

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2022-000760

THE STATE,

Respondent,

vs.

ERIC EMANUEL ENGLISH,

Petitioner.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

“Whether the Court of Appeals erred in affirming Petitioner’s conviction for criminal sexual conduct with a minor where the trial court admitted test results showing Petitioner had gonorrhea and another man the minor accused of sexually assaulting her did not, where no one from the laboratory responsible for the analyses testified, since pursuant to State v. James, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971), test results offered to ‘connect a defendant directly with the commission of a crime’ ‘must be substantiated by the person who conducted the tests’?”

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals reversibly err by finding the trial judge properly admitted into evidence medical records that contained the results of testing conducted at the requests of English and another individual when those records, which were generated and kept in the regular course of Lexington Medical Center’s business and which contained the results of testing conducted solely for purposes of medical diagnosis and treatment, did not constitute inadmissible hearsay, were inherently reliable, and were nontestimonial in nature, which meant those records could validly be admitted even without the testimony of the analysts who conducted the testing?

STATEMENT OF THE CASE

In March of 2014, Petitioner Eric Emanuel English was arrested following an investigation into allegations he engaged in sexual intercourse with his biological daughter when she was just seven years old. In October of 2017, the Lexington County Grand Jury indicted English for one count of first-degree criminal sexual conduct with a minor. On January 8, 2018, a jury trial was commenced in the Lexington County Court of General Sessions with the Honorable Eugene C. Griffith, Jr., circuit court judge, presiding. English was not present at that time, and the trial proceeded forward in his absence. At the conclusion of the three-day trial, the jury convicted English as indicted. Following the verdict, the trial judge sentenced English and sealed the sentence. Subsequently, English was apprehended, and, on April 9, 2018, a sentencing hearing was conducted. During the hearing, the trial judge unsealed English's sentence and imposed a forty-year term of imprisonment. Thereafter, defense counsel moved for reconsideration of English's sentence, and a hearing was held on the motion on April 27, 2018. However, at the conclusion of the hearing, the trial judge declined to reconsider English's sentence. English then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following brief and oral argument—issued a published decision unanimously affirming English's conviction. State v. English, 436 S.C. 338, 872 S.E.2d 191 (Ct. App. 2022). Thereafter, English timely filed a petition for rehearing, and that petition was denied. English then filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted on December 15, 2022.

STATEMENT OF FACTS

On the morning of March 4, 2014, Nurse Lee Lamb was on duty in the health room at the elementary school where she worked when a seven-year-old female student (“Victim”) came to her for assistance with dirty underwear. (R. p. 54; pp. 82-84). In response, Nurse Lamb provided clean underwear to Victim, who had also come by the health room on the preceding day to seek help with pants that needed to be “fixed,” and advised Victim to tell her mother (“Mother”) what had occurred. (R. pp. 83-86).

A few hours later, Victim returned to the health room, reported her underwear were again dirty, and told Nurse Lamb “it” was hurting while referring to her “private area.” (R. p. 86). At that point, Nurse Lamb attempted to get in contact with Mother, but her attempt to do so was not successful at that time. (R. pp. 86-87).

Just over an hour after that, Victim once again returned to the health room and informed Nurse Lamb her “private area” was itching and still hurting. (R. p. 87). In response, Nurse Lamb again provided Victim with clean underwear and let her know Mother, who had returned Nurse Lamb’s earlier call, was going to try to leave work early in order to take her to the doctor. (R. pp. 87-88; p. 90).

Thereafter, when Victim got home from school later that day, Victim showed her dirty underwear to Mother and further revealed she had been sexually abused by English, who was her biological father.¹ (R. pp. 56-61). At that point, Mother brought Victim to the emergency department at Lexington Medical Center, and the personnel at that location quickly sent her to Palmetto Health Richland for a child sexual abuse examination. (R. pp. 97-98). Upon Victim’s

¹ Although English was Victim’s biological father, he did not live with Victim and Mother and, instead, lived in a separate home with his own mother, his mother’s boyfriend, his girlfriend, and another of his children. (R. pp. 56-57). However, prior to the disclosure of the sexual abuse, Victim regularly visited with English on the weekends. (R. p. 56; p. 61; p. 73).

