THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of General Sessions
The Honorable Frank R. Addy Jr., Circuit Court Judge

Appellate Case No. 2018-000952

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

v.

Dazzelle Smith,.....Appellant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

The Greenwood County grand jury indicted the Appellant Dazzelle Smith for trafficking cocaine, possession with the intent to distribute (PWID) crack cocaine, and PWID marijuana. (Indictments 2017-GS-24-0593 – 594, 1634). Deputy Solicitor Yates Brown and Assistant Solicitor Micah Black prosecuted the case. Tristen Shaffer, Esquire and Janna Nelson, Esquire represented Appellant. Appellant was tried by jury on October 9th and 10th 2017 before the Honorable Donald B. Hocker. The trial ended in a mistrial because an officer testified that Appellant was charged with trafficking cocaine, third offense.

Appellant was tried by jury a second time on April 9th and 10th, 2018 before the Honorable Frank R. Addy, Jr. Deputy Solicitor Yates Brown and Assistant Solicitor Anna Sumner represented the State. The undersigned, William G. Yarborough, III, represented Appellant. The jury found him guilty of all charges. (Trial Transcript, April 9 – 10, 2018, pp. 169 – 170). Appellant was sentenced to twenty-five (25) years imprisonment for the trafficking cocaine charge, twenty years (20) imprisonment for PWID crack cocaine, and ten (10) years imprisonment for PWID marijuana, all to run concurrent and with ninety (90) days credit for time served. (Trial Tr. pp. 174–175; Sentencing sheets, 2017-GS-24-0593 – 594, 1634). This appeal follows.

STATEMENT OF FACTS

This was a constructive possession and presumptive weight case. (Trial Tr. pp. 35–36). The charges arose from an investigatory stop on Tanyard Avenue in the city of Greenwood in Greenwood County, South Carolina on November 30, 2016. (Trial Tr. pp. 71–72; Arrest Warrants, 2016A2420101035 – 037). At approximately 11:30 p.m. that night, three Greenwood city police officers had been patrolling the neighborhood on foot, "[j]ust kind of strolling the streets just to see if any criminal activity was going on." (Trial Tr. p. 72, ln. 7 – p. 73, ln. 5; pp. 110 –111). The officers left their patrol cars a few streets over, even though their patrol cars were the only means available to video or audio record any encounter or stop made. (Suppression Hearing Transcript, p. 24, ln. 4-22; p. 52, ln. 17-21).

When the officers turned on Tanyard Avenue, they observed a 1997 Lincoln sedan parked on the left-hand side of the road, facing the wrong direction. (Trial Tr. p. 73, ln. 7–8; p. 74, ln. 13; p. 110, ln. 21 – p. 111, ln. 1). Appellant was the sole occupant of the vehicle. (Trial Tr. p. 73, ln. 8–9). The vehicle was registered to Appellant's aunt, Arleen Smith.[2] (Trial Tr. p. 40, ln. 10–16). The car was parked in front of Arleen's home. (Trial Tr. p. 41, ln. 14–19). Arleen testified for the State. (Trial Tr. pp. 39–71). The officers reported smelling unburnt marijuana while on foot patrol and suspected it was coming from the car. (Trial Tr. p. 73, ln. 22–24). Officer Martin Harrelson approached the passenger side of the car to make contact with Appellant. (Trial Tr. p. 111, ln. 3–6). Officer Harrelson testified that he soon after tried to open the door of the car. (Trial Tr. p. 111, ln. 17–21). Officer Harrelson testified that from the passenger's side window, he could see what appeared to be green leafy material, later identified as marijuana, in one or more plastic baggies

[2] Because various witnesses refer to Appellant by his last name, Arleen Smith will hereinafter be referred to as "Arleen."

inside the panel of the driver's side door. (Trial Tr. p. 75, ln. 24 – p. 76, ln. 1; p. 111, ln. 21–25).[3] Appellant was then removed from the vehicle and placed under arrest. (Trial Tr. p. 112, ln. 17–19). Officers found $232.00 during a search of his person. (Trial Tr. p. 76, ln. 17–19). In the subsequent search of the vehicle, officers found inside the closed glove compartment a yellow plastic bag containing a green leafy substance later identified as marijuana, as well as a Crown Royal liquor bag containing two plastic bags containing white powder, and one baggie of an off–white crystal-like substance. (Trial Tr. p. 76, ln. 1–8). Upon opening the center console, officers found a small bag containing a white powdery substance, later identified as cocaine, as well as a small baggie of green leafy material, later identified as marijuana. (Trial Tr. p. 76, ln. 8–11).

There was a total of 228.4 grams of marijuana found in the different compartments during the search of the vehicle. (Trial Tr. p. 91, ln. 15 – p. 92, ln. 7). The cocaine found inside the Crown Royal liquor bag weighed a total of approximately 40.64 grams, and the total weight of crack cocaine was 5.44 grams. (Trial Tr. pp. 99 – 102).

[3] *See infra* pp. 28–31 for a more detailed summary of the stop and search.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL BECAUSE A STATE'S WITNESS GAVE A NON-RESPONSIVE ANSWER ON CROSS-EXAMINATION THAT CLEARLY IMPLIED THE APPELLANT HAD A PRIOR CRIMINAL RECORD, WHICH WAS EXTREMELY PREJUDICIAL AND INCURABLE BY A CURATIVE INSTRUCTION.

Relevant Facts

The State's first witness was Arleen Smith, Appellant's aunt. (Trial Tr. p. 39). On direct-examination, Arleen testified that the 1997 Lincoln Town Car belonged and was registered to her. (Trial Tr. p. 40, ln. 10–16). Arleen testified that she had been allowing Appellant exclusively to use her car for a few months. (Trial Tr. p. 40, ln. 19–25; p. 43, ln. 6–10). Arleen suspected Appellant may have been living out of the car at times, although only a few pairs of shoes or items of clothing were found in the trunk of the car. (Trial Tr. p. 41, ln. 3–6). Despite entrusting Appellant to use her car, Arleen did not know her nephew very well, she did not know Appellant's age. (Trial Tr. p. 40, ln. 5–6). Arleen testified she had been asleep on "the night when this occurred—when law enforcement found [her] nephew in the vehicle and found the drugs in the car." (Trial Tr. p. 41, ln. 20–23). In response to the State's following question as to when she became aware of "what was going on", Arleen began to explain that Appellant's sister had woken her up by calling to inform her that police were outside her home. (Trial Tr. p. 41, ln. 24 – p. 42, ln. 2). Appellant's objection to this line of questioning and the responses was sustained. (Trial Tr. p. 42, ln. 3–6). The State thereafter elicited testimony that Arleen had eventually woken up and gone outside, and that the police had eventually returned the car keys to her. (Trial Tr. p. 42, ln. 7–12). On cross-examination, Arleen testified that she had not told police or the solicitor about the information elicited on direct-examination until just a few months earlier, which was long after law

enforcement made contact with Arleen about the charges now on trial. (Trial Tr. p. 43, ln. 22 – p. 44, ln. 7). Arleen testified she had never said anything about any involvement between the drugs and the car until January 2018 because she had not known what was in her car. (Tr. p. 44, ln. 20–24). Arleen reaffirmed that the car belonged and was registered to her on cross-examination. (Tr. p. 44, ln. 13–19, ln. 25 – p. 45, ln. 4). On direct-examination, Arleen had testified that the car was technically parked in front of her immediate neighbor's house but explained that the houses on Tanyard Avenue are very close together, even "connected." (Trial Tr. p. 41, ln. 14–19). In response to the clarifying question on cross-examination: "It was your car parked in front of your house?", Arleen responded with: "Huh-uh. Dazzelle in that car almost -- he was living out of that car all the time. Long before they got him on Tanyard. He been arrested on Tanyard three times." (Trial Tr. p. 45, ln. 3–7).

