STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable George M. McFaddin, Circuit Court Judge

Appellate Case No. 2018-001438

THE STATE,

RESPONDENT,

V.

LEVANCE DUNHAM,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Admission of prejudicial evidence does not require reversal of a criminal conviction if it did not affect the result of trial. In this drug possession case, police arrested Dunham pursuant to a warrant for an unrelated forgery charge after recognizing his face from a wanted poster. The State introduced the poster to corroborate the officer's testimony. While searching Dunham, the officer found crack cocaine in Dunham's pants pocket. Does admission of the poster require reversal?

STATEMENT OF THE CASE

In February 2018, a Sumter County grand jury indicted Levance Dunham for possession of cocaine base. On July 26, 2018, Dunham proceeded to jury trial before the Honorable George M. McFaddin, Jr. Dunham was convicted and sentenced to five years' incarceration. He timely filed a notice of appeal and an initial brief. This brief of respondent follows.

STATEMENT OF FACTS

On August 25, 2017, at approximately 2:30 a.m., City of Sumter police officer Micah Young stopped a car in downtown Sumter for a window tint violation. (Tr. 14; 17). Dunham was a passenger in the vehicle. (Tr. 14, lines 18–20). Young recognized Dunham from a wanted poster distributed by the police department that morning advising officers that Dunham was wanted for forgery. (Tr. 18). When asked his name, Dunham initially told Young that his name was Matthew Hampton. (Tr. 73). After being cautioned about giving false information to a police officer, Dunham gave his true name. (Tr. 77-78). Young testified he ran Dunham's name through dispatch and confirmed he had an open warrant. Young placed Dunham under arrest for forgery. (Tr. 79; 94).

During a search incident to arrest, Young found Dunham's identification card and a crack rock in his pants pocket. Young showed Dunham the crack cocaine and Dunham responded by saying, "I don't know how [that] got in my pocket." (Tr. 81, line 24). Young also found a crack rock in the driver's purse and a crack pipe on the passenger's side floorboard. Both rocks field tested positive for cocaine base, and Young packaged them in a BEST kit a deposited them into the department's evidence locker. (Tr. 90; 95–98). Both rocks were analyzed and confirmed to be crack cocaine. (Tr. 127).

Pretrial Hearing

In a pre-trial hearing, Dunham challenged the initial traffic stop and moved to suppress his statements in the officer's body cam video. (Tr. 3-35). The trial court ruled Young had probable cause to make the stop and denied the motion. (Tr. 29–30). Dunham also objected to any "mention [of] him having a warrant," arguing this would be prejudicial to him. (Tr. 28, lines 8–12).

The solicitor argued it was necessary to establish the existence of the open forgery warrant in order to explain why Young arrested and searched Dunham: "We didn't want them to be able to say they didn't have reason to stop." (Tr. 32, lines 13–16). The trial court agreed, and defense counsel acquiesced in this ruling by indicating he would request a curative instruction explaining "he's not on trial for that." (Tr. 32, lines 7–10). Defense counsel further requested "limiting that it's nothing about his character, this is nothing about any dispositive opinion being convicted of anything." (Tr. 32, lines 17–20).

The solicitor requested a ruling on whether the State would be allowed to introduce the actual wanted poster for Dunham. Young testified he recognized Appellant from the poster, and had it with him at the time of the stop. (Tr. 16-18; Tr. 87, lines 1–5). He explained he received the flyer at that morning's rotation of shift. (Tr. 16, lines 9-11). The poster itself was visible in the officer's body cam video. (Tr. 19, lines 1–11).

