STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge
Lower Court Case No: 2014-GS-02-01182; 2012-GS-02-00133;

Appellate Case No. 2016-001835

THE STATE,

Respondent,

v.

KELVIN JONES,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General
SC Bar #101443

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge
Lower Court Case No: 2014-GS-02-01182; 2012-GS-02-00133;

Appellate Case No. 2016-001835

THE STATE,

Respondent,

v.

KELVIN JONES,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General
SC Bar #101443

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. Appellant failed to preserve any objection to the admission of the cocaine by expressly waiving the objection when the cocaine was admitted.

II. The probative value of Appellant's statement made to the lead investigator, Sawyer, was not substantially outweighed by the danger of unfair prejudice.

III. While not preserved, Sawyer was properly qualified as an expert to explain the value of the seized cocaine.

IV. Brady does not require the State to produce law enforcement personnel records without some reasonable basis to believe there is information helpful to a defendant's case contained within.

STATEMENT OF THE CASE

Appellant was indicted at the January 2012 term of the grand jury of Aiken County for trafficking cocaine, 400 grams or more (2012-GS-02-00132), possession with intent to distribute (PWID) cocaine within the proximity of a school (2012-GS-02-00133), and possession of ecstasy (2012-GS-02-00134). (R. p. 602-09). The case was conflicted to the South Carolina Attorney General's Office (SCAGO) because Solicitor Strom Thurmond, Jr. and an assistant solicitor from the Second Circuit Solicitor's Office were doing a ride-along with law enforcement when Appellant's house was searched and the drugs were recovered. On August 11, 2014, a hearing was held before the Honorable Edgar W. Dickson on Appellant's motion to change venue and motion to suppress the drugs seized in the search. (R. p. 1-9). Judge Dickson granted Appellant's change of venue motion and denied the motion to suppress the drugs. (R. p. 10-12; p. 22-25).

Appellant proceeded to a trial by jury on February 17-19, 2015, in Dorchester County before the Honorable R. Lawton McIntosh. (R. p. 28). Appellant was represented by Alexandra M. Benevento and Bakari T. Sellers. The case was prosecuted by Megan B. Burchstead and Michael Douglas Ross of the SCAGO. Prior to the beginning of the trial, Appellant pleaded guilty to possession of ecstasy. (R. p. 68-73). Judge McIntosh deferred sentencing until the end of the trial. At the conclusion of trial, Appellant was found guilty of on both charges. (R. p. 458). He was sentenced to the minimum of 25 years' imprisonment on the trafficking in cocaine charge, to 10 years on the PWID within the proximity of a school, and to 1 year on the ecstasy charge, all to be served concurrent. (R. p. 610-12; p. 466).

A notice of appeal was filed on February 24, 2015, but it was discovered that a motion for a mistrial was pending. (R. p. 498-99). Judge McIntosh contacted both parties to advise that it

had come to his attention that the BEST bag containing the cocaine was possibly opened during jury deliberations. (R. p. 472-489). A hearing was held on this motion on April 16, 2015. After discussing the matter with the parties, Judge McIntosh ordered that an investigation be conducted by the State Law Enforcement Division (SLED) to determine if the BEST bag had been tampered with by the jurors. (R. p. 494). Appellant's appeal was dismissed without prejudice by consent. (R. p. 497). On April 4, 2016, Appellant then filed a motion for a new trial arguing that the State failed to disclose a complaint that had been filed against an investigator who testified during the trial. (R. p. 498).

A hearing was held on this motion on July 6, 2016 in Anderson County. Judge McIntosh issued an order denying both the motion for a mistrial and the motion for a new trial on August 29, 2016. (R. p. 553-59). A notice of appeal was filed on September 2, 2016. The initial brief of appellant was filed on April 9, 2018. This brief follows.