Appellant then immediately moved for a mistrial on the grounds that Arleen's response about Appellant having been arrested on three previous occasions was not responsive to the line of questioning, was inadmissible, and the resulting prejudice could not be undone by a curative instruction. (Trial Tr. p. 45, ln. 16–23; p. 46, ln. 10–19; p. 47, ln. 14–15, ln. 21 – p. 48, ln. 4). The trial judge ultimately denied the motion for a mistrial, reasoning that although Appellant did not directly or intentionally elicit such a response, the trial judge could theorize how Arleen's testimony was responsive to the line of questioning, and that her response was not as prejudicial as the officer's testimony that had caused a mistrial at the first trial. (Trial Tr. p. 46, ln. 25 – p. 47, ln. 13; p. 49, ln. 24 – p. 50, ln. 15; p. 53, ln. 1–23; p. 54, ln. 20 – p. 55, ln. 13). The jury was then instructed it could not consider that portion of Arleen's testimony for any purpose. (Trial Tr. p. 68, ln. 1–20).

Standard of Review

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) (citing *State v. Stanley*, 365 S.C. 24, 33-34, 615 S.E.2d 455, 460 (Ct. App. 2005)). Likewise, whether a party "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. 2008).

Argument

It is error to deny a motion for a mistrial where it was absolutely necessary to correct a prejudicial error. *State v. Craig*, 267 S.C. 262, 268–69, 227 S.E.2d 306, 309–10 (1976) (quoting authority and internal punctuation omitted). "Among the factors to be considered are the character of the testimony, the circumstances under which it was offered, the nature of the case, the other testimony in the case, and perhaps other matters." *State v. Thompson*, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) (citing *Craig,* 267 S.C. at 269, 227 S.E.2d at 310). *See also State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("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.").

Here, the trial court's denial of Appellant's motion for a mistrial was reversible error. The denial of the motion for a mistrial was an abuse of discretion founded upon errors of law, including the trial court's improper reliance on comparing Arleen's testimony and the officer's testimony in the first trial, which was wholly irrelevant and should not have invaded the analysis in the second

trial. Arleen's testimony about Appellant's three prior arrests was not admissible and was unduly prejudicial. Further, the trial court's curative instruction was insufficient to cure the error.

A. The trial court's decision to deny Appellant's motion for a mistrial was founded upon an improper basis and various errors of law.

First, the trial court's reasoning was predominately founded upon comparing and contrasting Arleen's testimony with the officer's testimony in the first trial, which had resulted in a mistrial. This improper comparative analysis is both implicit (Trial Tr. p. 47, ln. 7–13) and explicit in the trial judge's findings and ultimate determination on the issue:

> Unlike the first time that this case was tried in front of Judge Hocker, the statement that we're dealing with here...it does not say what he was arrested for....[Arleen's testimony] is a lot less prejudicial than the initial statement from the arresting officer in the first trial about this being his third drug offense.

(Trial Tr. p. 50, ln. 1–11; p. 53, ln. 6–8). The officer's testimony in the first trial was irrelevant to whether a mistrial was warranted in Appellant's second trial, and not only was an improper basis for the trial court's decision, but also constituted an error of law. There is no South Carolina precedent that authorizes or even suggests acceptance of the comparative analysis that the trial court conducted here. The mistrial determination is a case-by-case analysis, which specifically lists factors that consider the nature and character of the particular testimony within the particular case in which the mistrial requested. *See Thompson, supra.* Further, the "perhaps other factors" in this afore-mentioned list does not otherwise render the irrelevant officer's testimony in the first trial relevant to the mistrial determination at Appellant's retrial. The character or nature of the officer's testimony and the degree of the resulting prejudice at that trial had no bearing on whether Arleen's testimony at retrial was so prejudicial to warrant a mistrial. The trial judge's decision is averse to the fact-specific, case-by-case standard set forth in South Carolina precedent for ruling on mistrial motions and constitutes an error an of law.

The trial court's reasoning also fails to consider all the relevant enumerated factors; the trial judge gave little in his findings as to the extent of resulting prejudicing relative to the facts of the case. *See Thompson, supra.* Although the trial judge specifically mentioned there were "four factors" to consider, and did list "the circumstances under which the testimony was offered" and "the character of this testimony as it relates to a potential mistrial"; several of the other significant factors, including facts unique to this constructive possession and presumptive-weight case, are completely absent from the trial court's findings. Such factors are imperative to the prejudice prong of the analysis in this case. *See infra,* pp. 15–16.

B. The resulting prejudice from Arleen's improper testimony made a mistrial necessary, and the trial court's prejudice determination was based upon an error of law.

The trial court's reasoning as to the substance of Arleen's testimony and the degree of resulting prejudice was equally flawed as its comparative analysis. The trial court repeatedly referred to the fact that unlike the officer's testimony in the first trial, Arleen's testimony pertained to Appellant's three previous arrests, which the trial judge found "less prejudicial than conviction, but it's also out there to a degree", and repeatedly pointed to the fact that she had not stated what he had been arrested for. (Trial Tr. p. 47, ln. 18–20; p. 50, ln. 11–13; p. 54, ln. 20–22). The trial judge further explained that the unspecified three prior arrests testimony was less prejudicial because "[s]he did not say it was a narcotics arrest. It could be an assault charge, it could be whatever." (Tr. p. 52, ln. 25 – p. 53, ln. 2).

The trial court's reasoning overlooks the entire body of precedent that holds it is reversible error to admit testimony or evidence that implies the defendant has a prior criminal record. In *State v. Tate*, the Supreme Court reversed the defendant's convictions because his mugshot was admitted into evidence, in which the defendant wore a small board around his neck bearing "'SPTBG. CO.

SHERIFF'" and the date the photo was taken. 288 S.C. 104, 104–05, 341 S.E.2d 380, 381 (1986). The Supreme Court reasoned "the markings on the photographs, particularly the date, which was almost one year prior to the trial of this case, would clearly infer to the jury that [the] [defendant] had a prior criminal record." *Id.* at 105–06. More recently in *State v. Lawson*, this Court reversed the defendant's conviction due to improper testimony regarding the defendant's fingerprint card being taken at Kirkland Correctional institution in 2003, more than a decade before the commission of the crimes on trial. 424 S.C. 51, 60–63, 817 S.E.2d 509, 513–15 (Ct. App. 2018), *reh'g denied*, Aug. 16, 2018. This Court reasoned the "temporal clarification excluded any possibility the jury would conclude [the defendant's] time at Kirkland was related to the crime for which he was on trial." *Id.* at 60–61, 817 S.E.2d at 514.

Contrary to the trial court's reasoning, the Supreme Court held the admission of the defendant's photo in *Tate* to be reversible error even though the improper evidence pertained to merely an arrest, rather than an official conviction. Moreover, Arleen's improper testimony was of a similar nature and carried the same degree of prejudice as the mugshot in *Tate* and the testimony in *Lawson* because just like in those cases, Arleen's testimony specifically referred to Appellant's three *previous* arrests. The temporal detail in Arleen's testimony clearly implied Appellant had a prior criminal record and excluded any possibility the jury could have inferred the testimony as relating to the offenses the Appellant faced at trial. *Cf. State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (finding an officer's testimony that the defendant "had warrants" was not reversible error because the jury could have understood the reference as relating to the warrants for the crimes for which the defendant was on trial instead of some prior bad act); *State v. Council*, 335 S.C. 1, 12–13, n. 7, 515 S.E.2d 508, 513–14, n. 7 (1999) (holding a SLED agent's testimony about matching the defendant's fingerprints with a set on file in "SLED

records" was not reversible error because it was "questionable whether the jury even understood the implication" of the defendant's prior record and there was no indication as to *when* SLED had obtained the fingerprints); *State v. Miller*, 258 S.C. 573, 576, 190 S.E.2d 23, 25 (Ct. App. 1972). The trial court also erred in concluding that Arleen's response was relatively less prejudicial because she did not specify what offenses Appellant had been arrested for on those three previous occasions. Arleen's lack of specificity is no consequence because in both *Tate* and *Lawson,* the improperly admitted evidence or testimony also gave no hint as to what specific charge either defendant had been previously arrested for. *See also Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) ("[E]vidence that petitioner was previously jailed on *unspecified* charges was not admissible under any exception.") (italics added). Further, Arleen's testimony about Appellant's criminal arrests on three previous occasions was neither vague due to the language she used nor was the resulting implication speculative. *Cf. State v. Beckham*, 334 S.C. 302, 309–10, 513 S.E.2d 606, 609–10 (1999) (references to the victim's past visit to a provider of services to domestic abuse victims was too vague and speculative to inject the prejudicial issue of spousal abuse into the case; the jury could have equally inferred that the victim was a volunteer); *Council*, 335 S.C. at 12–13, n. 7, 515 S.E.2d at 513–14, n. 7; *State v. Singleton*, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985).