arrival there, Nurse Gina Dyer-Goss—an expert in pediatric sexual examination—met with Victim, who reported she was “leaking” from her “private area” following a sexual assault that occurred a few days earlier. (R. pp. 91-92; p. 96; p. 99; p. 101). Nurse Dyer-Goss then conducted a physical examination of Victim and observed a thick, yellow-and-greenish discharge coming out of Victim’s vagina. (R. p. 102). She further observed redness and swelling in Victim’s genital area, and Victim reported she was experiencing tenderness and discomfort in that region of her body. (R. p. 102). As a result, Nurse Dyer-Goss collected samples of Victim’s blood and urine along with swabs from Victim’s vagina in order to check Victim for sexually-transmitted diseases, and she delivered the samples to the hospital’s laboratory for analysis. (R. pp. 102-104). Upon analysis, Victim’s urine sample tested positive for gonorrhea.² (R. pp. 118-119; pp. 232-240). Additional samples were then sent off to a different laboratory for further testing. (R. p. 104; p. 115; pp. 232-240).

On the following day, Dr. Katherine Atkinson, who was a board-certified pediatrician, conducted a follow-up examination on Victim. (R. pp. 124-126). During the examination, Dr. Atkinson found “a profuse amount of a green purulent vaginal discharge,” which prevented her from effectively determining whether there were any signs of trauma to Victim’s genitals. (R. p. 126; pp. 128-129). As part of the examination, Dr. Atkinson further reviewed Victim’s medical records from the hospital for purposes of medical diagnosis and treatment, and she ultimately diagnosed Victim with gonorrhea in light of her findings. (R. pp. 127-128). Based on that

² Later on during English’s trial, Dr. Henry Gilbert Potter, who was an expert in public health and preventative medicine, explained gonorrhea is a sexually-transmitted disease typically spread from a penis to a vagina, and he noted a seven-year-old child with gonorrhea would be presumed to have contracted it through sexual transmission. (R. pp. 155-157). Furthermore, he explained the incubation period for gonorrhea, which is treatable and curable, is typically two to five days from exposure. (R. pp. 159-160; p. 163).

diagnosis, Dr. Atkinson prescribed multiple antibiotics to Victim to treat the sexually-transmitted disease she had contracted.³ (R. pp. 128-129).

Meanwhile, on that same day, Jamie Stroman, who was Mother's live-in boyfriend at the time, went to the Swansea urgent care branch of Lexington Medical Center and personally asked to be tested for sexually-transmitted diseases. (R. p. 77; pp. 130-132; p. 231). Based on Stroman's request, a nurse practitioner collected samples from Stroman's body for testing purposes, and the ensuing analysis of those samples revealed Stroman did not have gonorrhea.⁴ (R. pp. 133-137; pp. 241-243).

Thereafter, on the following day, English went to the Lexington urgent care branch of the Lexington Medical Center on his own volition and similarly requested to be tested for sexually-transmitted diseases. (R. pp. 140-141; p. 146). In light of that request, Dr. Wesley Frierson, who was an emergency medicine physician, performed an examination of English, collected penile swabs in order to test for gonorrhea and chlamydia, and sent the swabs to the hospital's in-house laboratory for analysis. (R. pp. 142-143). As a result of the analysis, Dr. Frierson diagnosed English with gonorrhea. (R. p. 145; p. 244).

A few weeks after that, Victim was referred to a children's advocacy center, and she was interviewed there by Brooke Wymer, who was the center's director of clinical services. (R. pp. 63-65). During the course of the interview, Victim again disclosed she was sexually abused and indicated the sexual abuse occurred during a weekend visit to English's home.⁵ (R. pp. 65-66).

³ Had Victim not been treated for gonorrhea, the disease could have lasted for "quite some time" and resulted in permanent scarring. (R. p. 164).

⁴ Although Stroman did not have gonorrhea, the analysis established he had herpes. (R. p. 136).

⁵ In a subsequent interview, Victim revealed she was also sexually abused by Stroman on an earlier occasion. (R. pp. 70-71; p. 77; p. 231). Following that disclosure, Stroman admitted he

Subsequently, English was arrested and indicted for first-degree criminal sexual conduct with a minor. (R. p. 5; pp. 148-149; pp. 245-246). Following the issuance of the indictment, English's case was called to trial, he failed to appear despite having the requisite notice, and the trial proceeded forward in his absence.⁶ (R. p. 5; pp. 6-11).

