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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

Appellate Case No. 2020-000534
Civil Action No. 2017-CP-10-05824

John Mayers, Appellant,

v.

Konan Henthorn, Respondent.

PETITION FOR REHEARING

Angeline M. Larrivee (S.C. #105466)
Roy T. Willey, IV (S.C. #101010)
Eric M. Poulin (S.C. #100209)
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Attorneys for Appellant

The Appellant, John Mayers, respectfully submits this Petition for Rehearing under Rule 221, SCACR.

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT

I. The Court erred in concluding that the trial court acted within its discretion in admitting (1) the prejudicial medical note and (2) evidence and testimony of beer cans at the crash scene.

STATEMENT OF FACTS

This case stems from a collision that occurred on May 17, 2016. (R. p. 125, lines 8-11). Respondent Konan Henthorn, who was driving a black Mustang, rear-ended bicyclist John "Chad" Mayers. (R. p. 125, lines 12-18). As a result, Mayers suffered serious permanent injuries. (R. p. 230, line 11-p. 233, line 12).

The matter went to trial on February 19–20, 2020. (R. p. 71). During that time, the court made the two evidentiary decisions that are the subject of this Petition for Rehearing.

The court denied Mayers' motion to exclude certain medical records, including the prejudicial statement, "Patient drank approximately two 24-ounce beers." (R. p. 156, line 14-p. 159, line 13).[1] The statement appeared in a note that also said the case "present[ed] as auto versus pedestrian"; "Patient ha[d] obvious deformity to his upper right arm"; "Patient . . . ha[d] blood coming from his head"; and "Patient report[ed] that his pain [was] in his upper right arm but [said] he [was] in shock." (R. p. 45, line 13-p. 46, line 6).

[1] Apparently, this part of the record was inadvertently omitted from the Record on Appeal. Respondent's Motion to Supplement Record on Appeal purports to correct this error, but the page included with the motion is evidently not what was presented to the trial court. The part of the record presented to the court refers to the plaintiff as female. (R. p. 45, lines 19-25; p. 158, lines 12-19). Thus, this Petition relies on the language that appears in the transcript.

The court held that that statement fell within a hearsay exception "based on the fact that it's for diagnostic purposes because of course if you've been drinking alcohol you cannot go under anesthesia . . . I know that's exactly why they noted that for the [medical] records." (R. p. 156, lines 15-21). Shortly afterwards, the court reaffirmed that even though the information was ultimately unnecessary for treatment, it still fell within the hearsay exception as a statement for diagnostic purposes. (R. p. 157, line 8-p. 158, line 1).

The court also held that the statement passed the balancing test required by Rule 403, SCRE. The statement was "more probative than prejudicial" "for contributory negligence purposes," the court stated, given that "the on-scene nurse" was "going to indicate that [Mayers] smelled of alcohol"; that there were "two beer cans at the scene"; and that testimony indicated that Mayers "was wobbly." (R. p. 156, line 22-p. 157, line 3).

These holdings gave short shrift to the panoply of errors in the record. The page that referenced the beers also called Mayers a female and a pedestrian, (R. p. 45, lines 17-25; p. 158, lines 12-19), and other parts of the record called him "Platinum Doe" and said that he was one-hundred-and-five years old. (R. p. 263, lines 13-18).

Similarly, the court denied Mayers' motion to exclude evidence (including pictures) of unopened beer cans at the scene of the collision. (R. p. 106, line 11-p. 110, line 6; R. p. 180, line 17-p. 182, line 13). It specifically held that the pictures were "more probative than prejudicial." (R. p. 182, lines 9-10). Evidently, it relied on evidence of impairment other than evidence of the cans. (R. p. 106, line 11-p. 110, line 6).

But this other evidence is more ambiguous than it may first appear. The court made its decisions during Respondent's testimony. By that point, Respondent (who was the first witness) had agreed that Mayers' "wobble" was normal, given that Mayers was twisting back to look over

his shoulder. (R. p. 142, line 21-p. 143, line 6). Respondent had testified, too, that the weather was bad at the time of the collision: not only was it "drizzl[ing]" at the time, but it had also rained "for a couple of hours" prior. Presumably, a wet surface can affect bicycling conditions.

