STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
W. Jeffrey Young, Circuit Court Judge

THE STATE,

Respondent,

vs.

KEVIN L. MIDDLETON,

Appellant.

Appellate Case No. 2017-000837

FINAL BRIEF OF RESPONDENT

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II.

Evidence that law enforcement was serving arrest warrants on Appellant was admissible res gestae evidence as it explained why several law enforcement officers went to the third party trailer. Further, the issue is not preserved for review because Appellant did not renew his *in limine* objection during the jury trial.

STATEMENT OF THE CASE

A grand jury indicted Appellant Middleton for trafficking cocaine base, possession with intent to distribute (PWID) cocaine, and possession with intent to distribute (PWID) heroin. Following trial on April 13-15, 2015, a jury convicted Middleton of trafficking cocaine base, 28-100 grams and PWID heroin. The jury also found Middleton guilty of possession of cocaine as a lesser included offense of PWID cocaine, and found Middleton not guilty of trafficking cocaine base, 10-28 grams. The presiding judge, the Honorable W. Jeffrey Young, sentenced Middleton concurrently to sixteen years' imprisonment for trafficking cocaine base, ten years' imprisonment for PWID heroin, and three years' imprisonment for possession of cocaine.

STATEMENT OF FACTS

On April 19, 2013, the North Charleston Police Department's ILP (Intelligence Led Policing) team was seeking to serve an arrest warrant on Appellant Kevin Middleton and based on a tip, went to a trailer. R. pp. 55-57. Law enforcement was aware Middleton did not actually reside at the trailer. R. p. 28, lines 11-25. The team set up a perimeter around the residence. R. p. 59. Officer Kristopher Gorman knocked on the door and a white male opened it. As the white male stepped back, Officer Gorman saw Middleton on the couch hovered over a white rock-like substance, cutting it with a razor blade. When Officer Gorman made eye contact with Middleton, Middleton sat back and Officer Gorman noticed a digital scale in Middleton's lap. R. p. 60. When Officer Gorman entered the residence and ordered Middleton to the ground, the digital scale fell on the floor. R. pp. 64-65. On the floor by the table were baggies of white substance. R. p. 65.

Officer Gorman arrested Middleton and transported him to jail. R. p. 70. In the meantime, the ILP team called in the North Charleston narcotics unit. R. p. 70, lines 11-13. Officer Gorman explained, "[W]e specialize in wanted subjects, so they have more knowledge on narcotics and the procedures to gather evidence." R. p. 70, lines 15-17.

Officer Steve Hall from the North Charleston Police Department's narcotics unit was on "callout" duty when contacted by his sergeant that the ILP team stumbled on narcotics and Officer Hall needed to obtain a search warrant for the narcotics unit. R. p. 196. Officer Hall explained, "My partner, Detective Hurst, he went to the actual scene with ILP. I went to our office. He then relayed me over the phone what he had witnessed on scene, what he was told by ILP. I typed up the search warrant and got it signed by a judge." R. p. 197, lines 4-8. Officer Hall proceeded to the trailer to execute the search warrant. R. p. 197, lines 11-12. On cross-examination, Officer Hall estimated it

took an hour from the time he left his house, typed up the search warrant, and had it signed, to secure the search warrant. R. p. 213, lines 23-25.

When he arrived with the search warrant, the narcotics were already in plain view, which he explained was the probable cause for the search warrant. He read the search warrant to any possible defendants in the house. The narcotics officers took photographs and then searched the remainder of the house. R. p. 197, lines 16-22. During cross-examination, Middleton's counsel asked, "I want to be clear about this issue for the search warrant. You guys were called in after ILP was there. When you guys got there, they had these people outside of the trailer, correct?" R. p. 209, lines 6-10. Officer Hall answered affirmatively. R. p. 209, line 10.

Officer C.J. Habersham was the officer who went in behind Officer Gorman. When Officer Gorman went into the residence, he yelled "contact." Officer Habersham looked to the left and saw Middleton. He did not notice anything on the table at the time, but noticed the narcotics on the coffee table later. R. pp. 96-97. He arrested an individual named Tisdale, who attempted to flee. Tisdale dropped narcotics in his possession. Officer Habersham later noticed a crack cookie and a digital scale near Middleton. R. pp. 96-100. Officer Habersham confirmed no one in the house claimed the narcotics found in the house. R. p. 106. The ILP team remained on the scene until the narcotics unit arrived. The narcotics unit secured a search warrant for the trailer. R. p. 105.