Appellant objected to the admission of the wanted poster, stating "I object to that poster in full. I think the officer is [going to] testify as to the warrant, why is that, I think that's kind of superlative. That is kind of superfluous just showing . . . he's a bad guy." (Tr. 33, lines 17-21). The State conceded that portions of the poster needed to be redacted, but argued it should be admitted "Because Your Honor, the officer said right from the start, well, I know who you are, I know you're Levance Dunham. The reason he knew that is because he had this poster. He had this picture that he had looked at just that day, and that he had in his car so that's good evidence right there." (Tr. 34, lines 6-12). The trial judge then asked, "Why can't he just tell the jury that he was notified at their meeting that night about an open warrant on Mr. Dunham?" (Tr. 34, lines 13-15). The prosecutor answered, "Your Honor, just simply because his picture is on [the wanted poster], that is how he identified Levance Dunham. That way we don't have to get into

the fact he had numerous other arrest or anything like that. That's how we know right there and then." (Tr. 34, line 21 – Tr. 35, line 1). The trial judge ruled, "All right, I'll allow that, but I want the rest of it blocked out." (Tr. 35, lines 2-3). During its case in chief, the State offered the poster into evidence, but redacted most of the writing. The trial judge admitted the redacted poster, overruling Dunham's objection that the poster was "prejudicial." (Tr. 75, line 18).

The redacted poster includes a single photograph of Appellant from the shoulders up. The photograph itself does contain any signage or markings indicating it is a "mug shot," but the poster indicates that the picture is "from SLRDC, 1/6/2017," an apparent reference to the Sumter-Lee Regional Detention Center. The poster indicates that Dunham is wanted for forgery and gives his physical description. (State's Exhibit #3).

The attorneys crafted a curative instruction related to Dunham's unrelated forgery charge, and the trial judge included the instruction in his jury charge:

> During the course of this trial you have heard reference to Mr. Dunham being arrested for the offense of forgery. I charge you that when you deliberate in regard to the defendant's charge of possession of cocaine base you shall not consider the fact that he was arrested for the offense of forgery in determining if the defendant is guilty of this charge. To do so would be improper. It is incumbent on you to only consider whether defendant did possess cocaine base either actually or constructively in determining if Mr. Dunham is guilty of the charge before you. His arrest for forgery is simply an explanation of why the defendant was searched.

(Tr. 155, lines 8-21).

STANDARD OF REVIEW

Appellate courts review a trial court's decision regarding Rule 403 for an abuse of discretion and are obligated to give great deference to the trial court's judgment. State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001), overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. Id. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal. Id. A trial court has particularly wide discretion in ruling on Rule 403 objections, and a trial court's decision regarding the comparative probative value versus prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Thompson, 420 S.C. 386, 398, 803 S.E.2d 44, 50 (Ct. App. 2017).

To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012). The burden is on the Appellant to satisfy the court that there was prejudicial error. State v. Motley, 251 S.C. 568, 575, 164 S.E.2d 569, 572 (1968). An error is harmless if it did not reasonably affect the result of the trial. State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015).

ARGUMENT

Admission of a wanted poster with Dunham's picture offered to corroborate officer's testimony that he recognized Dunham from the poster does not warrant reversal of drug possession conviction because the drugs were found in Dunham's pocket, conclusively proving his guilt.

Dunham argues this Court must reverse his conviction because of the admission of the flyer showing he was wanted for forgery. His argument fails because evidence of Dunham's guilt was overwhelming, and admission of the poster was not so prejudicial as to influence the verdict. This Court should affirm.

The admission of a "mug shot" photograph is disfavored because it may alert the jury that the defendant has a prior criminal record. State v. Robinson, 274 S.C. 198, 201, 262 S.E.2d 729, 730 (1980). A mug shot photograph should not be admitted unless: (1) the state has a demonstrable need to introduce the photograph; (2) the photograph shown to the jury does not suggest the defendant has a criminal record; and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication. State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004). However, the erroneous admission of a mug shot photograph does not require reversal if the picture does not imply the defendant has committed other crimes. Traylor, 360 S.C. at 84, 600 S.E.2d at 528 n.12 (2004).

Mindful of the extreme deference appellate courts give to a circuit court's 403 rulings, the State does not concede that admission of the flyer was erroneous. However, the State recognizes that the case for its admission was marginal under the factors laid out in Traylor. Accordingly, the State's argument will focus less on the propriety of the court's decision to admit the flyer, and more on the negligible impact this piece of evidence had on the case.