Further evidence later revealed the court's initial decisions to be premature—and incorrect. Mayers clarified that any "wobbl[ing]" was due to the pressure needed to keep the bicycle upright (R. p. 228, lines 13-18) (presumably due to wet, or possibly uneven, terrain; in addition to Respondent's testimony, one witness testified that there was "a moderate rain," (R. p. 212, lines 10-15), and another testified that "[i]t was raining pretty hard," (R. p. 266, lines 7-8)).

And contrary to the court's suggestion, the beer cans were not evidence of earlier drinking; they were full, although at least one broke upon during the collision. (R. p. 184, line 6-p. 185, line 7; p. 199, lines 18-25; p. 219, lines 6-9; p. 271, lines 8-15).

Furthermore, although the "on-scene nurse" (in actuality, a bystander who happened to be a registered nurse, (R. p. 265, lines 17-21)) did say she smelled alcohol on Mayers' breath, (R. p. 275, lines 9-23), she later clarified that she could not be sure that the smell did not come from the spilled beer from the broken can, (R. p. 277, lines 1-7).[2] Mayers testified that he did not drink that day, and that he did not tell ER personnel that he drank that day. (R. p. 229, lines 5-6; p. 256, lines 14-21; p. 263, lines 1-9).

Despite the slender evidence of impairment, Respondent repeatedly elicited testimony on these prejudicial issues, and hammered the point home in closing. (R. p. 334, lines 17-25).

Ultimately, the jury found that Respondent was not negligent and returned a verdict in his favor. (R. p. 362, lines 2-7).

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[2] Another witness provided similar testimony and a similar clarification. (R. p. 218, line 22-p. 219, line 3; p. 221, lines 10-21).

This Court heard oral argument in March 2023, and it affirmed the trial court's judgment on May 11, 2023. This Petition for Rehearing follows.

STANDARD OF REVIEW

This Court reviews a trial court's evidentiary rulings for abuse of discretion, and may reverse the trial court's ruling if the trial court "clearly abused its discretion and the objecting party was prejudiced by the decision." *MacKenzie v. C&B Logging*, 436 S.C. 122, 128, 871 S.E.2d 185, 188–89 (Ct. App. 2022) (quoting *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 313, 628 S.E.2d 496, 514 (Ct. App. 2006)).

ARGUMENT

I. The Court erred in concluding that the trial court acted within its discretion in admitting (1) the prejudicial medical note and (2) evidence and testimony of beer cans at the crash scene.

A. *The medical note is inadmissible hearsay, and the evidence of unopened beer cans lacks probative value.*

1. Medical Note

This Court concluded that the trial court did not err in admitting the statement, "Patient drank approximately two 24 ounce beers today," under Rule 803(4), SCRE. Rule 803(4)'s hearsay exception permits "[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."

This conclusion was error. "Statements made for purposes of medical diagnosis or treatment are exempt from the rule against hearsay because of their general inherent trustworthiness: no sensible person genuinely seeking a doctor's help would speak falsely about his perception of his condition." *Glinyanay v. Tobias*, 436 S.C. 137, 145–46, 871 S.E.2d 193, 198

(Ct. App. 2022). Here, it is unclear whether the prejudicial statement relates to Mayers' "perception of his condition." The same medical note that contained the prejudicial statement contains several other statements, some of which could only be the physical observation of the writer (i.e., "obvious deformity to his upper right arm" and "blood coming from his head"), and one of which actually referred to what Mayers "report[ed]" and "[said]." The writer clearly knew how to attribute a statement to a patient, but he or she did not attribute the statement about the beers to Mayers. This leaves the statement's attribution in doubt, and may even suggest that the comment came from another source (perhaps from personnel who observed the cans on the scene).

Dellenbach v. Robinson, an Ohio Court of Appeals case, is on point. In *Dellenbach*, the defendant argued that certain medical records were admissible under Ohio's Rule of Evidence 803(4).[3] 95 Ohio App. 3d 358, 370, 642 N.E.2d 638, 645 (1993). However, the Court held that the records were inadmissible hearsay where the plaintiff denied the statement in question (and other statements in the records) and where "[t]he information on the records was recorded not by the plaintiff but, rather, by an unknown third party" who "did not identify statements made by the plaintiff." *Ibid.*

Here, Mayers denied the statement about the beer, and the information was recorded by an unknown third party who did not attribute that particular statement (although he or she clearly knew how to identify a patient's statement). Therefore, the statement was inadmissible hearsay.