Towards the beginning of English's trial, the solicitor advised the trial judge she intended to introduce medical records containing the results of the diagnostic testing conducted on the samples collected from Victim, English, and Stroman, and she asserted those records were admissible pursuant to the business record exception to the general rule prohibiting the admission of hearsay. (R. pp. 24-25). The solicitor further noted all the testing was done for medical treatment purposes, indicated the medical records containing the test results were kept in the ordinary course of business, and contended such records were inherently reliable in nature. (R. pp. 25-27). In rebuttal, defense counsel—while citing to the decision in State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971)—objected to the admission of the records unless the individuals who actually performed the testing were present to testify during trial. (R. pp. 27-28). Furthermore, defense counsel explained his objection to the records was specifically based on “hearsay” grounds. (R. p. 29). After considering the arguments of counsel, the trial judge indicated he was inclined to admit the records if a sufficient foundation was established for their admission. (R. p. 29). However, he expressly indicated his ruling was subject to change based on what was ultimately presented during trial and invited the parties to further argue the matter as the trial moved forward. (R. p. 29).

digitally penetrated Victim's vagina and was arrested. (R. pp. 38-39; p. 231). Thereafter, in March of 2017, Stroman was tried for and convicted of first-degree criminal sexual conduct with a minor based on his own sexual abuse of Victim. (R. pp. 38-39; p. 231).

⁶ By the time of trial, Victim was eleven years old. (R. p. 53).

Thereafter, during the course of trial, Victim recounted the details of the sexual abuse she suffered at English's hands, indicated English put his "private" into her "private" while she was on a weekend visit to his home when she was approximately six or seven years old, and noted he ejaculated during the incident. (R. pp. 56-60). Furthermore, Victim explained yellow-and-brownish "stuff" began to come out of her body subsequent to the sexual abuse, which ultimately led to her seeking help and revealing the abuse. (R. pp. 60-61).

In addition to that testimony, Wymer confirmed Victim disclosed the sexual abuse during a forensic interview, and a recording of the interview was admitted into evidence and played for the jury. (R. pp. 64-66; p. 69). Moreover, Nurse Lamb recounted the details of Victim's visits to the health room and requests for clean underwear, and the medical personnel who treated Victim after the sexual abuse was disclosed testified about their findings and observations in providing treatment to her, including in regard to the troubling symptoms she was exhibiting. (R. pp. 98-105; pp. 107-108; pp. 125-129). Furthermore, Dr. Atkinson testified she diagnosed Victim with gonorrhea during the course of treating her, and the medical records establishing Victim had gonorrhea were admitted into evidence—over defense counsel's objection—as business records after testimony was presented establishing they were kept in the ordinary course of the hospital's business, maintained for the patient's benefit, and carefully tracked to ensure accuracy.⁷ (R. pp. 113-117; pp. 119-120; pp. 127-128).

Beyond that testimony and evidence, Nurse Pamela Levi, who was a family nurse practitioner at Lexington Medical Center, recounted Stroman came to the center's Swansea

⁷ Notably, on appeal, English elected to abandon defense counsel's trial objection and *not* challenge the trial judge's ruling admitting the medical records containing the results of the analysis of the samples collected from Victim's body. (App. Br. pp. 1-14; Pet. for Cert. pp. 1-18, Pet. Br. pp. 1-15). As a result, the trial judge's ruling regarding those particular records has become the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (explaining unchallenged and unappealed rulings are the law of the case).

urgent care branch on March 5, 2014, and requested to be tested for sexually-transmitted diseases due to the fact he had engaged in unprotected sex two weeks earlier. (R. pp. 130-132). Based on Stroman’s request, Nurse Levi indicated samples were collected by another individual, Nurse Janice Black, and tested for a variety of sexually-transmitted diseases at Lexington Medical Center’s “main hospital.” (R. pp. 132-134). Nurse Levi further confirmed contemporaneous patient records were kept and maintained in the ordinary course of the center’s business of treating patients, and she affirmed she personally reviewed and verified Stroman’s test results once they were entered in the center’s record system. (R. pp. 134-135). At that point, the solicitor moved to admit a true and accurate copy of Stroman’s patient record containing his test results, and defense counsel objected. (R. pp. 134-136). However, the trial judge overruled the objection and admitted the results as a business record. (R. p. 136). Nurse Levi then confirmed Stroman tested negative for gonorrhea upon analysis as reflected in the results. (R. pp. 136-137).