STATEMENT OF FACTS

On April 21, 2011, investigators with the Aiken Department of Public Safety (ADPS) executed a search warrant at Appellant's residence located at 462 Morgan Street. Over a kilogram of cocaine was discovered. The investigation began after investigators received a tip that there was a constant flow of short term visitors who frequented the residence. (R. p. 44). Acting on the tip, on April 18, 2011, investigators coordinated with Bill Martin, who was the Solid Waste Supervisor with the Aiken Department of Public Works, to have Appellant's trash collected as it normally would be and then brought to ADPS to be examined. (R. p. 44; SW Affidavit). Numerous items suggesting drugs were being sold out of the house were recovered: several twisted and torn baggies, empty cigar tube wrappers, cigars that had been torn open to remove tobacco, burnt remains of a cigar that contained a green leafy material, and mail addressed to the residence. (R. p. 587-88). The investigators then went to a magistrate, presented him with these facts, and obtained a search warrant to search the residence. (R. p. 587-88).

Captain Marty Sawyer set up in an undercover vehicle to surveil the residence from an adjacent position. (R. p. 115-116). Second Circuit Solicitor J. Strom Thurmond, Jr., along with an assistant solicitor, accompanied Sawyer in a ride-along.[1] (R. p. 115). Investigators coordinated with the Special Response Team (SRT) to do the initial safety sweep of the house. It was noted that the SRT's job was to secure the residence, not to conduct the search. (R. p. 122; 173; 193-194; 202). Sawyer watched as a man named Ricky Lloyd approached the residence, knocked on the door, and when no one answered, he left. (R. p. 116-117). Shortly thereafter, Sawyer saw Appellant approach the residence with a blue backpack that seemed to be filled with something heavy making it hang low. (R. p. 117-119). Lloyd then walked back to the house

[1] This was to allow prosecutors to see what police and investigators are up against and to get a real world feel for cases. (R. p. 115; 296).

where he entered. (R. p. 120). More people arrived at the house and also entered. (R. p. 120). Approximately 1 to 1.5 minutes later, the SRT breached the home after knocking and announcing their presence. (R. p. 176; 190; 204; 221-22). Members of the SRT heard a lot of movement and commotion after the knock, so they knew no one was coming to answer the door. (R. p. 176-77; 190; 204; 221-22). As the SRT was sweeping the house, Lloyd was caught attempting to flush cocaine and his driver's license down the toilet. (R. p. 158-59; 247; 340).

Appellant and the other occupants of the house were placed in investigative detention. (R. p. 47). Approximately $5,042 was found in Appellant's pants in a plastic grocery store bag in denominations of mostly twenty dollar bills. (R. p. 123; 243). Over a kilo of cocaine was located in the blue backpack that Appellant was carrying just minutes earlier. (R. p. 138; 145; 228; 301). Other items recovered at the house were a Smith and Wesson handgun and a pickle jar containing marijuana. (R. p. 137; 207; 227-28). Testimony was offered that the house was within a half mile of Pine Crest School. (R. p. 132-34).

ARGUMENT

I.

Appellant failed to preserve any objection to the admission of the cocaine by expressly waiving the objection when the cocaine was admitted.

Appellant argues the search warrant issued to search the residence located at 462 Morgan Street NW, Aiken, South Carolina lacked sufficient probable cause to believe that narcotics would be found in the house. This issue has been waived by Appellant because defense counsel expressly stated he had no objection to the introduction of the drugs. (R. p. 286). Regardless, the fact that the house had many short term visitors combined with the fact that drug paraphernalia and items commonly associated with drug dealing were recovered in the house's trash can, is certainly sufficient to justify the issuance of the search warrant for the residence.

How the Issue was Raised Below

Appellant filed a motion to suppress the drugs arguing that the search warrant lacked sufficient probable cause. (R. p. 1-9). A hearing on that motion was held before the Honorable Edgar W. Dickson on August 11, 2014. A transcript of that hearing is not available. (R. p. 560-61). In lieu of convening a reconstruction hearing, the parties have agreed to stipulate to a few points pertaining to the motion to suppress hearing. (R. p. 562-64). At the hearing, Appellant argued the search warrant affidavit lacked sufficient probable cause. Specifically, he argued the affidavit was deficient because it failed to "demonstrate the reliability factors of Detective Sawyer's sources." (R. p. 3).