The flyer was mostly cumulative to other evidence.

To present a coherent case, the State needed to provide context to explain what led the officer to search Dunham and find the drugs in his pocket. Because Dunham was arrested pursuant to a preexisting arrest warrant, the introduction of some evidence establishing the existence of the warrant was unavoidable. Without it, the jury would have had no explanation for why the officer removed Dunham from the car and searched him. This would have been confusing to the jury and prejudicial to the State. Accordingly, evidence showing the existence of the arrest warrant was necessary to establish the cause and legality of the arrest and search. See State v. Wiley, 387 S.C. 490, 496, 692 S.E.2d 560, 563 (Ct. App. 2010) (finding no reversible error where "reference to [an arrest] warrant was for the purpose of establishing the legality of the traffic stop"). Therefore, evidence establishing the existence of the warrant was properly admitted to show the res gestae of the crime. See State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (explaining evidence of other crimes is admissible as res gestae when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case).

Even defense counsel accepted that some explanation of the arrest was proper when he acquiesced in the court's ruling allowing the State to establish the existence of the warrant. (Tr. p. 32). Defense counsel did not object to trial testimony establishing the existence of the warrant, and inquired into the existence of the warrant during his cross-examination of the officer. (Tr. p. 79, lines 6–8; Tr. p. 87, line 10–Tr. p. 88, line 2; Tr. p. 92–94). Evidence was admitted without objection establishing: 1) Dunham had an active warrant; 2) the warrant was for forgery; 3) police distributed a "wanted" flyer with Dunham's picture; 4) the officer recognized Dunham from the flyer; and 5) the officer had the flyer with him on the night of the

incident. Accordingly, admission of the flyer itself was mostly cumulative to other competent evidence.

The flyer had some probative value.

The only additional element is the photograph, along with the accompanying note "from SLRDC 1/6/17." Although the picture was not probative of whether Dunham knowingly possessed crack cocaine, the State had a legitimate purpose for admitting it: the picture corroborated the officer's testimony explaining his reason for searching Dunham. "If [a] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014). See also State v. Robinson, 201 S.C. 230, 22 S.E.2d 587, 588–89 (1942) (holding pictures were "only corroborative of the spoken word, and proved to be unnecessary in this particular case, but they were no more than harmless surplusage").

Though modern jurisprudence tasks the trial court with determining the reasonableness of a search for suppression purposes, juries have a traditional role in enforcing the prohibition on unreasonable searches and seizures. California v. Acevedo, 500 U.S. 565, 581–82 (1991) (Scalia, J., concurring). Juries inevitably consider the propriety of police conduct when it becomes an issue at trial, and some jurors are more skeptical of police conduct than others. A prosecutor may reasonably believe it necessary to emphasis the legitimacy of a police search, especially when the case is so strong that the only viable defense is to question police methods. When a motion for suppression fails, the defense may appeal to the jury on grounds of fairness to do to what the judge would not— punish the State for its perceived misconduct with a not guilty verdict. Thus, the prosecutor must walk the fine line between presenting a full case—strong enough to withstand every attack (even those that are legally dubious)—and avoiding overkill.

In this case, defense counsel made fairness an issue in his opening statement, stating that fundamental rights, including the protection against unreasonable searches and seizures, were "big issues in the case." (Tr. 62, line 24– Tr. 63, line 1). He urged the jury to "keep in mind . . . that there are issues with how the stop was initiated," and emphasized the fact that "Mr. Dunham was not advised of his rights." (Tr. p. 64). Thus, the propriety of the arrest and search was made an issue by the defense. The prosecutor was justified in taking steps to corroborate the officer's testimony in order rebut the insinuation of officer misconduct. See Lawn v. United States, 355 U.S. 339, 359 n.15 (1958).