Moreover, it is not as though this testimony would have otherwise been admissible. *See* Rule 404, SCRE. The nature of Arleen's improper testimony and the danger of undue prejudice this evidence carries makes it practically indistinguishable to prior bad act evidence, which is generally excluded even if the prior bad act did not result in an arrest or conviction. *See generally*, *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Indeed, Arleen's testimony impermissibly injected the issue of Appellant's character into the case. The very nature of his three previous arrests, even though the charges remained unspecified, raises the impermissible inference that

Appellant has a bad or criminal character. A mistrial was thus warranted because such character evidence has "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).

In regard to the other factors listed in *Thompson* as to prejudice, the fact that Arleen was the very first witness cannot be discounted when evaluating the degree of resulting prejudice because her testimony may have colored the jury's evaluation of the remaining evidence in the trial. Arleen's improper response about Appellant's prior arrests also mirrored the same setting as the offenses at trial and involved some of the most important evidence the jury would hear: the car, Appellant's use of the car to commit criminal activity, and Tanyard Avenue. Her testimony on Appellant's three previous arrests inextricably tied Appellant to the drugs found in her car, and thus had a particularly profound prejudicial effect in this constructive possession case. The necessity of a mistrial here is also evident when considering that constructive possession and the PWID charges each carry permissible inferences as to knowledge, possession, and intent. (Trial Tr. p. 158). The character evidence effect of her testimony tended to make these permissible inferences more readily acceptable. Arleen's response ultimately weakened the presumption of Appellant's innocence, and diminished any reasonable doubt that Appellant was in constructive possession of the narcotics found or had the intent to distribute them. This was also a case without direct evidence of Appellant's knowledge or intent, and was without evidence that directly or unequivocally put the drugs in Appellant's hands. Moreover, the trial judge's remark that "there would be no question about a mistrial" had this testimony come out on direct-examination by the State, (Trial Tr. p. 52, ln. 12–15), speaks volumes to the irrevocable prejudice and inflammatory effect created by Arleen's testimony and the necessity of declaring a mistrial.

Further, a mistrial was warranted because the prejudice resulting from Arleen's improper testimony could not be undone by a curative instruction. The trial judge instructed the jury that they were prohibited from considering the testimony for any purpose and from discussing it in any manner, and instructed the jury to excise the testimony from their minds. (Trial Tr. p. 68, ln. 1–20). Although this instruction contained the language held necessary for a sufficient curative instruction, *see e.g., State v. Smith*, 290 S.C. 393, 350 S.E.2d 923 (1986), a curative instruction is not a foolproof or absolute remedy to inflammatory testimony like Arleen's. "While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case, it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced." *State v. White*, 371 S.C. 439, 446, 639 S.E.2d 160, 164 (Ct. App. 2006) (citing *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996); 75B Am.Jur.2d Trial § 1284 (1992)). *See also Id.* ("Error is not always rendered harmless by instructions to the jury to disregard it or to give it only a limited effect. The test is one of prejudice.") (quoting Am.Jur.2d Trial § 1284). For example, in *State v. Kennedy*, the Supreme Court held the given curative instruction was an insufficient remedy to the judge's response to defense counsel's request to sequester witnesses during the defendant's testimony: "'I think they ought to stay in here. I want them to hear this fellow's lies I mean I want them to hear this fellow testify.'" 272 S.C. 231, 233, 250 S.E.2d 338, 339 (1978). The Supreme Court reasoned that a mistrial was necessary in light of the "patently erroneous and prejudicial" content of the remark and the resulting risk to the defendant's right to a fair trial. *Id.* at 234, 250 S.E.2d at 339–340. Here, Arleen's testimony created both the implication Appellant had the propensity to commit the crimes charged and the risk that this insinuation would become the jury's frame of reference or color the jury's evaluation of the remaining trial evidence; a situation similar to *Kennedy* in which the jury

was to hear and weigh the defendant's testimony after the judge had already called it "'lies.'" Thus, similar to *Kennedy*, Arleen's unexpected and non-responsive testimony created a danger of unfair prejudice insurmountable by a curative instruction. Although the remark of a trial judge is generally thought to be more influential to a jury than that of a witness, Arleen's testimony is arguably at least as prejudicial as the remark in *Kennedy* because there the possibility existed that the jury would understand the judge as having simply misspoken. Whereas in Appellant's case, there was no ambiguity in Arleen's response or the resulting prejudicial insinuation of Appellant's character or propensity.

Moreover, the curative instruction was an insufficient substitution for a mistrial also in light of the trial judge's repeated references to Arleen's improper testimony. *Cf. State v. Ferguson*, 376 S.C. 615, 621, 658 S.E.2d 101, 104 (Ct. App. 2008) (holding the instruction was sufficient to cure the prejudice resulting from a witness's improper and unresponsive answer because the instruction was "simple, and the court refrained from reiterating or emphasizing the unresponsive answer"). Indeed, the bulk of the curative instruction pertained to Arleen's testimony:

> [B]efore we took a break the witness in this case testified about her knowledge of the Defendant having been arrested previously....[A]n arrest is not a conviction in any sense of the word... As a practical matter, as you might very well be aware, many, many, many times, sometimes better than half the time, arrests end up in dismissal because there's simply no evidence to move forward, and that's why an arrest cannot be held against anyone.

(Trial Tr. p. 68, ln. 1–20). The explanation on arrests did just as much, if not more, to highlight Arleen's response in the jury's minds than the other portion of the instruction that were intended to downplay her testimony.

Thus, the trial judge erred in refusing to a grant a mistrial because Arleen's improper and prejudicial response created a risk to Appellant's receipt of a fair trial that far surpassed a curative instruction as a remedy.

C. The trial court erred in finding Appellant opened the door to Arleen's improper and unduly prejudicial testimony.

The trial judge concluded the Appellant had opened the door by finding Arleen's statements about his three previous arrests on Tanyard Avenue were in response to Appellant's question about whether the car belonged to Arleen and was parked in front of her home. (Trial Tr. p. 53, ln. 2–4). The trial judge noted Arleen was an "untrained lay witness", and thus he could "see where her response is responsive to the implication [the drugs were Arleen's] that's being put out there by the question". (Trial Tr. p. 53, ln. 10–21, p. 54 ln. 22–23).

The opening of the door doctrine allows for the admission of evidence in rebuttal or explanation after the other party introduced evidence on that same subject. *See e.g., State v. Beam*, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999). The party that opened the door cannot then complain of its admission. *E.g.*, *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991); *Beam*, 336 S.C.at 52, 518 S.E.2d at 301. Here, the doctrine is inapplicable to the issue, and the trial judge's ruling is based upon an error of law and his findings are otherwise without evidentiary support.