The supporting affidavit presented to the magistrate was as follows:

> Det. Sawyer received complaints of short-term traffic at 462 Morgan St. NW that is consistent with the sale of narcotics. On April 18, 2011 Det. Medlin coordinated with Bill Martin, Solid Waste Supervisor with the Aiken Department of Public Works, to collect the trash from 462 Morgan St. NW. Mr. Martin did so on Monday, April 18, 2011, which is the normal trash collection day for that

> residence. Mr. Martin found the can and contents at the curb beside the driveway in a manner consistent with the trash being ready for collection. Mr. Martin brought the can and contents to Det. Medlin at ADPS headquarters. Det. Medlin and Det. Sawyer searched the contents of the can and found the following items: 1-the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3-empty cigar tube wrappers; 4-cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly); 5-mail address to 462 Morgan St NW Aiken, SC. Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence. See Attachment B for photographs of the items found.

(R. p. 596-601). Judge Dickson issued an order denying the motion to suppress dated October 20, 2014. The order found, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash." (R. p. 11).

At trial, Appellant attempted to renew his motion to suppress before the trial began. (R. p. 82-83.)[2] The objection was overruled. (R. p. 83). When the drugs were introduced to evidence, Appellant stated that he had, "No objection, Your Honor." (R. p. 286).

Discussion

A. Preservation

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). For an issue to be properly preserved for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court. State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the

[2] Judge Dickson heard the motion to suppress argument and issued the order denying the motion. Judge McIntosh presided over the trial several months after the motion was denied.

first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

Merely raising an argument *in limine* does not preserve an issue for appellate review. State v. Stokes, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct. App. 2000). Failure to object when evidence is offered constitutes a waiver of the right to object. State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997); see State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) ("A ruling *in limine* is not a final ruling on the admissibility of evidence. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review." (citations omitted)). Unless a contemporaneous objection is made at the time evidence is offered and a final ruling obtained, the issue is not preserved for further review. State v. Mueller, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995) ("Generally, a motion *in limine* seeks a pretrial ruling preventing the disclosure of potentially prejudicial matter to the jury. A ruling on the pre-trial motion is preliminary, and is subject to change based on developments at trial. Because the evidence developed during trial may warrant a change in the ruling, the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for appeal." (citations omitted)).

Significantly, if a party fails to properly object to an issue pursuant to our issue preservation requirements, the party is precluded from raising that issue on appeal. See State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) ("If a party fails to properly object, the party is procedurally barred from raising the issue on appeal."). However, even if a party properly raises an objection during trial and the objection is ruled upon, a party may still waive his right to argue error in regard to that objection on appeal under certain circumstances. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Amongst the circumstances under which waiver can occur, a party

waives an objection by indicating to the trial judge the party does not have an objection to an issue to which the party previously objected. See Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion *in limine* to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."); see also State v. Britt, 237 S.C. 293, 313, 117 S.E.2d 379, 389 (1960) ("The appellant is not in position to complain of [an exhibit's] introduction into evidence when he expressly consented thereto[.]"), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Likewise, a party can waive a previously-raised objection to an issue by subsequently conceding that issue to the trial judge. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal).

In this case, it is clear Appellant did not properly preserve this issue for review. Not only was no objection made when the drugs were offered for admission, defense counsel stated in response to the lower court asking whether he had an objection, "No objection, Your Honor." (R. p. 286). This is fatal to Appellant's argument. This issue not properly preserved because the lower court did not have a chance to rule upon the issue, and it was expressly waived. Therefore, this issue is not properly before this Court.

