not hearsay because they were not offered for the truth of the matter asserted, but rather to give context to Appellant's responses. Therefore, the trial judge properly admitted both sets of text messages.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c) SCRE. "A statement is not hearsay if – The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity." Role 801(d)(2). "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted." Thompson, 352 S.C. at 558, 575 S.E.2d at 81.

Here, the State entered multiple text message exchanges from Appellant's phone. The exhibits entered contained outgoing text messages from Appellant's phone and incoming text messages from unknown individuals. Appellant contends that both the incoming text messages and the outgoing text messages were improperly admitted because they are hearsay. The outgoing text messages from Appellant's phone are not hearsay because they are admissions by a party opponent. The outgoing texts were Appellant's statements because they came from a phone in Appellant's possession and included authenticating information such as Appellant's address

and location when he was arrested. Therefore the outgoing text messages were properly admitted as admissions of a party opponent.

The incoming text messages on Appellant's phone came from unknown individuals. However, they were properly admitted because they were not offered for the truth of the matter asserted. The incoming messages were not offered to show that Appellant was in constructive possession of methamphetamine on January 25 or even to prove that Appellant was a drug dealer. Rather, the messages were offered to give context to Appellant's outgoing messages. Appellant's outgoing messages would not have made any sense to the jury if they were presented out of context. The outgoing messages only make sense when considered in conjunction with the incoming messages. Because the incoming messages were not offered for the truth of the matter asserted, they were not hearsay and thus the trial judge did not err by admitting them into evidence. Appellant's convictions and sentences should be affirmed.

V.

The trial judge properly admitted Appellant's text messages as an invited response after Appellant claimed in opening statement that the methamphetamine found in his house belonged to Heather Westerfield. However, even if Appellant's text messages were not properly admitted as an invited response, they were properly admitted as prior bad acts under Rule 404(b) to prove who owned the methamphetamine and to show Appellant's intent in possessing the drugs.

Appellant next contends the trial judge erred in admitting Appellant's text messages because they were impermissible evidence of Appellant's character. Specifically Appellant argues the text messages were inadmissible under each prong of a Rule 404(b) analysis. Appellant's argument is meritless. As an initial matter, the text messages offered against Appellant where not offered as prior bad acts under Rule 404(b), but rather as an invited response to Appellant's defense that the methamphetamine found inside his house belonged to someone else. Appellant told the jury in his opening statement that the methamphetamine

belonged to someone named Heather Westerfield. (Tr. 168). Therefore, Appellant invited a response from the State to prove the methamphetamine did, in fact, belong to Appellant. However, even if Appellant hadn't opened the door to this evidence being admitted, it was still properly admitted to prove who owned the methamphetamine found in Appellant's home and to prove what the owner intended to do with it.

Invited Response

The State did not offer Appellant's text messages as proof of Appellant's prior drug transactions but rather as proof of Appellant's ownership of the methamphetamine. Appellant invited a reply and opened the door for the State to admit his text messages based on his assertion in his opening statement that the methamphetamine belonged to another specific person. (Tr. 168).

When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003). An appellant cannot complain of prejudice from evidence he has brought before the jury. State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2009). "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012).

Here, Appellant explicitly claimed in his opening statement that the methamphetamine found in his house belonged to Heather Westerfield and not Appellant. (Tr. 168). The State was therefore entitled to rebut Appellant's assertion with text messages from Appellant's phone indicating that he was engaged in the sale of methamphetamine. The facts in Appellant's case are similar to the factual scenario in State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003). In Dunlap, Dunlap's attorney outlined a similar defense to Appellant's in his opening statement. Dunlap's attorney told the jury that Dunlap was addicted to drugs, but that he never sold them. Dunlap, 353 S.C. at 541, 579 S.E.2d at 319. This is similar to Appellant's opening statement and his overall defense at trial. Our Supreme Court held Dunlap's opening statement "opened the door to the introduction of evidence rebutting the contention that petitioner was merely an addict." Id. The State introduced evidence of Dunlap's prior drug convictions. Therefore, like in Dunlap, here the State was entitled to introduce Appellant's text messages to prove he was not a mere addict but was actively engaged in the sale of methamphetamine. However, unlike in Dunlap, the State did not introduce evidence of Appellant's prior drug convictions, but merely text messages that referenced drug activity. Accordingly, the State's evidence here was less prejudicial than evidence the South Carolina Supreme Court deemed to be admissible in Dunlap.

Prior Bad Acts

Even if we assume for the sake of argument that Appellant's text messages were prior bad acts, they were nonetheless admissible to prove the identity of the owner of the methamphetamine and Appellant's intent in possessing the drugs under Rule 404(b).

Generally, evidence of prior bad acts is not admissible to prove a defendant's guilt for the charged crime. Pagan, 369 S.C. at 211, 631 S.E.2d at 267. However, Rule 404(b), SCRE provides that evidence of prior bad acts may be admissible "to show motive, identity, the

existence of a common scheme or plan, the absence of mistake or accident, or intent." See also State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity).