The picture on the flyer bolstered the officer's credibility, making it more likely that his testimony was accurate. State v. Green, 412 S.C. 65, 82, 770 S.E.2d 424, 433 (Ct. App. 2015) (holding jail booking photo was "important for witness credibility" where officer claimed he recognized defendant from surveillance video); State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012) (finding no reversible error in the admission of photographs of the defendant's penis, in part because "Although clearly offensive, the photographs corroborated Investigator Platt's testimony"). The jury was able to judge for themselves whether the officer truly recognized Dunham's picture from the flyer, or whether it was merely a convenient excuse for police oppression. Accordingly, the picture was relevant. See Rule 401, SCRE ("'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.").

The picture did not imply Dunham had a prior criminal record.

The picture did not imply Dunham had a prior criminal record. The jury was already aware from other competent testimony that Dunham had a pending forgery charge. The picture

on the flyer was dated from earlier in 2017, roughly six months prior to the incident date. The jury likely assumed the picture was related to the aforementioned forgery charge, not to an unrelated prior criminal conviction. In these circumstances, the photograph did "not necessarily imply that [Dunham] had a prior criminal record and thus place his character in issue." See State v. Robinson, 274 S.C. 198, 201, 262 S.E.2d 729, 730 (1980) (finding no reversible error from admission of mug shot because "jury could just have easily inferred that the photograph was the result of the investigation of the [charge for which the defendant was on trial]"); State v. Green, 412 S.C. 65, 83, 770 S.E.2d 424, 434 (Ct. App. 2015) (finding no reversible error where "there was nothing on the face of the booking photo or the manner in which it was introduced that suggested Green had a prior criminal record"); State v. Robinson, 238 S.C. 140, 150–51, 119 S.E.2d 671, 676 (1961), overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding statement that defendant was on the way to the probation office "did not show that he had been convicted of any crime"). Cf. State v. Lawson, 424 S.C. 51, 60, 817 S.E.2d 509, 514 (Ct. App. 2018), reh'g denied (Aug. 16, 2018) (finding introduction of fingerprint card suggested defendant had a prior criminal record because it was from a prison and dated "over ten years prior to the commission of this crime. This temporal clarification excluded any possibility the jury would conclude Appellant's time at [prison] was related to the crime for which he was on trial."); United States v. Harman, 349 F.2d 316, 320 (4th Cir. 1965) (finding reversible error where "the conclusion seems inescapable that the pictures, taken together with Bodine's testimony, must have conveyed to the jury the information that Harman had been previously convicted and had served a prison sentence").

Furthermore, the prosecutor did not draw attention to the origins of the photograph or use it to prove Dunham had previously been convicted of a crime in order to show criminal

propensity. See State v. Robinson, 274 S.C. 198, 201, 262 S.E.2d 729, 730 (1980) (explaining "a vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes"); State v. Denson, 269 S.C. 407, 413, 237 S.E.2d 761, 764 (1977) (finding no reversible error from the admission of photographs that "came from the files of the Richland County Sheriff's Department and the Columbia Police Department" because "this testimony only explained the source of the photographs, it did not 'draw particular attention to the source or implications of the photographs'"). It was clear that the arrest warrant related to a pending charge. At most, it indicated that Dunham had been accused of a dissimilar (and not particularly serious) crime, not that he had a criminal record. There was little danger that the jury would infer Dunham was predisposed to commit a drug crime because he had previously been accused of a property crime.

Any prejudice was cured by the trial court's jury instruction.

The danger of unfair prejudice was cured by the trial court's detailed charge instructing the jury not to consider the picture for an improper purpose. The court instructed the jury to "not consider the fact that [Dunham] was arrested for the offense of forgery in determining if the defendant is guilty of this charge. To do so would be improper. His arrest for forgery is simply an explanation for why the defendant was searched." (Tr. p. 155). This succinct explanation of the relevance of the flyer ensured that the jury did not consider Dunham's pending forgery charge as propensity evidence, curing any prejudice from the admission of the flyer.