First, Appellant had not put his character into issue and Arleen's response was not responsive to Appellant's questions as to whether the car belonged to her and whether it was parked in front of her house, which called for only a "yes" or "no" answer. *See State v. Cunningham*, No. 2005–UP–35, 2005 WL 7084987 (Dec. 15, 2005) (holding the defendant did not open the door to an officer's gratuitous remark on cross-examination, which implicated the defendant's character, because the defendant had not put his character into issue and the officer's remark was not responsive to the question which had called for only a "yes" or "no" answer). Moreover, it is not as though it was the Appellant on cross-examination to be the first to elicit testimony about the ownership of the car and where it was parked that day; Arleen had already answered essentially

identical questions asked by the State on direct-examination. *See Robinson*, 305 S.C. at 474, 409 S.E.2d at 408 (holding defense counsel opened the door where defense counsel was the first to bring up the subject subsequently contested). Also as previously noted, the trial judge remarked that "there was no question" about declaring a mistrial had Arleen given this response on direct-examination, even though the trial judge found Appellant's counsel neither intended to elicit this testimony nor intended to create cause for a mistrial. (Trial Tr. p. 53, ln. 4–5; p. 54, ln. 24 – p. 55, ln. 1, ln. 8–9.) However, it is not determinative that Arleen gave this non-responsive testimony on cross-examination rather than in response to the *essentially same* questions posed by the State on direct-examination. *See e.g., supra, Cunningham*, No. 2005–UP–35, 2005 WL 7084987; *State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008); *State v. Hill*, 360 S.C. 13, 598 S.E.2d 732 (Ct. App. 2004) (defendant's testimony did not open door); *State v. McIntosh*, 358 S.C. 432, 595 S.E.2d 484 (2004) (same).

Further, there must be some logical nexus between the evidence or questioning that is said to open the door and the evidence or testimony thereafter admitted. *See State v. Foster*, 354 S.C. 614, 582 S.E.2d 426 (2003). It is clear that Appellant's questioning does not in any way relate to Appellant's previous criminal or non-criminal activity on Tanyard Avenue or while using that car. *See e.g., Beam*, 336 S.C. at 52, 518 S.E.2d at 301 (holding the doctrine applies "[w]hen a party introduces evidence about a *particular matter*, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.") (italics added)). The applicability of the opening of the door doctrine is simply not as broad as the trial judge's reasoning deemed it be. *See. Young*, 378 S.C. at 105–07, 661 S.E.2d at 389–90 (defendant's statement that he "hated to see a female cry" did not open the door to admission of his prior CSC and CDV convictions); *State v. McCray*, 413 S.C. 76, 94, 773 S.E.2d 914, 923 (Ct.

App. 2015) (in a self-defense murder case, this Court found the State had not opened the door to the admission of testimonies on the decedent's drug activity and brandishing of a weapon the night before his death because the testimonies were situation-specific and unrelated to the decedent's state of mind at the time of the homicide); *Id.* (testimony elicited by the State about the decedent's wholesome high school activities and potential professional football career was not evidence of his good character, and thus did not open the door to the admissibility of the decedent's prior bad acts and arrests); *State v. Wells*, No. 2017–UP–417, 2017 WL 5175587 (Nov. 8, 2017) (holding defense counsel did not open the door by asking an investigator whether the homicide victim's status as a drug dealer exposed him to heightened levels of danger because the question did not question the identity of the shooter and was consistent with the theory of the case).

The opening of the door doctrine is fundamentally inapplicable in this case because Arleen's response about Appellant's previous arrests does not explain or rebut that she owned the car or that it was parked in front of her house. *See Foster*, 354 S.C. at 623–24, 582 S.E.2d at 431 (holding evidence that does not explain or rebut the initial evidence said to have opened the door is not properly admitted pursuant to the opening the door doctrine); *see also Id.* (holding defense counsel's question about whether the witness had given a police statement consistent with her testimony on direct-examination did not open the door to admission of that statement because the content of the statement did not rebut or explain that she had in fact given such a statement). Arleen's improper response also cannot constitute as proper rebuttal or explanation evidence according to the trial judge's reasoning that Arleen could have interpreted Appellant's questions as implying that she was the true owner of the drugs. Rather, the trial judge's ruling equates to holding that evidence of Appellant's propensity explains or rebuts the questions' supposed insinuation that the drugs on this particular date belonged to Arleen; *ergo* that the drugs found on

this particular date must have been Appellant's rather than Arleen's because Appellant had had drugs on Tanyard Avenue or in that same car on three previous occasions. The rule against propensity or character evidence prohibits admitting Arleen's testimony in rebuttal or explanation in this way. *See Young*, 378 S.C. at 106, 661 S.E.2d at 390 (reversing for the admission of evidence under the opened door rationale because the evidence ultimately served to prove propensity, rather than address or rehabilitate the witness's credibility). Not only does deeming Arleen's response as rebuttal evidence inherently violate the rule against character evidence, her response also fails to rebut or explain the implication the trial judge found to result from Appellant's questions. Any of Appellant's *previous* activity or arrests in that car or on Tanyard Avenue have no bearing as to whether *these particular drugs found in the car on this particular date belonged to Appellant or Arleen.*

The trial judge thus erred in finding that Appellant opened the door to Arleen's improper and prejudicial response, and a mistrial was necessary.

II. THE TRIAL COURT ERRED IN PERMITTING AN INVESTIGATOR WITH NO INVOLVEMENT IN THE CASE TO OPINE ON ILLICIT DRUG SALES AND PRICING BECAUSE THE INVESTIGATOR WAS NOT PERMITTED TO TESTIFY AS AN EXPERT WITNESS, AND THIS TESTIMONY THUS CONSTITUTED AS PREJUDICIAL, IMPROPER LAY WITNESS OPINION.

Relevant Facts

Over Appellant's objection, Whitfield Brooks, an investigator in the Greenwood Sheriff's narcotics division, testified on the "street value" of several types of illegal narcotics. (Trial Tr. pp. 129–130). Investigator Brooks opined that cocaine or crack cocaine have roughly the same "street value" at $50.00 to $60.00 per gram, and the combined weight of the 46.08 grams of crack cocaine and cocaine in this case was worth approximately $2,300.00 to $2,700.00 per gram. (Trial Tr. p. 129, ln. 22 – p. 130, ln. 1, ln. 9–19). As for the cost of marijuana, Investigator Brooks explained that "loud marijuana" was what they called high-quality marijuana, which went for $20.00 per gram, and the 228.4 grams in this case would be worth $4,568.00 in value at that rate. (Trial Tr. p. 130, ln. 2–8). According to Investigator Brooks, the overall value of the drugs combined in this case was close to $7,000.00. (Trial Tr. p. 130, ln. 20–23). The trial court had denied the State's request to qualify Investigator Brooks as an expert in "illicit narcotic sales." (Trial Tr. p. 129, ln. 6 –19). The trial judge found:

> I don't know that this is necessarily an area where one would need to testify as an expert. I think he could probably testify based upon his own personal experiences in his involvement with *other* cases what the value of the drugs are....*I think that's a matter of common experience based upon his background in this area.*

(Trial Tr. p. 129, ln. 10-19) (italics added).

Standard of Review

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 based upon an error of law or a factual conclusion that is without evidentiary support. *E.g.*, *State v. Johnson*, 410 S.C. 10, 763 S.E.2d 36 (Ct. App. 2014). Further, "[i]n applying the harmless error rule, the court must be 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).

Argument

It was an error of law to permit Investigator Brooks to opine on the going rate or "street value" of the type of narcotics in this case generally, as well as opine on what the "street value" would be for the actual amount of the drugs found in this case. The trial court did not permit him to render these opinions as an expert, hence he was only permitted to testify on matters within his personal knowledge and offer 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 upon the witness's perception when the opinion or inference will aid the jury in understanding the testimony, and do not require special knowledge, training or skill. Rule 701, SCRE; Rule 602, SCRE. Investigator Brooks testified he had no involvement with Appellant's investigation or case whatsoever. (Trial Tr. p. 128, ln. 13–17). Although he was merely a lay witness, it is clear from the record that the content of Investigator Brooks's testimony falls under the umbrella of expert testimony because: 1) his testimony and opinions required some specialized, knowledge or expertise rather than pertaining to areas within the realm of common knowledge to the jury; 2) he was permitted to opine on the drugs in Appellant's case without any

personal knowledge or involvement with the case; and 3) his opinions were based on previous, unrelated cases rather than rationally-based on his own perception or personal knowledge.