"As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013)(citing State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895(2009)). "If the tril court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b)." Id. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "Other bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. King, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018).

The primary issue for the jury to decide in this case was who owned the methamphetamine found inside Appellant's home. The State maintained the methamphetamine belonged to Appellant, while Appellant claimed the drugs did not belong to him. Therefore, the identity of the owner of the drugs was the primary issue to be decided. The text messages offered from Appellant's phone were properly admitted under each step of the Rule 404(b) analysis to prove both identity and intent. Appellant's text messages were relevant to show that he owned the methamphetamine found inside his house and to show he had the intent to sell it. The State proved the text messages came from Appellant's phone by clear and convincing evidence. The State met their burden of proof by not only showing the phone in question was taken directly

from Appellant's person, but that Appellant's picture was also on the phone and he that acknowledged in two different text messages that his address was 162 Bailey Avenue. Finally, the probative value of the text messages was not substantially outweighed by the danger of unfair prejudice.

The Rule 404(b) analysis in Appellant's case is similar to the factual scenario considered by the South Carolina Supreme Court in State v. Gore, 299 S.C. 368, 384 S.E.2d 750 (1989). In Gore, the State sought to prove that Gore was in constructive possession of a quantity of drugs that were found in a residence where Gore's family resided. When Gore testified at trial, he denied ever selling drugs from that residence. Gore, 299 S.C. at 369, 384 S.E.2d at 750. The State then introduced evidence of two prior controlled buys from Gore at that residence within the preceding month. The Supreme Court held such evidence was properly admitted as a prior bad act to prove Gore's intent. Gore, 299 S.C. at 370, 384 S.E.2d at 751. Here, the State did not introduce evidence of prior drug buys made from Appellant, but instead introduced text messages that referenced drug transactions. The text messages introduced here are less prejudicial than the prior drug buys that were deemed appropriate in Gore. Therefore, the trial judge did not abuse his discretion in admitting the text messages from Appellant's phone. Appellant's convictions and sentences should be affirmed.

VI.

The issue of whether the trial judge used the correct standard of review and whether the trial judge made specific findings for the record is not preserved for appellate review because Appellant did not object to the trial judge's ruling or otherwise request the trial judge to make specific findings. However, even if Appellant properly preserved this issue for Appellate review, the trial judge did use the correct standard of review in determining Appellant's text messages were admissible and did make specific findings on the record.

Appellant's next contention of error is the trial judge used an incorrect standard of review when determining Appellant's text messages were admissible and that the trial judge failed to make specific findings on the record when making his ruling. Appellant's arguments are without merit. As an initial matter, Appellant failed to preserve this issue for Appellate review. Appellant did not object to the trial judge's ruling or the standard of review the trial judge used. Moreover, Appellant did not request specific findings, nor did he object to the sufficiency of the findings the trial judge made. However, even if Appellant properly preserved this issue for appellate review, the trial judge used the correct standard when determining Appellant's text messages were admissible and he made specific findings on the record.

Error Preservation

Appellant did not properly preserve this issue for appellate review because he did not object to the trial judge's ruling nor did he request the trial judge to make more specific findings of fact. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). "Our law is clear that a party must make a contemporaneous objection that is

ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011).

Here, the trial judge ruled Appellant's text messages were admissible and then articulated his Rule 404(b) analysis. (Tr. 233-34). Appellant did not object to the standard of review articulated by the trial judge nor did he request more specific findings be made on the record. Trial counsel offered no further objections on the subject. Therefore, this issue was not properly preserved for appellate review and should not be considered by this Court.

The Trial Judge Made Specific Findings

Even if we assume for the sake of argument that Appellant properly preserved this issue for appeal, Appellant's argument still fails on the merits because the trial judge made specific findings on the record to support his decision. If "an on-the-record Rule 403 analysis is required, [an appellate court] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." King, 349 S.C. at 156, 561 S.E.2d at 647. The trial judge made the following ruling when deciding on the admissibility of Appellant's text messages:

> Let me say for the purpose of the record the balancing text (sic) which I conducted. I find that this falls directly under the holdings and Rule 404(b) prior bad acts. I find that the proposed evidence of the text messages in the three weeks or so preceding that I looked at, what the State has offered, in the three weeks or so preceding the execution of the Search Warrant is, appears to be clear and convincing to me at least, as well as logically relevant to the issue at hand that of trafficking.
>
> Having said that, the next issue is whether or not its more approbative (sic) than prejudicial. Clearly these text messages are prejudicial to the Defense and there is no question about that. However, they are substantially approbative (sic) to the State's case, and therefore, having deducted that balancing test in considering all the factors I need to consider, I am going to allow most of the text messages in when they are properly authenticated when we go through that exercise later on.

(Tr. 233-34, lines 21-13).

The aforementioned ruling of the trial judge demonstrates the trial judge was well aware of the appropriate evidentiary rule and the analysis associated with it. Initially, the trial judge determined the proffered evidence was relevant to the crime charged. The trial judge acknowledged the appropriate burden of proof for the State was clear and convincing evidence. Finally, the trial judge conducted a Rule 403 analysis and determined the probative value of the text messages was not substantially outweighed by any unfair prejudice to Appellant.