In addition, even if the statement had been admissible, the trial court allowed defense counsel to use an improper mechanism to introduce the information.[4] "It is improper to cross-examine in a way that requires a witness to attack another witness's credibility." *State v. Benning*,

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[3] Identical in pertinent part to Rule 803(4), SCRE.

[4] Mayers raised this argument in his brief, but this Court did not address it.

338 S.C. 59, 63–64, 524 S.E.2d 852, 855 (Ct. App. 1999). Here, defense counsel's cross-examination required Mayers to attack the credibility of the declarant (who was presumably involved in Mayers' medical treatment) and was therefore improper.

2. Beer Cans

Furthermore, the pictures of and references to the ***unopened*** beer cans have not a shred of probative value for the comparative-negligence issue.[5] Unopened beer cans (unlike open, partially empty ones) reveal nothing about past alcohol consumption, though they may suggest an intent to imbibe in the near future. Nonetheless, this Court held that the trial court did not err in admitting evidence of unopened beer cans where there was (in the Court's view) evidence of impairment.

If this Court's analysis is correct, evidence of impairment can lend irrelevant, unrelated evidence enough probative value to overcome Rule 403's prejudice inquiry. Such an improbable result cannot be the law.

B. Assuming arguendo *that the medical note and evidence of the unopened beer cans were probative and otherwise admissible, the trial court ran afoul of Rule 403 in admitting them.*

The Uniform Act Regulating Traffic on Highways (Title 56, Chapter 5 of our legislative code) regulates both motor-vehicle operators and bicyclists. Although one section of that chapter, S.C. Code Ann. § 56-5-2930, establishes criminal penalties for operating a motor vehicle under the influence of alcohol or drugs, the chapter contains no corresponding duties or penalties for cycling under the influence. Therefore, bicyclists have no duty not to drink and ride. *Cf. Mayes v. Paxton*, 313 S.C. 109, 116, 437 S.E.2d 66, 70 (1993) (citations omitted) (finding that the plaintiff's "failure to wear a helmet [did] not constitute contributory negligence" where "the Legislature has

[5] The cans' only possible probative value would have been to explain why Mayers seemed to smell of alcohol.

enacted a statute requiring the use of helmets and has specifically elected not to extend that requirement to motorcyclists twenty-one or older.")

And because bicyclists have no duty not to drink and ride, evidence suggesting alcohol consumption is irrelevant without additional evidence of impairment. Additional evidence of impairment may add some probative value to alcohol-related evidence, but Rule 403, SCRE may still defeat admissibility if "the danger of unfair prejudice . . . or misleading the jury" "substantially outweigh[s]" proabtive value.

Three cases shed light on how much probative value may be necessary to survive Rule 403. In *Kennedy v. Griffin*, this Court held that the trial court erred in admitting a positive marijuana blood test where "the test did not measure the quantity of marijuana in [the plaintiff's] system or how recently [the] plaintiff had been exposed to marijuana"; "no evidence . . . indicated whether the marijuana was of such a level as to impair [the plaintiff's] judgment"; "[n]o marijuana was found in or near [the plaintiff's] truck and there was no testimony that [the plaintiff] smelled of marijuana"; and "[a]lthough witnesses noticed that [the plaintiff] delayed in applying his brakes, [his] actions did not necessarily suggest that he was driving under an impairment." 358 S.C. 122, 128–29, 595 S.E.2d 248, 251 (Ct. App. 2004). The Court held that "[u]nder these circumstances, evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury." *Id.* at 128.

Several years later, in *Lee v. Bunch*, the Supreme Court held that evidence of alcohol consumption was admissible where the plaintiff "admitted drinking shortly before the accident"; where expert evidence, based on a blood test, showed that the plaintiff's blood alcohol level was high enough to "negatively affect[] [the plaintiff's] judgment and his ability to multi-task, thus

impairing his motorcycle driving skills"; and where the plaintiff was speeding and "the impact occurred left of the center line." 373 S.C. 654, 658–59, 647 S.E.2d 197, 199–200 (2007).