Likewise, Dr. Frierson testified English—similar to Stroman—came to Lexington Medical Center’s Lexington urgent care branch and personally requested to be checked for sexually-transmitted diseases on March 6, 2014.^{8 9} (R. pp. 140-141). As a result of that request, Dr. Frierson indicated he collected swabs from English’s penis for testing purposes, sent the swabs to Lexington Medical Center’s in-house laboratory for analysis, and viewed and verified the results of the testing after it was entered in the center’s record system. (R. pp. 142-143). He further confirmed contemporaneous patient records were kept in the ordinary course of

⁸ By virtue of that testimony, the jury learned English rushed to get personally tested for sexually-transmitted diseases just after his seven-year-old daughter was diagnosed with gonorrhea. (R. pp. 127-128; pp. 140-141).

⁹ Notably, based on the address listed on English’s patient record, the urgent care branch English went to for the testing was located at the address of Lexington Medical Center’s main hospital campus. (R. p. 244).

Lexington Medical Center's business for the purpose of patient care, he stated he relied upon those records for treatment purposes, and he personally verified English's patient record containing the test results. (R. pp. 143-144). At that point, the solicitor moved to admit the record, defense counsel renewed his objection, and the trial judge overruled the objection while finding the record to be admissible as a business record. (R. p. 144). Dr. Frierson then confirmed English tested positive for gonorrhea. (R. p. 145).

Following the presentation of that testimony and evidence, the case was submitted to the jury, and the jury swiftly convicted English of first-degree criminal sexual conduct with a minor. (R. pp. 197-199). Subsequently, the trial judge sentenced English to a forty-year term of imprisonment for the conviction, and English promptly appealed, arguing—based on the decision in James—the trial judge erred by admitting the test results of the medical testing performed on him and Stroman. (R. p. 202; p. 208; p. 229; App. Br. pp. 1-14).

On appeal, the Court of Appeals affirmed. State v. English, 436 S.C. 338, 340, 872 S.E.2d 191, 192 (Ct. App. 2022). In affirming, the Court of Appeals first looked to the decision in James, which it correctly recognized was primarily premised on confrontation concerns. Id. at 345, 872 S.E.2d at 195. Because the medical testing related to English and Stroman was conducted by an in-house laboratory and because the results of that testing were nontestimonial in nature based on decisions that had been issued subsequent to the decision in James, the Court of Appeals concluded James did not require exclusion of the test results since their admission did not violate English's confrontation rights. Id. Next, the Court of Appeals looked to our evidentiary rules and concluded the test results were admissible pursuant to the business record exception to the general hearsay prohibition. Id. at 348, 872 S.E.2d at 196. As support for that conclusion, the Court of Appeals found the testimony of Dr. Frierson and Nurse Levi established

the test results “were records of diagnoses made at or near the time of testing ‘by, or from information transmitted by, a person with knowledge,’ and were kept in the course of a regularly conducted business activity.” Id. Furthermore, the Court of Appeals concluded the test results were presumptively trustworthy since the testing was performed by medical professionals solely for the purpose of diagnosing and treating their patients. Id. Accordingly, for all those reasons, the Court of Appeals found the trial judge properly admitted the test results over defense counsel’s hearsay-based objection. Id. at 348, 872 S.E.2d at 196-197.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); 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.”). Significantly, an appellate court will not reverse a trial judge’s decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge’s broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge’s evidentiary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ARGUMENT

The Court of Appeals correctly found the trial judge properly admitted into evidence medical records that contained the results of testing conducted at the requests of English and another individual because those records, which were generated and kept in the regular course of Lexington Medical Center’s business and which contained the results of testing conducted solely for purposes of medical diagnosis and treatment, did not constitute inadmissible hearsay, were inherently reliable, and were nontestimonial in nature, which meant those records could validly be admitted even without the testimony of the analysts who conducted the testing.

