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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2023-001578

John Alexander Webb.....Appellant.

vs.

The State.....Respondent.

FINAL BRIEF OF APPELLANT JOHN ALEXANDER WEBB

Lacey Thompson
Thompson Defense Firm
Attorney for the Defendant
604 16th Ave. North
Myrtle Beach, S.C. 29577
Phone: 843-444-6122
lthompson@grandstrandlaw.com

Attorney for Appellant Alexander John Webb

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in denying Appellant Webb's motion for directed verdict where Appellant Webb was charged with failing to keep or produce records pursuant to S.C. Code Section 44-53-390(a)(4), but the State failed to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping requirements.....5

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STATEMENT OF THE CASE

Appellant Webb was indicted for three violations of the drug distribution laws contained in S.C. Code Section 44-53-390(a)(4), which states:

> (a) It is unlawful for a person knowingly or intentionally to... (4) furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed *under this article*, or any record required to be kept *by this article*... (emphasis added).

Appellant Webb proceeded to trial on April 23, 2019. At the end of the State's case, Appellant Webb moved for a directed verdict based on the State's failure to reference any statute within Title 44, Chapter 53, Article 3 of the S.C. Code of Laws Ann. (1976), as amended, any federal law, or any rule issued by the Department of Health and Environmental Control (DHEC) as required by S.C. Code Sections 44-53-

390(a)(4) and 44-53-340. (R.p. 219-224). The Trial Court denied Appellant Webb's motion for directed verdict. (R.p.224).

After Appellant Webb rested his case without offering any evidence, Appellant Webb renewed his motion for directed verdict. (R.p. 231, lines 11-13). The Trial Court may or may not have ruled on Appellant Webb's renewed motion for directed verdict at that time. (R.p. 231). [1]

Appellant Webb was found guilty of all charges and the Trial Court sentenced Appellant Webb to concurrent sentences of one year, suspended on service of 90 days to be served on weekends and one year probation to be terminated upon completion of 240 hours of community service. (R.p. 272, line 17).

After the jury's verdicts were returned but before the sentences were given by the Court, Appellant Webb again renewed his motion for directed verdict, stating, "I need to renew my motions..." (R.p. 264, line 6). The Trial Court responds by saying, "The motion is noted for the record and I'll give you 10 days to prepare your motion." (R.p. 264, lines 9-11 through p. 280, line 23).

Appellant Webb then filed a Motion for New Trial and/or Judgment in Arrest of Verdict. (R.p. 19-20). Following a hearing, the Trial Court granted the Motion in Arrest of Judgment and entered verdicts of not guilty but did not rule on Appellant Webb's Motion for New Trial. Order Granting Motion in Arrest of Verdict. (R.p. 1-8). The State's

[1] The Trial Court's Order Granting Motion in Arrest of Verdicts states that "the Defendant renewed his motion for Directed Verdict on the grounds stated above which was also denied." (R.p. 4). In the transcript, Appellant Webb's trial counsel states, "Your Honor, at this time the defense rests. And we would renew our motion for directed verdict, we understand the Court's ruling." (R.p. 231, lines 11-13). The Trial Court then states, "Very good," and continues to address the jury prior to closing arguments. (R.p. 231, line 14).

Motion to Reconsider was denied by the Trial Court in a written Order. Order Denying Motion to Reconsider. (R.p. 13).

The State then appealed the trial court's decision to grant Appellant Webb's motion in arrest of judgment. In an unpublished opinion, on February 15, 2023, this Court granted the State's appeal, finding that the trial court erroneously relied on the sufficiency of the evidence against Appellant Webb to grant the judgment in arrest of verdict and remanding the case for the trial court's consideration instead of Appellant Webb's Motion for New Trial. State v. Webb, 2023-UP-059, Appellate Case 2020-000081 (S.C. App. Feb 15, 2023).

Upon remand, the case was heard by a different judge, as the original judge was no longer available, and the Court denied Appellant Webb's Motion for New Trial. (R.p. 362-386).