Officer Kruger, also on the ILP team, testified its purpose was to track down fugitives. R. p. 108. Officer Kruger explained the unit's purpose is to serve warrants, he is not a narcotics officer. R. pp. 119-20. Officer Kruger supervised the team that night. Officer Kruger testified that six or seven SWAT team officers from the fugitive unit went to the trailer. After arriving, they surveilled the scene for about twenty-five minutes. Part of the tip they received was there would be a social

gathering at 5 a.m. This information was corroborated by the team's observations of music and activity in the trailer made during their brief surveillance. R. p. 114. Officer Kruger testified he went inside the trailer after Officer Gorman and Officer Habersham. Officer Gorman's role was to deal with Middleton. Officer Kruger's role was to deal with everyone else. R. pp. 116-19.

Deron Ferguson went to the trailer around 5:00 a.m. to buy some marijuana for his work day as a landscaper. He spoke with Tisdale and bought some marijuana but thought he was not getting the full amount. Middleton inserted himself into the conversation. Ferguson asked Middleton to weigh the drugs because Middleton had a digital scale in his lap and Tisdale did not have one. Ferguson testified during the conversation, he noticed marijuana and crack cocaine on the table by Middleton and Tisdale. R. pp. 145-52.

Ferguson explained he knew when the team came in the trailer that they were police officers because their shirts said "SWAT team" and they were waiving big guns. R. p. 165, line 19 – p. 166, line 2. Ferguson explained he pled guilty because he knew he was in the wrong buying marijuana and he was on probation at the time. R. p. 158. Ferguson had several drug convictions and a grand larceny conviction. R. p. 156. Ferguson testified Middleton approached him and suggested they should blame Tisdale for the drugs. Likewise, Tisdale suggested to him they should blame Middleton. R. pp. 157-58.

Altogether, law enforcement recovered thirty-four grams of crack cocaine, .6 grams of a heroin and cocaine mixture (commonly known as a speedball), and .5 grams of cocaine. R. pp. 188-91. When his belongings were inventoried at the jail, Middleton had $400. Tisdale had $800. R. pp. 225-26.

After he was convicted, Middleton made the following apology to the Court:

> Your Honor, first of all, I'd like to apologize to my family and to the Court for putting everybody through this, and I realize I was younger back then, and I guess I was selfish too. I didn't think about actions. I didn't talk about the actions that I put on my family and I just wanted to say I'm sorry, because I'm not a bad guy, really.
>
> . . . I just want to say I'm sorry and wish that you have mercy on me. I made bad decisions. I was young, and I know that there are consequences. If [I] knew that all this would happen, I promise you, I wouldn't have set foot in that door.
>
> I just want to say I'm sorry. . . . I just ask that you have mercy on me and give me another chance. . . .

R. p. 330, line 7 – p. 331, line 13.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court is bound by the trial court's actual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000).

Middleton's first issue raises a Fourth Amendment claim. "South Carolina appellate courts review Fourth Amendment determinations under a clear error standard." State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). "A deferential standard of review applies in a Fourth Amendment challenge to a trial court's fact-driven affirmation of probable cause." State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005). State courts are not allowed to interpret the Fourth Amendment to provide greater protections than those provided by the precedent of the United States Supreme Court. Arkansas v. Sullivan, 532 U.S. 769, 772 (2001).

Middleton's second issue is an evidentiary issue. This court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial court's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). A trial court abuses its power of discretion when it commits an

error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

ARGUMENT

I.

The trial court did not err in denying Middleton's motion to suppress the narcotics because when law enforcement knocked on the door to enquire as to whether Middleton, the subject of an arrest warrant, was at the third party residence, law enforcement saw Middleton and narcotics in plain view before entering the residence. Middleton does not challenge application of the plain view exception to the warrant requirement. Middleton does not have standing to contest the search of the residence. Law enforcement did not need a search warrant to arrest Middleton in a third party residence as Fourth Amendment rights are personal and Middleton does not have greater Fourth Amendment protections in a third party residence than he would in his own home. The issue is not preserved for review.