Our Supreme Court ruled this was reversible error in *State v. Kelly*, 285 S.C. 373, 329 S.E.2d 442 (1985). 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 as a lay witness, the officer was only permitted to explain his "direct observations", and his improper opinion was unduly 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, Investigator Brooks's testimony constituted as improper opinion testimony. The subject of illicit drug sales or pricing is outside the scope of common knowledge and instead requires the specialized experience, training, or skill of a person qualified as an expert. Regardless of whether Investigator Brooks indeed possessed such specialized experience or skill, he was not permitted to testify as an expert witness and thus could not opine or form conclusions on drug pricing and sales in this case. Further, it is apparent from the record that his opinions and insight were not based solely on his own personal observations of the drugs seized in this case or the facts of the investigation; he testified he had no involvement with this case. Investigator Brooks instead drew upon his experience and knowledge working on unrelated, past narcotics investigations when

giving his improper opinion. Similar to the improper lay witness opinions in *Kelly* and *Fowler*, the portion of Investigator Brooks's testimony previously summarized herein was not based upon his direct observations, perception, or the reasonable inferences therefrom, and was thus improper lay witness opinion testimony.

This error was not harmless as Investigator Brooks ultimately opined on an issue pivotal to the outcome of this constructive possession case and the State relied upon his opinion. During closing arguments, the State argued

> Defense [*sic*] wants you to believe it was somebody else's drugs and he didn't know whose drugs were in the car....Heard from Whit Brooks. What's the value? $20 a gram of loud, between 50 and $60 a gram for cocaine and crack cocaine. The total amount, if you go the low end, $50 a gram for the cocaine and crack, you're at $6,872. You go higher end....$7,332. Somebody's just letting Dazzelle Smith sit in there with it? Just let some random guy sit in there? They're going to store their drugs in there? Or is the owner of them, the one using them, pushing them or selling them is sitting in the car with them. Between 6,800 and 7,300. He had the elements of possession with the intent to distribute.

(Trial Tr. p. 141, ln. 8–20). This error cannot be deemed harmless in light of the State's heavy reliance upon the investigator's opinions to portray Appellant as a drug dealer that operated out of his car to prove the charges and to extinguish any reasonable doubt that someone else was in constructive possession of the drugs or had the intent to traffic or distribute the drugs found. *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); *see also State v. King*, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999) (holding it was "impossible" to conclude the error in admitting improper prior bad acts was harmless partly due to the State's reliance on this evidence in its closing argument). The prejudice of his improper opinion testimony is also evident when considering that by the very nature of the charges, the verdict largely depended on whether the jury found Appellant possessed any of the narcotics not merely for his

personal use. Additionally, as the trial judge instructed the jury, constructive possession and the trafficking and PWID charges carry permissible inferences as to knowledge, possession, and intent. (Trial Tr. p. 158, ln. 8–14, ln. 18–25; p. 159, ln. 1–12; p. 160, ln. 1–8). The State's reliance on Investigator Brooks's testimony to portray Appellant as a drug dealer tended to make these permissible inferences more readily acceptable and dispel any belief that Appellant may have possessed any of the baggies of drugs only for his own use. This was also a case without direct evidence of Appellant's knowledge or intent, and one without evidence that directly put the drugs in Appellant's hands. Additionally, Investigator Brooks's testimony, coupled with Arleen's improper response, heightened the insinuation of Appellant's propensity to commit the offenses charged and reinforced the other's testimony.

III. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED DURING THE WARRANTLESS SEARCH OF THE VEHICLE BECAUSE THE TOTALITY OF THE CIRCUMSTANCES FAILED TO SUPPORT THE PLAIN VIEW EXCEPTION TO THE SEARCH WARRANT REQUIREMENT AND THE BASIS FOR THE TRIAL COURT TO HAVE FOUND PROBABLE CAUSE TO SEARCH IS OTHERWISE INSUFFICIENT.

Relevant Facts

The search of Appellant's vehicle took place at approximately 11:30 p.m. on November 30th, 2016 on Tanyard Avenue in Greenwood City. (Motion to Suppress Hearing Transcript, p. 14, ln. 24 – p. 15, ln. 5). During the in camera hearing, Officer Vaughn testified he, Officer Cory Boyter, and Officer Harrelson had parked two or three blocks away from Tanyard Avenue when they began patrolling the area on foot that night. (Supp. Hr'g Tr., p. 15, ln. 18–20). The officers noticed an illegally parked 1997 Lincoln Town Car upon turning onto Tanyard Avenue. (Supp. Hr'g Tr. p. 16, ln. 8–10, ln. 23–25; p. 26, ln. 20– 21). Officer Vaughn and Officer Boyter stated that while on foot patrol, they smelled marijuana they suspected was coming from the car. All of the windows of the car and its sunroof were shut. (Supp. Hr'g Tr. p. 31, p. 53, ln. 13– 17; p. 57, ln. 22– 25). The officers' testimonies are inconsistent with one another, and are collectively inconsistent with the information provided in the arrest warrant, as to whether the alleged odor noted while walking through the neighborhood was burnt or unburnt marijuana. *See infra*, pp. 34–35. Upon approaching the car, Officer Vaughn went to the driver's side to make contact with its occupant, subsequently identified as Appellant, while Officer Harrelson went to the passenger's side and Officer Boyter stood at the back of the car. (Supp. Hr'g Tr. p.17, ln. 4–10). Officer

Harrelson could apparently see a baggie of marijuana sitting in the handle[4] of the driver side's door from his position outside of the closed passenger door. (Supp. Hr'g Tr. p. 17, 6–11, p. 30; p. 53, ln. 5–20; p. 59, ln. 12 – p. 60, ln. 7). In his incident report, Officer Harrelson instead described seeing the baggie in the lower pocket of the driver's side door panel. (Supp. Hr'g Tr. p. 59, ln. 12 – p. 60, ln. 7, pp. 62–63). Officer Harrelson testified that after seeing the baggie in the driver's side door, he informed the other officers and then tried to pull open the passenger door, and after finding it locked, continued still to try to force the door open. (Supp. Hr'g Tr. p. 53, ln. 25 – p. 54, ln. 3). Officer Vaughn then opened the driver's side door to pull Appellant out of the car and arrested him for possession of marijuana. (Supp. Hr'g Tr. p. 17, ln. 1–17). The officers testified that when all three officers had Appellant on the ground to handcuff him, Appellant attempted to wring himself from their grasp. (Supp. Hr'g Tr. p. 17, ln. 19 – p. 18, ln. 12; p. 54, ln. 17–24). Officer Harrelson testified Appellant stopped resisting after he "applied about two elbow strikes to the small of his back." (Supp. Hr'g Tr. p. 54, ln. 20–23). Although each officer testified at some point during the hearing that Appellant exited the car on his accord after being so commanded, the officers' testimonies are still inconsistent with one another as to when Appellant began resisting arrest and whether Appellant exited the car voluntarily or had to be removed. (Supp. Hr'g Tr. p. 46, ln. 13–23; p. 45, ln. 21–25; p. 54, ln. 5–8; p. 60).

Appellant testified his Aunt Arleen had given him permission to borrow her car that night to go see his girlfriend. (Supp. Hr'g Tr. pp. 66–67; pp. 75–76). He had been sitting in the car for only a few minutes to let the car first warm up when the officers approached. (Supp Hr'g Tr. pp. 66–67; p.74, ln. 1–9). He explained he had all the windows and sunroof closed because it was

[4] In addition to the "handle", the location of the baggie in the driver's inside door panel is described as several different names or locations, including the "handgrip", armrest, door panel, door pocket, and pocket within the armrest, handgrip, or handle.

very cold that night, but that he had rolled the passenger window down when the first of officers, Officer Harrleson, approached the passenger side and asked him to open the window. (Supp. Hr'g Tr. pp. 68–69). Officer Harrelson then informed him they had gotten a report about loud music in the neighborhood. (Supp. Hr'g Tr. p. 69, ln. 12–15). Appellant responded that he had just come out of his Aunt Arleen's house and had not been playing any music. (Supp. Hr'g Tr. p. 69, ln. 16–23). Appellant was rolling the window back up when he stated the other officers appeared at the car and subsequently pulled him out of the car. (Supp. Hr'g Tr. p. 69, ln. 23 – p. 71). Appellant did not know or understand why he was being pulled out of the car until Officer Vaughn told him he was under arrest because there was "reefer in the door." (Supp. Hr'g Tr. pp. 71–72). Appellant stated he did not previously know there was anything in the door. (Supp. Hr'g Tr. pp. 71–72). Using a photograph of the inside of the driver's side door, Appellant explained that he did not notice the baggie tucked into the armrest or "handgrip" when he got into the car because that particular part of the door had long been broken and would have broken off had he pulled on it to shut the door from the inside. (Supp. Hr'g Tr. pp. 72–73). Appellant explained that the door is closed by another handle located higher up on another end of the door. (Supp. Hr'g Tr. pp. 72–73).