English contends the Court of Appeals erred by affirming his first-degree criminal sexual conduct with a minor conviction on appeal. As support for that contention, English maintains the Court of Appeals failed to recognize the trial judge purportedly committed reversible error by admitting into evidence the results of certain diagnostic medical tests. In maintaining the admission of the test results was erroneous, English—while relying on State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971), which has been effectively abrogated by subsequent changes in the law—alleges those results could not properly be admitted without the testimony of the analysts who actually conducted the tests because, without such testimony, the results were allegedly inadmissible as untrustworthy. To the contrary, the trial judge committed no error by admitting the medical records, which were kept in the ordinary course of Lexington Medical Center’s business and were generated for purposes of medical diagnosis and treatment, into evidence because: (1) they did not constitute inadmissible hearsay pursuant to now-controlling South Carolina law; (2) they were inherently reliable and trustworthy as medical records relied upon by medical professionals to treat their patients; and (3) they were non-testimonial in nature, which meant their admission did not violate English’s constitutional right to confrontation. As a result, the Court of Appeals correctly affirmed both the trial judge’s proper evidentiary ruling and English’s conviction on appeal. Both English’s conviction and the decision of the Court of Appeals should be affirmed.

More than fifty years ago, this Court issued a decision in State v. James, 255 S.C. 365, 369, 179 S.E.2d 41, 43 (1971), that addressed an issue involving the admissibility of testimony regarding the results of chemical testing conducted by a non-testifying third party. In that case, the trial judge permitted several doctors to testify to the arsenic content found in James’s husband’s urine based solely on a report prepared by an out-of-state laboratory over an objection from James’s defense counsel that was raised on hearsay grounds. Id. at 368, 179 S.E.2d at 42. Thereafter, James was convicted of two counts of administering arsenic poison with intent to kill, and she appealed. Id. at 367, 179 S.E.2d at 42. On appeal, this Court reversed. Id. at 372, 179 S.E.2d at 44. In reversing, this Court instructed:

Where the results of tests or analyses are offered to prove an essential element of a crime or connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses. Otherwise, the effect of their admission would be to allow a witness to testify without being subject to cross-examination, and thus deprive the accused of his constitutional right to be confronted with and to cross-examine the witnesses against him.¹⁰

¹⁰ In articulating that particular rationale, the James court cited to and primarily relied upon the decision of the Minnesota Supreme Court in State v. Matousek, 178 N.W.2d 604, 608 (Minn. 1970), which stated: “[A]dmissibility in evidence of business records depends upon the purpose for which they are offered. If they are offered to prove an essential element of the crime or connect the defendant directly to the commission of the crime, then they must be proved through persons having personal knowledge of the element or connection and such persons must be available for cross-examination. If, instead of producing the person who has personal knowledge, the state relies on documents made by such person or recorded testimony, the defendant has been denied his right to confront the witnesses against him.” See James, 255 S.C. at 370, 179 S.E.2d at 43 (citing approvingly to and relying upon the decision in Matousek as support for its ruling). Critically though, the Minnesota Supreme Court—subsequent to the decision in James—characterized the pertinent portion of the Matousek decision relied upon by the James court as being merely dicta, noted the cases from other jurisdictions *it* had relied upon in making the statements it did in Matousek had subsequently been overruled, and indicated what had been stated in Matousek no longer accurately reflected the position held in the other jurisdictions. In re Welfare of L.Z., 396 N.W.2d 214, 221 n. 5 (Minn. 1986).

Id. at 370, 179 S.E.2d at 43. Thus, this Court found the challenged testimony in James’s case to be inadmissible on hearsay-based and confrontation-based grounds.^{11 12} Id.

Significantly though, a few years after the decision in James was reached, the South Carolina General Assembly adopted the Uniform Business Records as Evidence Act. S.C. Code Ann. § 19-5-510. Pursuant to that legislation, “[a] record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.” Id. As a result, our legislature created a new method by which medical records could be admitted into evidence during a trial in South Carolina without running afoul of any then-existing hearsay prohibitions. See State v. Sarvis, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct. App. 1994) (“The Uniform Business Records as Evidence Act provides an exception to the hearsay rule for certain records of an act, event, or condition.”); Benchoff v. Morgan, 302 S.C. 116, 121, 394 S.E.2d 19, 22 (Ct. App. 1990) (“Generally, medical records are properly admitted under the Business Records as Evidence Act as an exception to the rule against hearsay.”); see also James F. Dreher, A Guide to Evidence Law in South Carolina 95-99 (Jon P. Thames ed., 1979) (explaining South Carolina should develop a broader view of the business records exception to the hearsay rule due

¹¹ Notably, since it was decided, James has only been cited by a South Carolina appellate court in a published decision on a single occasion, and, in that lone decision from 1985, James was merely referenced for the general proposition “[h]earsay testimony is inadmissible because the adverse party is denied the opportunity to cross-examine the declarant.” State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 150-151 (1985).