B. The search warrant affidavit contained sufficient probable cause to allow for the search of Appellant's home.

Even if this Court were to excuse the waiver and find the issue is preserved, it is without merit. The search warrant affidavit contained sufficient probable cause. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977). Generally, in order for a search to be reasonable under the Fourth Amendment, a law enforcement officer must obtain a search warrant prior to conducting the search. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014). In South Carolina, an officer seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-349 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant.").

In deciding whether to issue a search warrant, the issuing judge must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). The court should base its determination on the totality of circumstances and afford great deference to the issuing judge's probable cause determination. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in

indicia of probable cause as to render official belief in its existence entirely unreasonable.' " State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

An affidavit supporting a warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of probable cause. State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). The duty of a reviewing court is to ensure that the issuing magistrate had a substantial basis upon which to conclude that probable cause existed under the "totality-of-the-circumstances" set forth in Illinois v. Gates; Baccus, 367 S.C. at 50, 625 S.E.2d at 221.

Here, the affidavit set out the relevant facts and circumstances of the investigation which was sufficient to support the probable cause finding. Investigators received a tip that the house was receiving frequent visitors who only stayed for a short period of time. (R. p. 577). See United States v. Cavazos, 288 F.3d 706, 708 (5th Cir. 2002) (finding, among other things, the observation of twenty to twenty five people coming and going from the residence in a two and a half hour period as evidence giving rise to probable cause); United States v. Restrepo, 966 F.2d 964, 966-67 (5th Cir. 1992) (citing confidential tip and neighbor's information that a number of different cars pulled into the garage of the residence and then left, among other facts, as evidence creating probable cause for the warrant). There was a reasonable basis to believe that drugs would be found inside the house because drugs were already found in the house's trash can. See California v. Greenwood, 486 U.S. 35, 40-41, 108 S. Ct. 1625 (1988) (holding that defendants do not have an expectation of privacy in trash left for collection along a public street). In State v. Keith, the supreme court ruled that the evaluation of probable cause is based on a common sense determination of the totality of the circumstances. 356 S.C. 219, 225, 588 S.E.2d 145, 148. The

supreme court correctly explained: "In the case of drug dealers, evidence is likely to be found where the dealers live." Id. (citing United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986); State v. Scott, 303 S.C. 360, 362, 400 S.E.2d 784, 786 (Ct. App. 1991)).

There was certainly a substantial probability that drugs and contraband were present in the house since drugs were discarded in the trash can only three days beforehand. (R. p. 577). Appellant seems to argue that since the drugs and paraphernalia were discarded that it was erroneous to believe there would be more drugs or evidence of drug dealing in the house. Considering that drugs and paraphernalia were found in the trash can and that witnesses noted the frequent short term traffic in and out of the house, there was sufficient information set forth to support the magistrate's finding of probable cause. See Kaley v. United States, 571 U.S. 320, 337, 134 S. Ct. 1090, 1103 (2014) (recognizing probable cause "is not a high bar").

Furthermore, even if this Court were to find the lower court erred, nevertheless the good faith exception to the warrant requirement applies. Law enforcement acted in objective good faith reliance upon the order that was issued. "Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective good faith." [Leon, 468 U.S. at 922–923]." Messerschmidt v. Millender, 565 U.S. 535, 535, 132 S. Ct. 1235, 1245 (2012).

The Supreme Court determined the exclusionary rule should only "rarely" be applied to cases where officers reasonably relied upon subsequently-invalidated search warrants. Leon, 468 U.S., at 926. Specifically, the Supreme Court concluded suppression of evidence based on a subsequently-invalidated search warrant was only appropriate in four limited situations: (1) where the affiant misled the issuing judge by including false or misleading information in the

search warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the search warrant affidavit was " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]' " and (4) when a search warrant was so facially deficient in some technical respect the officer executing that warrant could not reasonably have presumed it to be valid. Id. at 923 (citation omitted). None of these factors are present here. Appellant argues the affidavit lacked any indicia of probable cause to believe that drugs or contraband would be found in the house. (IBOA, p. 14). The tip that the house received frequent visitors and that several items commonly used to packaged and sell drugs and the fact that actual drugs were found in the trash pull suggests that drugs were being sold out of the house. Thus, the good faith doctrine should apply.