Officer Harrelson testified he believed probable cause existed to search the car and to arrest Appellant based upon "the totality of the unburnt marijuana and seeing the marijuana." (Supp. Hr'g Tr. p. 58, ln. 1–7). Reading from his notes, Officer Vaughn testified during the subsequent search of the vehicle, officers found and seized: two baggies of marijuana stuffed into the driver's side door panel; a freezer bag containing marijuana inside of a larger yellow freezer bag inside of the glove compartment; a baggie of crack cocaine and a baggie of cocaine inside of a Crown Royal liquor bottle bag placed inside the glove compartment; and a baggie of cocaine and a baggie of

marijuana inside of the center console. (Supp. Hr'g Tr. p. 18, ln. – p. 19, ln. 12). Officer Boyter testified the narcotics found in the glove box and center console were not visible until opening each of those compartments. (Supp. Hr'g Tr. p. 48, ln. 17 – p. 49, ln. 1). Officers also found $232.00 in cash during a search of Appellant's person. (Supp. Hr'g Tr. p. 19, ln. 13–18). No evidence of recently burnt or smoked marijuana or any smoking device were found. (Supp. Hr'g Tr. p. 44, ln. 17–18).

No pictures were taken of the narcotics in their original locations or positions inside the car. (Supp. Hr'g Tr. p. 20; p. 35, ln. 14–18; p. 43, ln. 3–5). The officers did not have body cams at that time, and although their patrol cars were equipped with video cameras and equipment to record audio from the microphones on the officers' person, neither equipment is functional when the officers reach a certain distance away from their patrol cars. (Supp. Hr'g Tr. p. 24, ln. 4–22; p. 52, ln. 17–21). Therefore, no part of the search or arrest or any of the officers' activity that night were audio or video-recorded. When asked why then they had chosen to patrol the area on foot, Officer Boyter responded, "It's my job. Patrol the City of Greenwood, yeah." (Supp. Hr'g Tr. p. 46, ln. 1–2).

At the close of the suppression hearing, Appellant argued the officers did not have probable cause to search the car or seize evidence due to the infeasibility of the baggie being in plain view, the impossibility of the officers' ability to smell unburnt marijuana supposedly coming from the car, as well as the inconsistencies in the officers' testimonies. (Supp. Hr'g Tr. p. 77, ln. 11–22). The trial court denied the motion to suppress, finding the facts and circumstances gave rise to probable cause, as well as finding their testimonies credible and with little variation between them. (Supp. Hr'g Tr. p. 77, ln. 23 – p. 78, ln. 2).

Argument

The Fourth Amendment and its near identical counterpart in the South Carolina Constitution ensure protection against unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Warrantless searches and seizures are *per se* unreasonable absent a recognized exception. *E.g., Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (citations omitted). "Only in a few specifically established and well-delineated situations will a warrantless search withstand constitutional scrutiny, even when law enforcement has probable cause to conduct it. The burden rests on the prosecution to establish the existence of such an exceptional situation to the warrant requirement, such as the plain view exception." *State v. Brown*, 289 S.C. 581, 587, 347 S.E.2d 882, 885 (1986) (citing *Vale v. Louisiana*, 399 U.S. 30 (1970)). "Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." *Beckham*, 334 S.C. at 317, 513 S.E.2d at 613. The plain view exception is applicable where "the initial intrusion which afforded the authorities the plain view was lawful[,] and...the incriminating nature of the evidence was immediately apparent to the seizing authorities." *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (quoting authorities omitted).

Here, the trial court erred by denying the motion to suppress because there was a lack of competent testimony that the baggie of marijuana was in plain view before officers opened the driver's side door to arrest Appellant. *See Brown*, 289 S.C. at 588, 347 S.E.2d at 886 (reversing because "there was no competent testimony that the objects seized were in plain view at the time of the seizure" in that the suppression hearing testimony comprised of hearsay and the witnesses were not certain or could not recall numerous details). As shown by the photographs and demonstratives at the suppression hearing, it is incredulous that the baggie tucked into a tiny pocket

within the "hand grip" or arm rest could be seen, or that the baggie's criminal nature was immediately determinable, in the dark car through closed windows by Officer Harrelson on the other side of the car with his eyes level to the armrest. Officer Vaughn's inability to see the baggie even when using his flashlight and standing on the same side of the car as the baggie further evidences that the baggie was not in plain view. Prior to Appellant's arrest and with the car's windows and door closed, Officer Vaughn explained: "To be honest, it was dark, I don't know... I didn't get a good look at it in the light." (Supp. Hr'g Tr. p. 28, ln. 23 – p. 31). *Cf. State v. Culbreath*, 300 S.C. 232, 237, 387 S.E.2d 255, 258 (1990) ("When the cocaine was initially spotted [in Culbreath's hand], *there had been no attempt to enter the vehicle by any of the officers or to force [Culbreath] out of the vehicle.* After struggling to get Culbreath out of the vehicle, [another officer], with the aid of his flashlight, *also* saw the package of cocaine inside the vehicle.") (emphasis added). Officer Vaughn also could not sufficiently identify or recognize a picture of the inside door panel of a 1997 Lincoln Town Car in order to point out where the baggie would have been and whether it was indeed visible. (Supp. Hr'g Tr. pp. 28–30). Officer Boyter testified he could not see the baggie of marijuana Officer Harrelson referred to at all either, and stated that no other drugs or evidence were in plain view. (Supp. Hr'g Tr. p. 40, ln. 5–8; p. 48, ln. 17–20). Even if Officer Harrelson's statement that he saw the baggie from where he was standing on the opposite side of the parked car were taken as true, he would have had to essentially place his head past the threshold of the window and crane his head to see into the grooves of the door while aiming the flashlight at such a peculiar angle into that tiny pocket of the door. The maneuvering required to theoretically see the baggie from Officer Harrelson's vantage point is hardly within the plain view exception because it is not something reasonably within the view of any member of the public had they walked by. *See generally California v. Ciraolo*, 476 U.S. 207 (1986) (utilizing the Supreme

Court's common analysis for plain view issues that evaluates what would have been reasonably visible to any member of the public).

Further, from the testimony taken and the improbability the baggie was seen from Officer Harrleson's vantage point, the baggie was not visible until Officer Vaughn opened the driver's side door and seized it; or in the least, Officer Harrleson could not see the baggie until he *ordered* Appellant to roll his passenger side window down. This was not a request, and any movement or interference of the setting in order to discover an object's incriminating nature renders the plain view exception inapplicable and the consequent search and seizure invalid. *See Arizona v. Hicks*, 480 U.S. 321, 325–29 (1987) (holding that if the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object, *i.e.*, if it's incriminating character is not "immediately apparent", then the plain view exception does not apply); *see also Id.* (holding "even a small intrusion" can be an unlawful search under the Fourth Amendment). *See also McHam v. State*, 404 S.C. 465, 746 S.E.2d 41 (2013), *abrogated on other grounds by Smalls v. State,* 422 S.C. 174, 810 S.E.2d 836 (2018) (holding that narcotics visible in the car only after the officer opened the car door was not within plain view, and the opening of the car door constituted a warrantless search itself, but ultimately holding the search was nevertheless reasonable on other grounds); *see also Commonwealth v. Podgurski*, 386 Mass. 385, 436 N.E.2d 150, 153 (1982) (cited by *McHam*) ("[T]he officer's act of sticking his head inside the slightly ajar sliding door of a windowless cargo van, whereupon he discovered the occupants bagging hashish, was deemed to constitute a search.").