¹² Bizarrely, after finding the testimony about the test results was improperly admitted, the James court remanded the matter for entry of a judgment of acquittal. James, 255 S.C. at 371-372, 179 S.E.2d at 44.

to the enactment of the Uniform Business Records as Evidence Act and solely identifying civil cases when discussing the historic common law business records exception that had previously existed in our state prior to the adoption of the act).

Then, over twenty years after James was decided, the South Carolina Rules of Evidence were adopted and put into effect. See Rule 1103(b), SCRE (“These rules shall become effective September 3, 1995.”). Pursuant to those rules, records kept in the ordinary course of business are not excluded by the general rule prohibiting the admission of hearsay evidence. See Rule 803(6), SCRE (instructing the hearsay rule does not require the exclusion of “[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness”). Likewise, statements made for the purposes of medical diagnosis or treatment are similarly not excluded by the general hearsay prohibition. See Rule 803(4), SCRE (stating the hearsay rule does not require the exclusion of “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment”).

Beyond those changes and modifications to the law in South Carolina, the United States Supreme Court clarified what is guaranteed by the constitutional right to confrontation in a series of decisions issued well after the decision in James. See State v. Daise, 421 S.C. 442, 452-453,

807 S.E.2d 710, 715 (Ct. App. 2017) (discussing a series of United States Supreme Court decisions addressing the Confrontation Clause that began in 2004). Through that series of cases, the United States Supreme Court explained the constitutional right to confrontation is only applicable when out-of-court statements are testimonial in nature, which generally means the statements were taken for use at trial or made for the primary purpose of creating an out-of-court substitute for trial testimony. See Crawford v. Washington, 541 U.S. 36, 68 (2004) (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does [Ohio v. Roberts, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”); see also Michigan v. Bryant, 562 U.S. 344, 358-359 (2011) (instructing the Confrontation Clause does not prevent the admission of a statement “not procured with a primary purpose of creating an out-of-court substitute for trial testimony” as such statements are nontestimonial); Davis v. Washington, 547 U.S. 813, 821 (2006) (“Only [testimonial] statements . . . cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” (citation omitted)). Significantly, business records, which generally would include medical records, have consistently been recognized as and found to be nontestimonial in nature. See Bryant, 562 U.S. at 362 n. 9 (explaining both statements made for purposes of medical diagnosis and treatment *and* business records “by their nature” are “made for a purpose other than use in a prosecution”); Crawford, 541 U.S. at 56 (recognizing “by their nature” business records are not

testimonial); see also United States v. Ellis, 460 F.3d 920, 924 (7th Cir. 2006) (“[I]t is clear that statements embodied in a business record are nontestimonial.”); Berkley v. State, 298 S.W.3d 712, 715 (Tex. App. 2009) (“[M]edical records, created for treatment purposes, are not ‘testimonial’ within the meaning of Crawford.”).

In the case sub judice, English contends the Court of Appeals erred by affirming the ruling admitting the results of his and Stroman’s diagnostic testing for sexually-transmitted diseases that were contained in medical records from their personal visits to Lexington Medical Center. In making that particular contention, English—relying on the common law rule articulated in the 1971 James decision—maintains the test results could not properly be admitted or found to be trustworthy without the testimony of the analysts who actually performed the testing.

Importantly though, James, which was primarily decided based on concerns regarding the constitutional right to confrontation, has been—just as the Court of Appeals recognized—greatly undermined and effectively abrogated by changes to the law that have occurred in the five decades that have passed since it was originally decided. Compare James, 255 S.C. at 370, 179 S.E.2d at 370 (finding medical test results must be substantiated by the person who conducted the test in order to be admissible because “[o]therwise, the effect of their admission would be to allow a witness to testify without being subject to cross-examination, and thus *deprive the accused of his constitutional right to be confronted with and to cross-examine the witness against him*” (emphasis added)); with Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312 n. 2 (2009) (explaining “medical reports created for treatment purposes” are not considered to be testimonial); and State v. Cooper, 291 S.C. 351, 355, 353 S.E.2d 451, 454 (1987) (recognizing the right to confrontation is not absolute). Because James is now of questionable value due to