Middleton argues that although law enforcement with a valid arrest warrant could enter his own residence without a search warrant to arrest him, law enforcement would be unable to arrest him in a third party residence without a search warrant. Federal circuits have rejected the argument that the Fourth Amendment affords greater protections for the subject of an arrest warrant in a third party residence than afforded the subject of an arrest warrant in his own home. Middleton lacks standing to challenge the search. However, at the onset of the analysis, law enforcement saw Middleton and narcotics in plain view after an officer knocked on the door and a person inside opened the door, and before law enforcement entered the residence. Because Middleton did not challenge on appeal the seizure of the narcotics under the plain view exception, this finding is the law of the case and further review of Middleton's Fourth Amendment claims are not warranted.

The Suppression hearing

When addressing Middleton's motion to suppress the search warrant, the prosecutor argued Middleton was unable to show standing. When the trial court inquired, Middleton's counsel

represented to the trial court that the premises where Middleton was arrested "definitely wasn't his house, and so he's charged with possessing these drugs. That's – I think that's where the standard comes in." The trial court agreed with the prosecution that Middleton lacked standing. R. p. 18, lines 22-25; p. 19, lines 4-20 (direct quote, p. 19, lines 11-13).

Officer Gorman testified that the ILP team received a tip from the community that Middleton would be staying at the address. He testified the officers thought he would be sleeping at the residence overnight, so they left early in the morning. R. p. 24, lines 19-22. They arrived at the trailer to loud music and the chatter of multiple conversations. They surrounded the trailer and decided to knock on the door. R. pp. 24-25.

A white male opened the door. The officers positioned themselves on the sides of the door rather than stand in the middle of the doorway. The white male took a step back and Officer Gorman saw Middleton sitting on the couch. Officer Gorman entered the house and ordered Middleton to the ground. R. p. 25, lines 13-22.

The prosecution elicited the following testimony from Officer Gorman:

> Q: So you entered because you saw a subject that had an outstanding arrest warrant?
>
> A: That, and I also saw a large off-white rock-like substance that was sitting on the table in front of Mr. Middleton that I identified as narcotics.
>
> Q: And were there other narcotics besides that in plain view in the house?
>
> A: Yes, sir.
>
> **Q: And was that readily apparent from the doorway?**
>
> **A: Yes, sir.**

R. p. 25, line 23 – p. 26, line 7.

After Officer Gorman's *in camera* testimony, Middleton's counsel argued because law enforcement only had an arrest warrant for Middleton, law enforcement did not have authority to enter a third party residence on the belief Middleton would be there. Middleton further argued even evidence in plain view could not be seized. R. p. 29, lines 11-21. Middleton's counsel argued based on Steagald v. United States, 451 U.S. 204 (1981),[1] the evidence should be suppressed. R. pp. 29-30. The prosecutor noted when an individual answered and opened the door, not only was Middleton in plain view, but so were the narcotics. R. p. 30, lines 9-24. The prosecutor also referenced his prior argument and the trial court's ruling on standing. R. p. 31, lines 2-5.

The trial court ruled as follows:

> And one thing I'm noting in the [Steagald] case is that they were looking for Mr. Lyons when he went in. Mr. Lyons wasn't there. Here is the difference, Mr. Whipper, is that they always have a right to knock on the door. Door opens, there is the man they have the warrant for. Everything is in plain view. I think most of the rules that protect the Fourth Amendment, because of his presence there with drugs and has an active arrest warrant, certainly gives them probable cause to go further.

R. p. 32, lines 7-16.

Middleton's counsel claimed Officer Gorman testified he only saw Middleton, not the narcotics, from the doorway, but the trial court explained his understanding was Officer Gorman also saw the narcotics. R. p. 32, line 24 – p. 33, line 8.

The un-appealed ruling that the narcotics were in plain view before Officer Gorman entered the trailer is the law of the case and therefore the two-issue rule precludes further

[1] The court reporter transcribed both defense counsel and the trial court's references to this case as "United States v. Seigel."

review of whether law enforcement needed a search warrant to enter the premises to arrest Middleton.

Middleton's brief seems written in total denial that both he **and** the narcotics were in plain view of the officers before entering the premises. The trial court's ruling that the plain view exception to the warrant requirement applies is an un-appealed ruling that is the law of the case. The two issue rule precludes further review of Middleton's Fourth Amendment claim.

An appellant's failure to challenge the trial court's ruling in the appellant's brief renders the unchallenged ruling the law of the case. State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012). An unchallenged ruling, right or wrong, becomes the law of the case and will not be considered by the appellate court. State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012).