Further, the odor of marijuana in the open air in the mere general vicinity of the car is insufficient to support a finding of probable cause on its own. There was no initial reason to suspect that the odor was coming from the car apart from the officers' belief it was occupied when they

saw it was running from about a block down the street. Although one officer testified the odor of unburnt marijuana was stronger when they arrived at the car, the odor alone is still insufficient to amount to probable cause and the officers had merely a hunch that marijuana would be found inside the car or criminal activity was occurring inside the car. *See e.g., State v. Brannon*, 347 S.C. 85, 93, 552 S.E.2d 773, 777 (Ct. App. 2001). Moreover, the officer's inconsistent testimony regarding the odor of marijuana further diminishes the basis for the trial court to have found probable cause. (Supp. Hr'g Tr. p. 46, ln. 13–23; p. 45, ln. 21–25; p. 54, ln. 5–8; p. 60). *See generally, State v. Easterling*, 257 S.C. 239, 247–48, 185 S.E.2d 366, 369–70 (1971) (holding the State did not meet their burden to prove the probable cause existed because the officers' inconsistent testimonies at the suppression hearing effectively negated the basis for the plain view exception to apply). The arrest warrant notes that Officer Boyter was the first to smell burnt marijuana in the open-air walking around the neighborhood. (Supp. Hr'g Tr. p. 26). At the suppression hearing, Officer Boyter stated he was more than 30 feet away from the car when he first smelled unburnt marijuana. (Supp. Hr'g p. 45, ln. l–9). Officer Boyter testified he was certain he detected the smell of unburnt marijuana, and that the arrest warrant's description of burnt marijuana was unlikely to change his mind. (Supp. Hr'g Tr. p. 46, ln. 13–23). Officer Vaughn testified he could smell the odor of unburnt marijuana from ten to fifteen feet away from the car; and he had "no clue" why when he wrote he smelled burnt marijuana in the arrest warrant. (Supp. Hr'g Tr. p. 16, ln. 8–10, ln. 23–25; p. 26, ln. 20–21; pp. 31–33). Officer Harrelson did not note the same odor while walking around the neighborhood because he has a very poor sense of smell unless he is in the immediate space of its source. (Supp. Hr'g Tr. p. 27, ln. 12–21; p. 51; p. 58, ln. 16 – p. 59, ln. 4). Not only do the officers' testimonies, inconsistent with one another and with the arrest warrant, erode the basis for probable cause, but it is also frankly incredible that the officers

could detect the smell of *unburnt* marijuana contained in closed plastic bags or stored inside closed compartments of the car with all of its windows shut from up to 30 feet away. *See generally*, *Alabama v. White*, 496 U.S. 325, 330 (1990) ("Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and *its degree of reliability.*") (italics added).

Further, no photo of the baggie inside the door or any similar such photo was taken or admitted into evidence. At best, the circumstances established a mere hunch that the car would contain drugs, which is insufficient under the Fourth Amendment to search and seize as the officers did here.

Further, the trial court erred in denying to suppress the cocaine, crack cocaine, and additional marijuana seized during the search of the car. The exclusionary rule applies not only to the direct product of police illegality (the "primary" illegality), but also to secondary evidence, what has been deemed "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471 (1963). The record demonstrates that the arrest and the subsequent search and seizure of the other drugs in the car would not have arisen without the officers' search of the driver's side door pocket, which was erroneous under the plain view doctrine and otherwise unreasonable under the Fourth Amendment. Thus, the wrongful search and seizure of the baggie in the driver's side door, the primary illegality, induced the secondary illegality of the unreasonable search and seizure of the remaining contents in the car. This evidence thus should have also been suppressed as the fruit of the poisonous tree.

Therefore, the plain view exception was inapplicable here and there was an insufficient basis for the trial court to have found probable cause. The trial court thus erred in denying Appellant's motion to suppress.

IV. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON A JUROR'S FAILURE TO DISCLOSE INFORMATION MATERIAL THAT WOULD HAVE TRIGGERED A CHALLENGE FOR CAUSE OR BEEN MATERIAL TO APPELLANT'S DECISION-MAKING IN USING A PEREMPTORY CHALLENGE.

Relevant Facts

Following the verdict, Appellant became aware that one of the jurors, Patricia Raiford, failed to bring to the trial court's attention during *voir dire* or jury selection that she had known Appellant, State witness Arleen Smith, and Appellant's family from growing up with them on the same street. Appellant filed a motion for a new trial based upon this information and an evidentiary hearing was held on May 11, 2018 during which both Raiford and Arleen testified. (Motion for a New Trial, Apr. 13, 2018).

Raiford testified that she and Arleen do not presently speak, but they did grow up together on the same street and knew one another from childhood until Raiford moved away to attend college. (Motion for a New Trial Hearing Transcript, May 11, 2018, p. 4, ln. 22 – p. 5, ln. 6; p. 9, ln. 23–24.) Regarding Raiford's familiarity with Appellant, she stated she did not currently speak to him and that they did not "deal together" or "go out", but explained that she knew him and his family, particularly Appellant's mother. (New Trial Hr'g Tr. p. 5, ln. 9 – p. 6, ln. 2). Raiford stated she did not make this information known during *voir dire* because she decided at that time it did not "influence" her; yet she also stated she "didn't know what [she] was in court for." (New Trial Hr'g Tr. p. 6, ln. 14–17).

During *voir dire*, the trial court asked the jury panel to make known "any blood or marriage relation", "close business relationship", or "social relationship" with Appellant. (Trial Tr. p. 6, ln. 16–19). The trial judge also asked the pool to make known any familial relation, close business relationship, or social relationship they had with any of the witnesses after reading a witness list

submitted by the State that included Arleen's name. (Trial Tr. p. 7, ln. 21 – p. 8, ln. 10). The trial judge also asked the jury panel: "Is there any member of the jury panel who knows of any reason why you cannot give both the State of South Carolina and the Defendant in this case, Mr. Smith, a fair trial? Any reason whatsoever why you just want to sit this one out? If so, please stand." (Trial Tr. p. 12, ln. 1–6). Raiford did not make any of this information known in response to any of the trial court's questions.

Arleen testified she and Raiford had a bad relationship, explaining: "She don't like me and I don't like her...I don't like her. I know how she feel about me." (New Trial Hr'g Tr. p. 12, ln. 1–9). Arleen testified that she and Raiford last saw one another five months before the motion hearing and would sometimes run into one another at stores but do not currently speak or "deal" with one another. (New Trial Hr'g Tr. pp. 9–11; p. 12, ln. 13–16). Arleen confirmed that she and Raiford grew up together on the same street and that Raiford knew the Smith family, particularly Appellant's mother. (New Trial Hr'g Tr. pp. 9–11). Arleen explained that in their neighborhood, there was always talk amongst neighbors and people knew what went on in others' lives to explain how she knew Raiford had gotten married and knew her new married name although they no longer spoke. (New Trial Hr'g Tr. p. 11, ln. 15).

The trial court denied Appellant's motion for a new trial, finding:

> [I]n smaller counties and smaller towns, and that's pretty much everyone in the Eighth Circuit, it's almost impossible...if you read a list of five, ten, fifteen witnesses and you ask the jury panel if they know any of those people you're going to have probably everybody stand up....The way the current precedent is currently established in this state, I'll simply say for the record that there's an obligation for attorneys, defendants, and for the State to do jury research to find out this information pre-trial if it is discoverable...There was no act of concealment at the time of trial by that juror. Their relationship was not close. When the juror testified...I did find her testimony credible on this point, as well as the testimony of Ms. Smith.

(New Trial Hr'g Tr. p. 14, ln. 17–23; p. 16, ln. 2–12).