II.

The probative value of Appellant's statement made to the lead investigator, Sawyer, was not substantially outweighed by the danger of unfair prejudice.

Appellant argues the lower court erred by admitting a statement made by Appellant directed towards Sawyer during the execution of the search warrant. Specifically, he argues the lower court erred in finding the statement was not the equivalent of a prior bad act. He also argues the statement's probative value was substantially outweighed by the danger of unfair prejudice.

How the Issue Was Raised Below

A pretrial Jackson v. Denno[3] hearing was held to determine whether Appellant's statement was made voluntarily. (R. p. 38-60). Sawyer testified at the hearing that Appellant stated, "Sawyer, Sawyer, I need to talk to you." (R. p. 48). Appellant was detained at the time and his statement was not made in response to any questioning. (R. p. 47-48). The lower court

[3] 378 U.S. 368 (1964).

found that there was no custodial interrogation and no evidence of any coercion on law enforcement's behalf. (R. p. 55). The lower court also noted Appellant's statement was made spontaneously. (R. p. 60). Appellant noted that they were not arguing his statement was a confession of any sort. (R. p. 56). Specifically, Appellant cited Rule 403, SCRE, and argued this testimony would prejudice his case by showing that Sawyer had previously arrested him. (R. p. 57). The State responded to the lower court's question of relevance, by arguing the statement goes to identity which is at the heart of the case. (R. p. 58). The State noted they had prepared Sawyer not to go into any arrests or any previous incidents or interactions he had with Appellant. (R. p. 58). The State further argued that officers know people in the community and just because Appellant knew Sawyer does not mean he is a convicted criminal. (R. p. 58-59). The lower court ruled that the statement was admissible, but noted that the closer the testimony got to Appellant having a criminal record, the more concerned he would be. (R. p. 95). The judge concluded by saying, "I'm from Anderson. I grew up knowing a lot of police officers who still call me by my first name. They never arrested me ever, at least not in recent years." (R. p. 96).

Sawyer was the State's first witness called to testify. (R. p. 110). He recalled that when he saw Appellant in the house, after the SRT had been through, that Appellant stated, "Sawyer, Sawyer, I need to talk to you." (R. p. 123). He testified that he knew Appellant and recognized him on sight. (R. p. 111-12).

Discussion

Rule 404(b), SCRE, does not apply to Appellant's statement. "The State cannot attack the character of the defendant unless the defendant himself first places his character in issue." Rule 404(a), SCRE; Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). "Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad

person." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 682 (1999). No mention of any act was ever made or testified to by Sawyer, so it is difficult to see how the lower court erred in admitting a prior bad act. Further, the jury was not asked to make any negative inferences regarding the fact that Appellant knew Sawyer. Appellant asks this Court to make the leap that because a defendant seemed to know an investigator prior to being arrested that he is guilty of some prior bad act. Appellant did not argue the statement was not relevant, thus our analysis moves to whether the lower court erred in overruling the objection made under Rule 403, SCRE.

The lower court properly found the probative value of Appellant's statement was not substantially outweighed by the danger of unfair prejudice. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct. App. 2008). Appellate courts use the abuse of discretion standard when reviewing a lower court's decision regarding Rule 403 and are obligated to give great deference to the trial court's judgment." Id.; See State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion).