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

Because Middleton fails to challenge seizure of the narcotics based on the plain view exception to the search warrant requirement, this Court should affirm on the unchallenged ruling. The State will address the merits of the plain view exception below.

The issue is not preserved for review because Middleton did not renew his objection to the search before the jury.

Middleton never renewed his motion to suppress during the jury trial. Instead, he advised the trial court he did not have an objection to photographs of the narcotics that were entered into evidence during Officer Gorman's testimony. R. p. 62; pp. 68-69. He also did not object to the SLED drug report. R. p. 187. A pre-trial ruling on the admission of evidence is not considered final

and a party must renew his objection at the time the evidence is admitted. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). In the instant case, because Middleton did not renew his motion before the jury, the issue is not preserved for review.

Law enforcement was allowed under federal law to knock on the door of the trailer because when law enforcement knocks on a door to speak with an occupant, they do no more than a private citizen might do. Therefore, they were authorized to seize Middleton and the narcotics, both seen in plain view by Officer Gorman before he entered the residence.

An important oversight in Middleton's brief is the failure to recognize that when a police officer knocks on the door of a residence and a person opens the door, there is no Fourth Amendment issue because the officer is only doing what any private citizen is allowed to do. Law enforcement decided to knock on the door to the trailer and a white male opened the door for them. This does not constitute a search for Fourth Amendment purposes.

"When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." Kentucky v. King, 131 S. Ct. 1849, 1862 (2011)); State v. Wright, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011) (finding a law enforcement officer may lawfully go to a person's home and door to interview that person); see also Florida v. Jardines, 569 U.S. 1, 9, n. 4 (2013) ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that.*" (emphasis in original)).

"A voluntary response to a knock at the front door of a dwelling does not generally implicate the Fourth Amendment, and thus an officer generally does not need probable cause or reasonable suspicion to justify knocking on the door and then making verbal inquiry." United States v. Cephas,

254 F.3d 488, 493-94 (4th Cir. 2001) (finding "[w]hen Cephas opened his apartment door without knowing who was on the other side, he voluntarily exposed to the public any odors and such a view as one standing at the door could perceive. None of Sergeant Shapiro's conduct up to that point, at which he smelled 'a strong smell of marijuana coming from the apartment' **and 'saw a young girl sitting' in the apartment** constituted a search within the meaning of the Fourth Amendment" (emphasis added)).

The trial court specifically found both Middleton and the narcotics were in plain view. "[O]bjects falling within the plain view of a law enforcement officer who is rightfully in position to view these objects are subject to seizure and may be introduced in evidence." State v. Brown, 289 S.C. 581, 588, 347 S.E.2d 882, 886 (1986). Middleton takes a head-in-the-sand approach in his brief, not challenging the knock and talk or the plain view evidence. However, this ruling justifies the warrantless seizure of the narcotics which were in Officer Gorman's plain view.

Because Fourth Amendment rights are personal, Middleton lacked standing to complain that law enforcement entered a third party residence without a search warrant.

Middleton relies on Steagald v. United States, 451 U.S. 204 (1981) to argue the police violated his Fourth Amendment rights. In Steagald, law enforcement entered a residence without a search warrant in an attempt to find a fugitive, Ricky Lyons. The officer admitted he could have sought a search warrant, but did not on the belief that his arrest warrant for Lyons was sufficient. The officers found cocaine in the residence and arrested Steagald, the homeowner. While some facts arguably contradicted whether Steagald was a resident, the Supreme Court found the government was estopped from asserting Steagald lacked standing because it argued in lower court that Steagald was a resident of the home. Id. at 206-07.

The Supreme Court noted,

> Here, of course, the agents had a warrant – one authorizing the arrest of Ricky Lyons. However, the Fourth Amendment claim here is not being raised by Ricky Lyons. Instead, the challenge to the search is asserted by a person not named in the warrant who was convicted on the basis of evidence uncovered during a search of his residence for Ricky Lyons. Thus, the narrow issue before us is whether an arrest warrant – as opposed to a search warrant – is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances.

Id. at 213.

The Supreme Court noted the arrest warrant was used for more than arresting Lyons in a public place or his home, it was used to enter the home of a third party. The Supreme Court commented, "Thus, while the warrant in this case **may have protected Lyons** from an unreasonable seizure, it did absolutely nothing to protect [Steagald's] privacy interest in being free from an unreasonable invasion and search of his home." Id. at 213 (emphasis added).