the changes in the law that have occurred since it was decided, the admissibility of the test results in English's case was not controlled by its holding and, instead, was controlled by the relevant evidentiary rules and current law regarding hearsay and the right to confrontation now in effect. See State v. Shands, 424 S.C. 106, 122, 817 S.E.2d 524, 532 (Ct. App. 2018) (finding a decision reached before South Carolina's evidentiary rules were adopted not to be controlling in a case arising after the rules were adopted); cf. State v. King, 422 S.C. 47, 66, 810 S.E.2d 18, 28 (2017) (“[T]he Georgia case cited by the Court of Appeals is now of questionable value as a state statute has been enacted to address this issue.”). And, when looking to that now-controlling law regarding hearsay and confrontation, the trial judge—just as the Court of Appeals correctly concluded—committed no error by admitting the records containing the results of the medical testing conducted at English's and Stroman's requests because those records were admissible pursuant to our state's evidentiary rules and law.

Initially, demonstrating the propriety of the trial judge's ruling, the testimony of Nurse Levi and Dr. Frierson established the challenged medical records were generated at or near the time English and Stroman were tested for sexually-transmitted diseases from information transmitted by a person with knowledge from Lexington Medical Center's in-house laboratory and were kept in the regular course of Lexington Medical Center's business of treating patients. See S.C. Code Ann. § 19-5-510 (setting out the statutory requirements for a business record to constitute competent evidence pursuant to the Uniform Business Records as Evidence Act); Rule 803(6), SCRE (articulating the requirements for the general hearsay prohibition's business record exception to be applicable); cf. Gen. Ins. Co. of Am. v. United States Fire Ins. Co., 886 F.3d 346, 358 (4th Cir. 2018) (“Rule 803(6) does not require that the records be created by the business having custody of them. And a qualified witness need not have personally participated in the

creation of the document, nor know who actually recorded the information. Rather, the qualified witness must be able to testify that the record was kept in the course of a regularly conducted business activity and also that it was a regular practice of that business activity to make the record.” (citations, internal quotations, and brackets omitted)). Relatedly, since the records contained the results of medical testing conducted for and relied upon for diagnostic purposes by medical professionals, those records were inherently reliable and trustworthy under the circumstances even without the testimony of the analysts who actually conducted the tests, and nothing was presented during trial indicating a lack of trustworthiness. See Rule 803(6), SCRE (explaining a legitimate business record should not be excluded as hearsay “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness”); Jamison v. Morris, 385 S.C. 215, 227, 684 S.E.2d 168, 174 (2009) (instructing the trustworthiness of medical records is *presumed*, which means the results of tests done for medical treatment purposes “are admissible without a chain”); Ex parte Dep’t of Health & Envtl. Control, 350 S.C. 243, 250, 565 S.E.2d 293, 297 (2002) (“The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment.”); see also Thomas v. Hogan, 308 F.2d 355, 361 (4th Cir. 1962) (“There is good reason to treat a hospital record entry as trustworthy. Human life will often depend on the accuracy of the entry, and it is reasonable to presume that a hospital is staffed with personnel who competently perform their day-to-day tasks. To this extent at least, hospital records are deserving of a presumption of accuracy even more than other types of business entries.” (footnote omitted)); State v. Garlick, 545 A.2d 27, 35 (Md. 1988) (holding the inherent reliability and trustworthiness of test results conducted for medical purposes permits the admission of such results *even without* the introduction of the testimony of the technician who actually performed the testing); cf. McLean

v. State, 482 A.2d 101, 104 (Del. 1984) (“[I]t is not improper for courts to take judicial notice of the fact that the business of a metropolitan hospital is such that records of this type are relied upon by the doctors in decisions of the utmost importance—the diagnosis and treatment of patients. Since these records are depended upon in connection with medical treatment which may involve life and death consequences, they may be even more trustworthy than other business entries. . . . The lab technician who entered the results of the blood-alcohol content test, as an employee of the Wilmington Medical Center, was under a strict obligation to perform the test properly and to accurately record the results. Such employees may be assumed to be fully aware of the possible consequences of inaccurate tests and faulty entries, and it is likely that they did their duties properly.”). As a result, the records were admissible pursuant to both our evidentiary rules and the Uniform Business Records as Evidence Act as contemporaneous records kept and maintained in the ordinary course of business even without the testimony of the analysts who actually conducted the testing. S.C. Code Ann. § 19-5-510; Rule 803(6), SCRE; see Commonwealth v. Nieves, 582 A.2d 341, 344 (Pa. Super. Ct. 1990) (concluding gonorrhea testing was “sufficiently similar to standard spermatozoa and alcohol tests to fall within” the business records exception to the hearsay rule); cf. State v. Martorelli, 346 A.2d 618, 621-622 (N.J. Super. Ct. App. Div. 1975) (rejecting Martorelli’s contention the physician or analyst who performed a blood alcohol test on him after he was brought to the hospital injured was required to testify in order for the results of the test to be admissible under the business record exception to the hearsay rule, noting that particular exception “was designed to eliminate the necessity of producing employees of an organization to establish a fact which experience has demonstrated to be trustworthy,” and explaining the fact evidence is admissible pursuant to the business records