Standard of Review

A ruling on a new trial motion based upon a juror's alleged concealment during *voir dire* is reviewed for an abuse of discretion. *See State v. Tucker*, 423 S.C. 403, 410, 815 S.E.2d 467, 471 (Ct. App. 2018) (citing authority omitted). Credibility determinations are findings of fact and will not be disturbed on appeal unless there is no probative evidence in the record to support them. *State v. Johnson*, 413 S.C. 458, 467–68, 776 S.E.2d 367, 371–72 (2015); *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Classifying the concealment 'is a fact intensive determination which must be made on a case by case basis.'" *Tucker,* 423 S.C. at 411 (quoting *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001)).

Argument

The South Carolina Constitution and federal constitution guarantee a criminal defendant the right to an impartial jury, and "*voir dire* can be an essential means of protecting this right." S.C. Const. art. I, § 14; U.S. Const. amends. VI, XIV; *Warger v. Shauers*, —— U.S. ——, 135 S.Ct. 521, 528–29 (2014). The State likewise has a right to try its case before an impartial jury. *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998). A defendant's constitutional right to trial by an impartial jury is violated when a potential juror misleads the court, makes false statements, or conceals information during *voir dire* in response to questions regarding any source of bias or prejudice against either party. *Id* ."Through the judge, parties have a right to question jurors on their *voir dire* examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982). Consequently, should jurors give false or misleading answers during *voir dire*, the parties may unknowingly or mistakenly "seat[] a juror who could have been excused by the court,

challenged for cause by counsel, or stricken through the exercise of a peremptory challenge." *Id.* at 371 (quoting authorities and internal punctuation omitted).

The movant of a motion for a new trial carries the burden of proving the juror misconduct necessitates a new trial. *See e.g., Tucker*, 423 S.C. at 413, 815 S.E.2d at 472. "A new trial is warranted when: (1) the juror intentionally concealed information, and (2) the information withheld would have triggered a challenge for cause or been material to a party's choice to use a peremptory challenge." *Id.* at 411. "'[I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable.'" *Id.* (quoting *State v. Galbreath*, 359 S.C. 398, 404 n.2, 597 S.E.2d 845, 848 n.2 (Ct. App. 2004)). "[A] juror who intentionally conceals is presumptively biased; '[o]n the other hand, where the failure to disclose is innocent, no such inference may be drawn.'" *Id.* A party alleging innocent or unintentional nondisclosure "'has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges.'" *Id.* (quoting *State v. Coaxum*, 410 S.C. 320, 329, 764 S.E.2d 242, 246 (2014)). *See also Woods*, 345 S.C. at 588, 550 S.E.2d at 284 (explaining that bias and prejudice are inferred from a juror's intentional concealment and "'[o]nly where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional*, should the trial court inquire into prejudice.'") (quoting *Doyle v. Kennedy Heating & Service, Inc.*, 33 S.W.3d 199, 201 (Mo. Ct. App. 2000) (original emphasis in *Doyle*)). Unintentional concealment occurs where the *voir dire* question posed is "ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Woods*,

at 588, 550 S.E.2d at 284. *But see Coaxum*, 410 S.C. at 328-29, 764 S.E.2d at 246 ("[T]he trial court in the unintentional concealment situation must determine whether the information concealed would have supported a challenge for cause or would have been a material factor in a party's exercise of its peremptory challenges.") (italics added). *See also Id.* at 330, 764 S.E.2d at 247 (explaining that a finding of unintentional concealment is not the end of the inquiry because such approach "does not consider how material the information would have been to the parties in exercising their peremptory challenges.").

Here, the trial court's first error was the failure to make any findings on whether the non-disclosed information would have triggered a challenge for cause or would have been material to Appellant in exercising his peremptory challenges. *See Coaxum* at 330, 764 S.E.2d at 247. Further, the aforementioned questions posed to the jury panel are easily comprehensible to the average juror and are thus unambiguous. *See Tucker* at 412 (deeming unambiguous a substantially similar *voir dire* question about "'a close personal or social relationship'" with a potential witness). When denying Appellant's motion, the trial judge stresses the fact that Raiford and Appellant or Raiford and his Aunt did not have recent or current contact at the time of trial. However, Arleen and the juror's relationship cannot fairly be said to be so easily forgotten. Arleen's name was clearly called out during *voir dire*, the juror later watched and listened to her testimony, and the State repeated her name in examination of other witnesses and discussed her testimony during closing argument. However, Raiford still never disclosed this information to the court or to the parties' at any point during the trial and the trial court's emphasis on the temporal factor is not paramount when considering that Raiford had known and had contact with Appellant and his Aunt from childhood to adulthood and presently *hated* Arleen. The extent and length of the past relationship between Raiford and Appellant and his family and the current animosity between them makes her failure

to respond during *voir dire* unreasonable. Raiford's failure to respond to the trial judge's last two broad, catchall questions (Trial Tr. p. 12, ln. 1–6) further demonstrates the concealment was intentional and it was unreasonable for her to respond. The trial court thus erred in not finding that Raiford was presumptively biased.

Even without deeming Raiford as presumptively biased or even if this were an innocent non-disclosure, it is clear from the testimony about the still ongoing animosity between Arleen and Raiford—coupled with how long Raiford had known Arleen, Appellant, and his family— that this non-disclosed information would have triggered a challenge for cause or been material to Appellant's choice to use a peremptory challenge. The pivotal issue at trial was whether Appellant was guilty of the charges by way of constructive possession of the narcotics found in a vehicle occupied by Appellant but registered to Arleen, which had been parked in front of her home. Arleen was inextricably linked to how the charges against Appellant arose. Even though Arleen testified for the State, Arleen was also inextricably tied to Appellant as his blood relative, a close enough relative to trust Appellant with her car. A bias against Arleen thus inherently has the tendency to spill over to Appellant. Thus, not only would this information have been material to Appellant in using strikes or triggered a challenge for cause, but Appellant would have actually struck Raiford. Considering that Raiford may be biased against Arleen, which inherently had a tendency to lend a bias against Appellant, this bias could have very well made an impact on Raiford's determination of Appellant's guilt given the facts of the case. An inescapable implication here pertains to Arleen's testimony about the close-knit neighborhood and the talk between neighbors about one another's lives and Arleen's improper testimony about Appellant's past arrests on Tanyard Avenue. Appellant would tried to strike Raiford due to her knowledge of the

family and their lives in order to prevent any unfavorable, prior information she knew about Appellant from tainting her evaluation of the evidence in this case.

Because this information was not disclosed, Appellant unknowingly and mistakenly sat a juror he would have sought to strike due to the risk of bias. Appellant was ultimately deprived of this opportunity. The trial judge thus erred in denying Appellant's motion for a new trial.

CONCLUSION

For the foregoing reasons, the Appellant Dazzelle Smith respectfully urges this Honorable Court to reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of General Sessions
The Honorable Frank R. Addy Jr., Circuit Court Judge

Appellate Case No. 2018-000952

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

v.

Dazzelle Smith,.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that one (1) original of the Initial Brief of Appellant, Designation of Matter, and Motion to Allow Late Filing and six (1) copies were filed with this Court this day through the United States mail with sufficient postage attached addressed to:

The Honorable Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

The undersigned further certifies that one (1) true copy of the Initial Brief of Appellant, Designation of Matter, and Motion to Allow Late Filing were served upon the Respondent this day through the United States mail with sufficient postage attached addressed to:

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The undersigned further certifies that all parties required to be served pursuant to the appellate court rules have been served.

This 26th day of March 2019

Lauren C. Hobbis, SC Bar #103190
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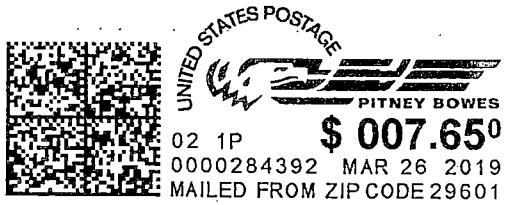

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