Further in its analysis, the Supreme Court observed, "The issue here, however, is not whether the subject of an arrest warrant can object to the absence of a search warrant when he is apprehended in another person's home, but rather whether the residents of that home can complain of the search." Id. at 219. The Supreme Court noted a search warrant was not needed to execute the search warrant on the subject in public or the subject's home. Id. The Supreme Court ultimately concluded that in order to execute a search of a third party's home for the subject of an arrest warrant, law enforcement would need a search warrant of the residence. Id. at 222.

Steagald, however, does not control the instant case because Middleton is similarly situated to Lyons, the subject of the arrest warrant in Steagald, and not Steagald, the homeowner unprotected by **any** warrant. In the instant case, Middleton is the subject of the unchallenged arrest warrant and

failed to show he held an expectation of privacy in the trailer. Middleton attempts to glide past this significant distinction in his brief, claiming without citation that "the law remains relevant when it comes to Appellant." Br. of App. p. 7. However, case law from the federal circuits does not back up this bold assertion.

The Ninth Circuit Court of Appeals rejected the argument Middleton presents on appeal in United States v. Underwood, 717 F.2d 482 (9th Cir. 1983). In that case, Underwood was a fugitive who escaped from a federal correctional institution in Kentucky. Law enforcement obtained an arrest warrant for Underwood, but did not possess a search warrant when they apprehended Underwood in a house. He was found in possession of firearms, which were seized from him.

The Ninth Circuit noted that under Payton v. New York, 445 U.S. 573 (1980), if law enforcement obtained an arrest warrant to arrest a subject, law enforcement is not further required to obtain a search warrant for a place where the subject of the arrest warrant resides. Id. at 483. The Ninth Circuit rejected any contention that Underwood's rights were violated if law enforcement did not obtain a search warrant for a house where he did not reside. The Ninth Circuit explained, "A person has no greater right of privacy in another's home than in his own. If an arrest warrant and reason to believe the person named in the warrant is present are sufficient to protect that person's fourth amendment privacy rights in his own home, they necessarily suffice to protect his privacy rights in the home of another." Id. at 483-84 (citation omitted).

Much like Middleton does in his brief, Demetrius Pruitt, the defendant-appellant in United States v. Pruitt, 458 F.3d 477 (6th Cir. 2006), relied on a mashed up analysis of Steagald, Payton, and Minnesota v. Olson, 495 U.S. 91 (1990)[2] to argue law enforcement needed a search warrant to

[2] The point Middleton attempts to make with citation to Olson and Georgia v. Randolph, 547 U.S.

arrest Pruitt in his girlfriend's house. Pruitt told law enforcement he did not live in the house. The Court of Appeals split over whether law enforcement is required to have probable cause or just a reasonable suspicion to enter a third party's home to execute an arrest warrant on a subject. But this split was merely dicta to the unanimous determination that Pruitt's rights were protected by the arrest warrant and he lacked standing to contest the search of his girlfriend's house.

The Pruitt majority noted, "Steagold does not resolve the issue before us; namely whether officers may rely on an arrest warrant, coupled with the reasonable belief that the subject of the warrant is within a third-party's residence, to enter that residence to execute the [arrest] warrant." Id. at 481. The majority quoted the circuit's own precedent, to observe, "It would be illogical to afford the defendant any greater protection in the home of a third party than he was entitled to in his own home. That illogical result, however, is precisely what would happen if we accepted the defendant's contention that Steagald required a search warrant in this case." Id. at 482 (quoting United States v. Buckner, 717 F.2d 297, 300 (6th Cir. 1983)).

However, it was Judge Clay, in his concurring opinion, who truly undertook unraveling the Steagald/Payton/Olson knot Pruitt relied on. Judge Clay noted "The Supreme Court has held that Fourth Amendment interests are personal." Id. at 485 (citing Minnesota v. Carter, 525 U.S. 83, 88 (1998)). Therefore, Pruitt could only assert his own Fourth Amendment rights, and not the Fourth Amendment rights of his girlfriend, who was the homeowner. Id. Judge Clay considered Pruitt's reliance on Payton, observing, "[T]he Payton Court noted that a valid arrest warrant for the suspect

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103 (2006) is not clear. Middleton's trial counsel did not argue Middleton was an overnight guest as in Olson, or a resident as in Randolph. To the extent Middleton attempts to argue he should have received special protection under Olson, that issue was not raised below. State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

based on probable cause, would permit the police to enter a suspect's home to effectuate an arrest. . . . The Payton Court did not address the question (presumably because it was not before the Court) of whether entry with merely an arrest warrant would impinge on the Fourth Amendment interest of persons not named in the arrest warrant." Id. at 486.