Appellant argues the trial judge misapplied the appropriate Rule 403 analysis because he did not articulate that the test is "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." (Initial Brief of Appellant 46). Appellant's argument is an exercise in semantics. The trial judge acknowledged the messages were prejudicial to Appellant, but stated they were "substantially" probative to the State's case. If evidence is substantially probative, then its probative value cannot be substantially outweighed by the danger of unfair prejudice. Perhaps the trial judge did not articulate his ruling in the most carefully considered manner, but the substance of his ruling was clear: The trial judge performed a balancing test and determined the probative value of the texts was not substantially outweighed by the danger of unfair prejudice because the probative value of the evidence was so great. Appellant's convictions and sentences should be affirmed.

VII.

When read as a whole, the trial judge's jury instructions did not improperly shift the burden of proof to Appellant by mentioning the word "truth" on two occasions but rather clearly explained the State had the sole burden of proof to prove every element of each crime charged beyond a reasonable doubt.

Next Appellant contends the trial judge erred in charging the jury that they should determine the truth of the evidence presented and that a reasonable doubt was to be considered from the perspective of a juror seeking the truth. Specifically, Appellant complains the trial

judge's use of the word "truth" shifted the burden of proof to Appellant and made the instruction ambiguous and confusing. Appellant's argument lacks merit. The trial judge's use of the word "truth" during his instructions to the jury did not shift the burden of proof from the State nor did it render the instructions ambiguous or confusing. When read as a whole, the instructions never relieve the State of the burden of proof and, in fact, require the State to prove every element of each crime beyond a reasonable doubt.

The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) (*quoting* State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003)) A jury charge that is substantially correct and covers the law does not require reversal. Mattison at 478, 697 S.E.2d at 583. "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

"A trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. 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. We instruct 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." Beaty, 423 S.C. at 34, 813 S.E.2d at 506.

Here, the trial judge instructed the jury it was their duty to "determine the effect, the value, weight, and truth of the evidence presented during this trial. (Tr. 510, lines 14-16). The trial judge also defined reasonable doubt as "a doubt which makes an honest sincere conscientious juror in search of the truth to hesitate to act." (Tr. 514, lines 22-24). Appellant claims the trial judge's use of the word truth on two occasions in the entire jury charge shifted the burden of proof from the State to Appellant. When read as a whole, the trial judge's jury instructions never shift the burden from the State to Appellant. In fact, the trial judge explained at length on two occasions that the State bore the only burden of proof:

> As you know the Defendant has pled not guilty to these charges and that plea has ***placed the burden upon the State*** to prove the Defendant guilty beyond a reasonable doubt. ***A person charged with committing a criminal offense is never required to prove innocence.*** I charge you, ladies and gentlemen, it is an important rule of law that the defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be not guilty of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

(Tr. 513, lines 20-5) (emphasis added).

> The Defendant in this case contends another person committed these crimes. The burden is on the State to prove beyond a reasonable doubt of the Defendant's guilt for each charge. The State must prove the allegations along with all the other elements of the offense beyond a reasonable doubt. The ***law places no burden*** on the Defense to prove that someone else committed the crime, and there is no burden upon the Defendant to prove another person's guilt.

(Tr. 516, lines 3-11) (emphasis added). The trial judge also twice instructed the jury that the Defendant should get the benefit of every reasonable doubt. (Tr. 511, 522).

Appellant primarily relies on State v. Beaty to support his argument. In Beaty our Supreme Court cautioned trial judges to avoid language encouraging juries to "search for the truth, or to find the true facts." Beaty, 423 S.C. at 34, 813 S.E.2d at 506. Here, the trial judge used neither of the specific phrases cautioned against in Beaty. Furthermore, Beaty did not create

a categorical prohibition against using the word "truth" in a courtroom. Indeed as the trial judge recognized in responding to Appellant's objection, in the standard trial juror oath "they say the word true no less than three times in that." (Tr. 526, lines 18-19). Additionally, the trial judge correctly recognized that State v. Beaty had not be rendered as a final decision as of the date of trial and thus he was not bound by its holding. (Tr. 526). When read as a whole, the trial judge's jury instruction was proper because it left no doubt the State bore the sole burden of proof in Appellant's case. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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March 14, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
The Honorable Brian M. Gibbons, Circuit Court Judge

RECEIVED
MAR 14 2019
SC Court of Appeals

Appellate Case No. 2018-000423

THE STATE, Respondent,

v.

JONATHAN OSTROWSKI, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

William G. Yarborough, Esquire
522 North Church Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served.
This fourteenth day of March, 2019.

SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

March 14, 2019

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MAR 14 2019
SC Court of Appeals

William G. Yarborough III, Esquire
522 North Church Street
Greenville, SC 29601

RE: State v. Jonathan Ostrowski
Appellate Case No. 2018-000423

Dear Mr. Yarborough:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Scott Matthews
Assistant Attorney General
Bar # 101464

JSM/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services

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