Evidence of Dunham's guilt was overwhelming, and admission of the flyer did not affect the outcome of trial.

Because this case does not involve a constitutional error, this Court is not required to find beyond a reasonable doubt that admission of the flyer could not have affected the result of trial. See Chapman v. California, 386 U.S. 18, 24 (1967) (recognizing "harmless-constitutional-error rule"); U.S. v. Seidel, 620 F.2d 1006, 1013 n.13 (4th Cir. 1980) ("There is a difference between a claim of harmless error where the error is of constitutional dimension and where it involves a lesser right, such as that afforded by a procedural rule[.]"); Arnold v. State, 309 S.C. 157, 166, 420 S.E.2d 834, 839 (1992). Instead, this Court should apply the less-demanding standard properly employed for non-constitutional errors: "An error is harmless if it did not reasonably affect the result of the trial." State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015).

To say that an error did not contribute to the verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Arnold v. State, 309 S.C. 157, 166, 420 S.E.2d 834, 839 (1992). A harmless error analysis is contextual and specific to the circumstances of the case: "No definite rule of law governs [the finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Byers, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012). The burden is on the Appellant to satisfy the court that there was prejudicial error. State v. Motley, 251 S.C. 568, 575, 164 S.E.2d 569, 572 (1968). The appellate court should look to the strength of the other evidence in the case to determine if the admission of a

mug shot photograph led to conviction instead of acquittal. United States v. Johnson, 623 F.2d 339, 343 (4th Cir. 1980).

Another description frequently cited is that error "is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29–30 (2014). Such was the case here. The evidence showed that Young found a crack rock in Dunham's front left pants pocket, along with his identification card. Dunham's explanation was that he "didn't know how it got [there]." This quintessentially poor explanation requires little response, other than that it is completely unbelievable.

Dunham claims the jury may have believed that "whatever was found in his pocket" was comingled with crack cocaine seized from the driver. Dunham's attempt to portray the evidence of possession as equivocal does not comport with the record, and this feeble defense demonstrates the strength of the State's case. The arresting officer testified he retrieved a single crack rock from Dunham's front left pants pocket. The rock field-tested positive for crack cocaine. (Tr. p. 90). The officer found a second crack rock in the driver's purse, and it also field-tested positive for crack cocaine. The officer testified the rocks were never comingled, and that he sealed both rocks in a BEST kit and sent them for laboratory analysis. (Tr. 88, lines 15–16). The chemist who analyzed the drugs testified he received a BEST kit containing two separate plastic bags, each containing one crack rock. One bag was labeled "Tobias" and one bag was labeled "Dunham." (Tr. p. 124). Both tested positive for cocaine base, and the chemist testified that comingling would not have affected the result of the test. (Tr. 124–25; Tr. p. 127, ll. 12–19). Police also found a crack pipe in the floorboard where Dunham was sitting, in addition to the crack and crack pipe recovered from the driver. The comingling defense had

nothing to do with Dunham's credibility or character, and was not weakened or strengthened by the admission of the flyer.

The only rational conclusion from the evidence is that Dunham possessed crack cocaine. Accordingly, this Court should affirm the conviction.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Appellant's conviction and sentence from the lower court be affirmed.

Respectfully submitted,

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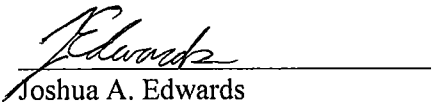
BY: 
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June 20, 2019

STATE OF SOUTH CAROLINA
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Appellate Case No. 2018-001438

THE STATE,

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PROOF OF SERVICE

I, NAME, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by delivering two copies of the same to Katherine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 20th day of June, 2019.

Anne A. Mueller
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June 20, 2019

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RE: State v. Levance Dunham
Appellate Case No. **2018-001438**

Dear Ms. Hudgins:

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

Sincerely,

Joshua A. Edwards
Assistant Attorney General
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JAE/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division