Judge Clay then referred to Buckner's analysis of Steagald, noting, "The Buckner panel was presented with the precise question before the Court in the instant case: the police had a valid arrest warrant for a suspect, but no search warrant for the third party premises on which the suspect was actually found." Id. (citing Buckner at 298-99). Judge Clay noted the Sixth Circuit panel in Buckner distinguished Steagald, because in Steagald, the third-party homeowner and not the subject of the arrest warrant, challenged the search. Id. (citing Buckner). Judge Clay opined because Fourth Amendment rights are personal, an arrestee lacks standing to assert the homeowner's Fourth Amendment injury. Id. at 487 (citing Carter, 525 U.S. at 88).

Judge Clay then addressed Pruitt's assertion that Olson changed the application of Payton and Steagald to cases like Pruitt's. Judge Clay refuted this assertion because "the Olson decision did not purport to overrule Payton or Steagald . . ." Id. Instead, Judge Clay found, "Olson is entirely compatible with Payton and Steagald." Id. Judge Clay explained,

> After Olson . . . the courts recognized that some guests have Fourth Amendment interests while staying in the home of another akin to the homeowner himself. . . . It does not follow, however, that the Olson decision grants greater Fourth Amendment protections to overnight guests than those granted to homeowners' themselves. Under Payton, a valid arrest warrant is sufficient to protect the Fourth Amendment rights of the person named in the arrest warrant, even if that arrest takes place in his or her home. It would be incongruous to say that the overnight guest has greater Fourth Amendment protections in the home of another than he or she would have in his or her own home.

Id. (citing Buckner, 717 F.2d at 300). Ultimately, Judge Clay concluded, like the majority, that

because Fourth Amendment interests are personal, Pruitt lacked standing to challenge the search of the third party residence. Id. at 487-88.

The Eighth Circuit reached a similar conclusion with a briefer analysis, as follows:

> *Kaylor* maintains that the district court should have granted his motion to suppress the evidence seized at the time of his arrest because the police did not obtain a search warrant before entering the Lindgren home. Assuming that Kaylor has standing to raise this claim, we hold that the entry of the home did not violate Kaylor's Fourth Amendment privacy interests.
>
> Under Payton v. New York, 445 U.S. 573, 602-03, 100 S.Ct. 1371, 1388, 63 L.Ed.2d 639 (1980), the police could have entered Kaylor's own home without a search warrant to execute a warrant for his arrest if they had reason to believe he was inside. The arrest warrant would have sufficiently protected his Fourth Amendment rights. Id. Kaylor cannot claim any greater Fourth Amendment protection in the Lindgren home than he possessed in his own home. . . . Therefore, the possession of a warrant for Kaylor's arrest and the officers' reasonable belief of his presence in the Lindgren home justified the entry without a search warrant.

United States v. Kaylor, 877 F.2d 658, 663 (8th Cir. 1989) (citations except to Payton omitted).

Because Fourth Amendment rights are personal and because Middleton does not possess any greater Fourth Amendment protection in the trailer than his own residence, Middleton's claim his Fourth Amendment rights were violated fails. Of course, analysis need go any further than the application of the plain view exception to the warrant requirement because the narcotics and Middleton were in plain view of law enforcement before law enforcement entered the trailer, and Middleton's brief fails to challenge the trial court's ruling on that point. The trial court did not err in denying the motion to suppress and the issue was waived on appeal.

II.

Evidence that law enforcement was serving arrest warrants on Appellant was admissible res gestae evidence as it explained why several law enforcement officers went to the third party trailer. Further, the issue is not preserved for review because Appellant did not renew his *in limine* objection during the jury trial.

Middleton complains the trial court erred in allowing testimony that law enforcement came to the trailer to attempt to serve a warrant on Middleton. However, because the testimony explains why law enforcement officers who were not narcotic officers went to the trailer, the evidence is admissible res gestae and its probative value outweighs the danger of unfair prejudice. Further, the issue is not preserved for review.