Here, Appellant's statement was important to show that Sawyer knew Appellant and was able to identity him. The State used the statement to substantiate Sawyer's testimony that he recognized Appellant by sight and identified Appellant as the individual who was carrying the backpack into the house before the raid. This statement corroborated their prior knowledge of each other and rebutted the potential defense that Appellant was not the individual carrying the

backpack into the house. This was a significant piece of evidence. Just because Sawyer and Appellant knew each other prior to the incident, it does not mean that the jury would naturally conclude Sawyer had arrested him in the past or that he had a criminal past. The lower court was correct in not thinking the jury would jump to such conclusions. See State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] 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. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985) (finding an arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 ((1961) (finding testimony by a witness that Robinson told him that he was on the way to the probation office did not create an inference that Robinson was convicted of another crime) *overruled on other grounds by* Torrence. The lower court noted that growing up he personally knew a lot of police officers and that they knew him by name. (R. p. 96). This fact, alone, does not lead to the conclusion that Appellant had been arrested many times before. Importantly, the jury was never asked to draw any inferences or conclusions from the fact that the two knew each other by name. Likewise, no mention of any prior arrests or convictions was made. This situation does not present an exceptional circumstance to justify reversal. The lower court did not abuse its discretion by admitting Appellant's statement because the risk of unfair prejudice did not substantially outweigh the probative value of the statement.

III.

While not preserved, Sawyer was properly qualified as an expert to explain the value of the seized cocaine.

Appellant argues the lower court erred in admitting Sawyer as an expert to allow his testimony regarding cocaine valuation.

How the issue was raised below

Sawyer testified as the State's first witness and then was recalled at the conclusion of the State's case. (R. p. 110-149; 312-341). During his first time testifying, the State attempted to elicit testimony from Sawyer regarding the street value of the cocaine seized at the house. (R. p. 206-08). The lower court noted that the State had not yet introduced evidence proving the drugs found were actually cocaine and that the question seemed to call for a response only an expert can give. (R. p. 147-48). The lower court ruled the State would be allowed to recall Sawyer after the lab evidence was introduced which the State did as they then recalled Sawyer as its last witness. (R. p. 148; 312). The lower court stated that qualifying Sawyer as an expert in narcotics investigations was much too broad. (R. p. 316). The State noted that it only wanted to elicit the street value of the cocaine recovered to show that it was not feasible for one individual to control this much product. (R. p. 319). Sawyer ultimately testified that the cocaine recovered could be valued up to $65,000 in total if sold on a retail level. (R. p. 332-33).

Discussion

A. Preservation

First, this issue is not preserved. Appellant argues on appeal that Sawyer's testimony failed to satisfy Rule 702, SCRE. At trial, the only arguments made challenged Sawyer's qualification and his experience. (R. p. 320; 325-327). The lower court even stated that his ruling was based on Appellant's argument regarding Sawyer's experience. (R. p. 327-328). At no point

in the objection did Appellant argue that Sawyer's testimony would not "assist the trier of fact to understand the evidence or determine a fact in issue." (FBOA, p. 17). If an error is not presented to and ruled upon by the trial judge, it simply cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). To the contrary, Appellant only argued Sawyer lacked sufficient qualification to testify as a narcotics expert. Appellant did not challenge the subject matter of the testimony. See State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). This issue was neither raised nor ruled upon by the lower court and is therefore not preserved.

B. Merits

Appellant's argument that Sawyer's testimony did not satisfy Rule 702 is meritless. Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Sawyer's specialized knowledge of the drug trade assisted the jurors to understand the evidence and also went directly to a fact in issue. The State's case was partially based on the conspiracy element of trafficking in that Appellant was part of a larger conspiracy to distribute the cocaine.[4] Sawyer's testimony proved that the amount of cocaine was certainly not for

[4] S.C. Code § 44-53-370(e) provides: "Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or **conspires to sell**, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:

personal use and that anyone with that much cocaine would be conspiring with others to sell it. (R. p. 320-321). This limited testimony explained how the economics of drug dealing work. This is directly in line with the fact that Appellant had several thousand dollars in mostly twenty dollar bills directly on his person when he was detained. (R. p. 139). The State's theme was to follow the money. Appellant bought cocaine in a large quantity, had people working for him who would help sell it, and then he collected the profits. Sawyer's testimony clarified how much the cocaine was valued at and explained it was not typical for one person to control that much cocaine alone. On cross examination, defense counsel focused on the fact that there was no direct evidence presented of a conspiracy to sell the cocaine or that others were involved, only circumstance evidence. (R. p. 336-337).