exception does *not* prevent a party from attempting to attack the weight of the evidence by personally calling the individual who administered the laboratory test as a witness if so desired).

Likewise, the testimony presented during trial established the test results were solely generated for the diagnostic purposes of determining whether two Lexington Medical Center patients had any sexually-transmitted diseases at that time. Under such circumstances, they constituted statements made for the purposes of medical diagnosis and treatment, which were and are a type of statement not considered to constitute inadmissible hearsay. Rule 803(4), SCRE; see State v. Doerflinger, 285 P.3d 217, 224 (Wash. Ct. App. 2012) (recognizing a non-testifying radiologist’s findings were made for the purposes of diagnosis and treatment and, thus, did not constitute inadmissible hearsay).

Furthermore, Nurse Levi’s and Dr. Frierson’s testimony established the records were from medical tests performed not for any investigative or trial purposes but, instead, solely at the request of and for the purpose of diagnosing two patients who—on their own volition—came to Lexington Medical Center seeking to be tested for sexually-transmitted diseases. Critically, since the testing was conducted *solely for the purpose of medical diagnosis and treatment*, the medical records containing the results of the testing were nontestimonial in nature. See State v. Brewer, Op. No. 28120 (S.C. Sup. Ct. filed Oct. 12, 2022) (Howard Adv. Sh. No. 37 at 16, 24) (“In determining whether an out-of-court statement is testimonial, courts employ the primary purpose test, which consists of where the primary purpose of an out-of-court statement is to serve as evidence or an out-of-court substitute for trial testimony, the statement is considered testimonial.” (citation and internal quotations omitted)); cf. Doerflinger, 285 P.3d at 222 (holding a non-testifying radiologist’s findings were nontestimonial because “they were simply a confirmation of a condition about which the treating physician inquired in order to determine

appropriate treatment” as opposed to an out-of-court substitute for trial testimony). As a result, the admission of those nontestimonial results did not implicate or violate English’s constitutional right to confrontation. See Bryant, 562 U.S. at 358 (explaining the “basic objection” of the Confrontation Clause is “to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements *taken for use at trial*” (emphasis added)); cf. Brewer, Op. No. 28120 (S.C. Sup. Ct. filed Oct. 12, 2022) (Howard Adv. Sh. No. 37 at 16, 29) (“*[B]ecause* the NMS lab report is testimonial in nature, Brewer should have had an opportunity to cross examine the individual who performed the testing.” (emphasis added)).

For all those reasons, the trial judge did not abuse his broad discretion by admitting into evidence the medical records containing the results of diagnostic testing conducted solely at the requests—and for the benefits—of English and Stroman, and the Court of Appeals correctly affirmed that sound evidentiary ruling on appeal. See State v. Chisholm, 395 S.C. 259, 270, 717 S.E.2d 614, 619 (Ct. App. 2011) (“The rationale for admitting laboratory test results as business records is that if it is sufficiently trustworthy to be relied upon for medical treatment, it is sufficiently trustworthy to be admitted as a business record.” (citation and internal quotations omitted)); see also Melendez-Diaz, 557 U.S. at 312, n. 2 (2009) (recognizing medical reports generated for treatment purposes are nontestimonial in nature); cf. Jamison, 385 S.C. at 227, 684 S.E.2d at 174 (“Here, we have a situation where a sample was drawn at a hospital for medical purposes but never tested. Had the hospital performed Carlos’ BAL test as part of its medical treatment of him, the results would have been a part of Carlos’ medical record. Under Ex parte DHEC, those results would be presumed reliable as a business record regardless of a chain of custody.”). Both English’s conviction and the decision of the Court of Appeals should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the decision of the Court of Appeals and the judgment and conviction of the trial court should be affirmed.

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