First, the issue is not preserved. Middleton objected *in limine* to testimony concerning his warrants. R. pp. 7-17. However, before the jury, Middleton only objected on the grounds of hearsay when Officer Gorman was asked about the tip law enforcement received about Middleton (R. p. 56, lines 9-23), and did not renew his *in limine* arguments during Officer Gorman's testimony about going to the trailer to serve active warrants on Middleton (R. p. 70, lines 1-5).

A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Because Middleton failed to object in front of the jury to the res gestae testimony, this issue

is not preserved for this Court's review.

Further, the evidence was admissible as res gestae evidence because it explained why multiple law enforcement officers went to the trailer. Evidence of a prior bad act may be admissible under the res gestae theory where it is "an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

This Court noted the following:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence 'furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other' [and is thus] part of the res gestae of the crime charged."

State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005) (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)[3] (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980))); accord State v. Benjamin, 345 S.C. 470, 549 S.E.2d 258 (2001) (finding, in prosecution of armed robbery and murder at a Citgo, evidence of subsequent robbery at a Dodger's store, where defendant dropped his gun, was admissible under *res gestae* theory, as it was necessary to a full presentation of State's case); State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997) (in strong arm robbery prosecution, evidence that defendant offered his civilian captors dope to let

[3] *Overruled on other grounds by* State v. Giles, 407 S.C. 147, 54 S.E.2d 261 (2014).

him go was admissible as *res gestae* of crime); State v. Crim, 327 S.C. 254, 489 S.E.2d 478 (1997) (Evidence of defendant's larceny of car defendant drove when the accident leading to the felony DUI charge occurred was admissible as *res gestae* in prosecution for felony DUI); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (defendant's use of cocaine prior to robbery and murder admissible as the drug usage was inextricably intertwined with robbery and murder); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547, 552 (1991) (finding that evidence of a dead body in defendant's van tended to explain why the defendant shot the trooper when the trooper opened the van door).

When evidence is relevant under the res gestae theory, the trial court must still undergo a Rule 403 balancing test to determine whether the probative value is substantially outweighed by the danger of unfair prejudice. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014); Rule 403, SCRE. "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds 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." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012).

In the instant case, the evidence that law enforcement was attempting to find Middleton at the trailer to serve an outstanding warrant was admissible as res gestae because it provided necessary context to explain why law enforcement was trying to find Middleton and to explain why six or seven members of the SWAT team, armed with "big guns" surrounded the trailer. It also explains why Officer Gorman immediately focused his attention on Middleton, and the testimony further supports the accuracy of Officer Gorman's identification of Middleton as the man sitting on a sofa with narcotics in front of him and a digital scale in his lap. Finally, it also explains why law enforcement did not obtain a search warrant until an hour after Middleton was arrested and why the narcotics unit did not show up until after the residence was secured.

The probative value of the evidence was not outweighed by the danger of unfair prejudice. If not for the explanation that law enforcement was serving an outstanding warrant, the jury would be left wondering why such a large group of officers went to the trailer. Accordingly, it was only fair the prosecution be allowed to explain the level of law enforcement response to the trailer and explain why law enforcement was at the trailer in the first place when law enforcement un-expectantly uncovered evidence of crimes in progress. However, none of the witnesses testified to what charges were the subject of the arrest warrant.

Further, any error was harmless beyond a reasonable doubt. "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)). The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d

694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)).

The jury was obviously focused on the evidence concerning Middleton's possession of the narcotics found in his presence and not on warrants for unknown charges. The jury acquitted Middleton of a trafficking charge and found him guilty of only the lesser possession charge instead of PWID cocaine. Further, the evidence of guilt was overwhelming because Middleton was caught red-handed with drugs in front of him and he was actively cutting crack cocaine when law enforcement found him on the couch. Middleton had a digital scale on his lap. Because the evidence was overwhelming, any error is harmless beyond a reasonable doubt.

Further, Middleton's apology and request for mercy to the trial court eliminates the need for further review as it eliminates any doubt about the correctness of Middleton's conviction. State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) ("Any doubt about the correctness of [affirming the appellant's conviction] is eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge that he had participated in the robbery . . . . Further review of the record, therefore, is rendered unnecessary.").

CONCLUSION

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

Respectfully submitted,

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September 10, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2017-000837

THE STATE, Respondent,

vs.

KEVIN L. MIDDLETON, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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