Appellant further argues that since he was charged with trafficking and proximity, that valuation and packaging were not issues in the case. Appellant seems to overlook the fact that he was also charged with PWID cocaine within the proximity of a school. (R. p. 604-05; 610).

S.C. Code § 44-53-445(A) provides:

> It is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully **possess with intent to distribute**, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school . . .

(emphasis added). It is clear Sawyer's expert testimony was relevant and went directly to the "possession with intent to distribute" element of the proximity charge. It was part of the State's

---

(2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
(e) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars." (emphasis added).

theory that Appellant possessed the cocaine with the intent to sell it. It was certainly proper for this testimony to be admitted to support the State's contention that Appellant was involved in a conspiracy to sell the very large amount of cocaine recovered at his house. Furthermore, Appellant has suffered no prejudice in having this testimony admitted. Appellant's defense was based on the fact that the cocaine was not his and could have belonged to anyone in the house. The value of the cocaine and how drugs are typically sold in a hierarchy does not prejudice Appellant in the slightest.

IV.

Brady does not require the State to produce law enforcement personnel records without some reasonable basis to believe there is information helpful to a defendant's case contained within.

Finally, Appellant argues the lower court erred in failing to grant a new trial based on an alleged Brady[5] violation pertaining to a complaint in Detective Medlin's personnel file held by ADPS. Specifically, he argues that the complaint was admissible impeach evidence favorable to his defense. Confidential law enforcement personnel records are not Brady materials. The State is under no obligation to produce such records absent a showing that there is helpful information pertaining to a defendant's case contained within.

How the issue was raised below

Immediately before the trial began, Appellant presented the lower court with a proposed order granting him access to personnel records of seventeen (17) investigators from ADPS presumably involved with the case. (R. p. 61-62). Appellant argued he was entitled to these documents as they "go directly to the credibility and what's in them of each witness that we put forth. We have officers, and we are simply seeking their employment records to see. And it's by

[5] Brady v. Maryland, 373 U.S. 83 (1963).

no means a fishing expedition, but it will help us present a defense. And, if need be, go with the credibility of those witnesses." (R. p. 62). Appellant noted that he previously filed a Freedom of Information Act (FOIA) request for this information but had not received a response. (R. p. 62). The State opposed this request citing the fact that the request was nothing more than a "fishing expedition" and an end run around the rules of discovery. (R. p. 63-64). The State argued Appellant had no basis for such a wide-ranging request. (R. p. 64). The lower court noted that the officers have privacy rights in these records and that it was not appropriate for the parties to review them. (R. p. 65). The lower court then denied the motion and instructed the State to forward any disciplinary records to it for an *in camera* review (R. p. 66-67).

Appellant filed a motion for a new trial while a separate motion for a mistrial was pending. Appellant argued that the State failed to disclose a disciplinary complaint that had been filed against Detective Medlin on October 3, 2014. A hearing was held on the motion on July 6, 2016, where Appellant argued this was a clear Brady violation that warranted the granting of a new trial. (R. p. 519-520). Appellant alleged that a complaint was in Medlin's personnel file before the trial began and that it should have been turned over subject to his request. (R. p. 521). Appellant explained that he read about the complaint in the Washington Post in an article titled *Video Shows White Cops Performing Roadside Cavity Search of Black Man* and recognized Medlin's name. (R. p. 520). Appellant argued he would have been able to impeach Medlin with this complaint. (R. p. 521-522). The State argued the complaint was not exculpatory and was not material to Appellant's case. (R. p. 534-537). The State noted that at the time of trial this was merely an allegation where no disciplinary actions had been levied. (R. p. 540).