Then, in *Johnson v. Horry County Solid Waste Authority*, this Court examined a case where the facts fell "between *Lee* and *Kennedy*." 389 S.C. 528, 534–36, 698 S.E.2d 835, 838–39 (Ct. App. 2010). Specifically, there was "more corroborating evidence than in *Kennedy*," where the toxicologist's "deposition testimony indicated Decedent had ingested marijuana and cocaine within hours of her death" and had a "blood alcohol level . . . well in excess of the limit for driving under the influence"; where "Decedent's ex-husband testified she was at a bar from approximately midnight until 4 a.m. the night of the accident"; where a police officer testified "that the circumstances of" the first part of the "accident indicated it occurred because she was intoxicated or possibly fatigued"; and where an expert "placed Decedent at least partially in the road at the time of impact." *Id.* at 535–36, 698 S.E.2d at 839.

However, in *Johnson*, "there [was] no 'smoking gun' like in *Lee*, when the accident inarguably occurred to the left of the center line"; there was "no expert testimony regarding how [the decedent's] judgment would have been impaired"; and "[a]lmost all the expert testimony placed Decedent within the safe zone at the time of impact." *Id.* at 536, 698 S.E.2d at 839. Therefore, the evidence in *Johnson* was "substantially more prejudicial than probative" and was thus inadmissible. *Johnson*, 389 S.C. at 534–36, 698 S.E.2d at 838–39.

Here, as in *Johnson*, the facts lie between *Kennedy* and *Lee*. The scene smelled of alcohol, and testimony also suggested that Mayers' breath smelled of alcohol; the medical record states "Patient drank approximately 2 24-ounce beers"; and Mayers appeared to "wobble" on his bike.

At the same time, none of these issues constituted an "inarguabl[e]" "smoking gun." No one was sure whether the smell came from Mayers' breath or from a broken beer can. Mayers

denied telling ER staff that he drank the beers, the medical records failed to attribute that statement to Mayers, and those same records contained other ludicrous errors. Respondent admitted that the "wobble" was not unusual for a bicyclist looking over his shoulder under normal circumstances, and here, the terrain was doubtless very wet. Furthermore, unlike *Kennedy*, *Lee*, or *Johnson*, there was no real medical evidence, such as a blood test. Under *Johnson*, then, the trial court abused its discretion in admitting the medical note and evidence of the beers.

C. The trial court's evidentiary errors prejudiced Mayers.

As the *Kennedy* line of cases suggests, evidence of alcohol consumption has a strong tendency to prejudice a jury. Pictures of and references to alcohol at a crash scene are calculated to inflame a jury, given widespread public awareness of "drunk driving." And the medical note is even more prejudicial, because a jury is likely to deem statements "inherent[ly] trustworthy" if a patient allegedly made them for medical diagnosis or treatment. *See Glinyanay*, 436 S.C. at 145–46, 871 S.E.2d at 198.

Individually, these error seriously prejudiced Mayers. Combined, they cost him his right to a fair trial. Now, they mandate reversal.

CONCLUSION

For the foregoing reasons, and for any other reason that may be evident from the record, the jury verdict should be reversed, and the case should be remanded for a new trial.

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Respectfully submitted,

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John Mayers, Appellant,

v.

Konan Henthorn, Respondent.

PROOF OF SERVICE

Pursuant to Rule 262(c), SCACR, I certify that I have served Appellant's Petition for Rehearing on Respondent by Electronic Mail and placing a copy in the U.S. Mail, postage prepaid on May 25, 2023, addressed to Respondent's attorneys of record, William Joseph Horvath of Turner Padget Graham & Laney, PA, PO Box 22129, Charleston, SC 29413 and Michael T. Coulter of Clarkson, Walsh & Coulter, P.A., PO Box 6728, Greenville, SC 29606.

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Respectfully submitted,

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May 25, 2023

<u>VIA U.S. MAIL and E-MAIL ctappfilings@sccourts.org</u>
The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
PO Box 11629
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RE: *John Mayers v. Konan Henthorn*
Case No.: 2020-000534

Dear Ms. Kitchings:

Attached for filing, please find Appellant's Petition for Rehearing, and Proof of Service. A check in the amount of fifty (50) dollars for the filing fee is arriving under separate cover. Please let us know if you need any additional information.

Sincerely,

s/ Angeline Larrivee

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Cc: William J. Horvath
Michael T. Coulter