The lower court deferred its ruling and issued an order dated July 22, 2016, denying the motion for a new trial. (R. p. 553-59). The order found that the evidence was not favorable to the

defendant because it was not exculpatory and not admissible under Rule 609 or Rule 404, SCRE. (R. p. 553-59). The order made a point in finding that the complaint was suppressed by the State. (R. p. 553-59). It also found the complaint's allegations are not relevant to Appellant's case and that Rule 403, SCRE, would prevent any evidence regarding the complaint to be admitted. (R. p. 553-59).

Discussion

This Court should affirm the lower court's result even though it was based on partially erroneous analysis. South Carolina courts have long recognized the "right result, wrong reason doctrine." See Parnell v. Maner, 16 S.C. 348, 350 (1882) (holding a court will affirm if the result is correct but the reasoning is incorrect). While the lower court was correct to deny Appellant's motion for a new trial, it wrongly concluded that Brady even applied to ADPS's personnel records. Brady was not triggered by Appellant's far-reaching request for production because personnel records are not Brady material. See United States v. Akers, 374 A.2d 874, 878 (D.C. 1977) (reversing a trial court which ordered discovery of officer personnel records on the grounds that the records are not proper impeachment materials because they do not involved dishonesty or false statements and were not material to the defendant's case). The personnel records at issue are not subject to Brady absent a factual basis showing the records contained helpful information.

Appellant first made this overly broad request immediately before the trial was set to begin. (R. p. 64). This was a shot in the dark. Appellant's request neither cited any basis nor gave any reasons to show that any disciplinary records even existed in the files or related to Appellant's case. Appellant had absolutely no basis whatever to justify a request for the employment records of seventeen (17) employees of the ADPS. The request was nothing more

than a blind fishing expedition. Appellant had no foundation to believe that the personnel files contained anything helpful to the defense, not in the least anything exculpatory. It is not the rule that confidential personnel files of officers and investigators are routinely fair game for discovery absent some reasonable foundation. There must be something to precipitate the request and provide a factual predicate for an order to produce the entire personnel files of over a dozen law enforcement officials. It would take great time and resources to review each officer involved in the proceeding's personnel records. See Spicer v. Roxbury Correctional Institute, 194 F.3d 547, 555 (4th 1999) (holding that "Brady does not create a full-scale, constitutionally-mandated discovery right for criminal defendant. Such a rule would impose an oppressively heavy burden on prosecutors and would drastically undermine the finality of judgement." (citations omitted)). It is noteworthy that Appellant cites no authority allowing for the production of confidential personnel records. The lower court's finding that Brady applied to law enforcement's confidential personnel record absent some reasonable basis was erroneous.

Assuming Brady would require disclosure of this complaint, the lower court was correct in refusing to grant a new trial. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985).

Appellant failed to prove any of the elements. The complaint was in no way favorable to the defense of Appellant's case nor can it be considered material to Appellant's guilt. The lower court was correct in finding that any testimony on the complaint would only serve to inflame the passions of the jury and distract from the facts presented during the trial. The complaint arose from a completely separate set of circumstances and was in no way relevant to Appellant's case. The only avenue for admitting any testimony regarding the complaint would be through some sort of impeachment, but Rule 608(b)'s bar on the introduction of extrinsic evidence would prevent the complaint was being admitted. The complaint does not implicate Medlin's truthfulness or untruthfulness in any way either. In addition, the rules of evidence do not allow for the introduction of prior bad acts to show conformity with those acts. Rule 404(b), SCRE. In conclusion, even if the complaint had been produced, it would not have been admissible in Appellant's trial.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General
SC Bar #: 101443

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

BY: _____
ATTORNEYS FOR RESPONDENT

October 15, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge
Lower Court Case No: 2014-GS-02-01182; 2012-GS-02-00133;

Appellate Case No. 2016-001835

THE STATE,

Respondent,

v.

Kelvin Jones,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211 (b), SCACR.

Respectfully submitted,

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General
SC Bar #: 101443

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

BY: _____
ATTORNEYS FOR RESPONDENT

October 15, 2018