Appellant Webb asked the Court to grant his Motion for New Trial based upon 1) the State's repeated burden shifting throughout trial, 2) the State's failure to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control (DHEC), or any federal law setting forth record keeping requirements, and 3) the trial court's failure to instruct the jurors on the record-keeping requirements of Article 3, DHEC regulations, and federal law. (R.p. 378, line 14 through p. 380, line 23).

Appellant Webb now appeals his conviction on the grounds stated below, and requests that this Court grant his appeal, reverse the convictions, and remand his case

with instructions to grant Appellant's 1) directed verdict or 2) Motion for New Trial as the Court deems appropriate.

ARGUMENT

I. **The Trial Court erred in denying Appellant Webb's motion for directed verdict where Appellant Webb was charged with failing to keep or produce records pursuant to S.C. Code Section 44-53-390(a)(4), but the State failed to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping requirements.**

The Trial Court erred in denying Appellant Webb's motion for directed verdict. Appellant Webb was indicted for three violations of the drug distribution laws contained in S.C. Code Section 44-53-390(a)(4), which states:

> (a) It is unlawful for a person knowingly or intentionally to… (4) furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed *under this article*, or any record required to be kept *by this article*… (emphasis added).

Section 44-53-340 expressly limits the record-keeping requirements to those provided in Article 3 of Title 44, federal law, or additional regulations promulgated by DHEC:

> Persons registered to manufacture, distribute, or dispense controlled substances under this article shall keep records and maintain inventories in conformance with the record-keeping and inventory requirements of Federal law and with any additional rules the Department issues.

The State, however, failed to reference, in testimony or other evidence, any record keeping requirements contained within Article 3 of Title 44, any rule issued by DHEC setting forth record keeping requirements, or any federal law setting forth record keeping requirements. It would have been impossible for the jurors to determine that Appellant Webb violated the record-keeping requirements of S.C. Code Sections 44-53-390(a)(4) and 44-53-340 when the State at no point instructed the jurors as to what record keeping requirements were mandated by the relevant laws and regulations.

During pretrial motions, defense counsel argued that the Court should exclude any testimony regarding "standard of care" or orientation materials from Appellant Webb's medical residency because the statute expressly states that violations are limited to the requirements contained within Article 3 of Title 44, any rule issued by DHEC setting forth record keeping requirements, or any federal law setting forth record keeping requirements. (R.p. 96, line 13 through p. 112, line 12).

The Trial Court agreed, suggesting that the State simply publish to the jurors any DHEC regulation that the State alleges Appellant Webb had violated. The Trial Court stated, "If it's a DHEC regulation just publish the regulation," (R.p. 99, lines 14-15), and "it's not violative of the language unless it's required to be kept or filed *under this article* or a record required to be kept *by this article*." (R.p. 103, lines 7-9 (emphasis added)).

At no point during the trial did the State publish a DHEC regulation or even reference a DHEC regulation, statute under Article Three, or federal law to inform the jurors as to what record keeping requirements the State alleged Appellant Webb violated.

Directed Verdict Motion

Appellant Webb made a timely motion for a directed verdict on the grounds that the State did not introduce any evidence of state or federal laws or regulations regarding the record-keeping requirements, (R.p. 219, line 13 through p. 224, line 24), and renewed his motion for a directed verdict after the defense rested their case. (R.p. 231, lines 11-13).

In response to the directed verdict motion, the State points out that Investigator Strickland testified that registered practitioners are supposed to keep records, and says, "that goes directly to the heart of the statute itself:"

> With regards to that specific objection by Mr. Humphries, although that regulation might not have been specifically quoted to his liking, it was testified to by Investigator Strickland with regards to what registered practitioners are supposed to do, what they're required to do with keeping the records. That goes directly to the matter of the statute itself, Your Honor, where the State is of the position that this defendant failed to produce and then omitted any material information from those records, that goes hand in hand with Investigator Strickland's testimony of what was required.

(R.p. 221, lines 10-20).

The State goes on to explain:

> Pharmacist Kate Birringer… also elaborated that she also had to keep a record as a practitioner and that she would hope that a doctor would as well, insinuating that that's what a practitioner is supposed to do. That is directly from regulation 602(b) with DHEC, Your Honor. So, although not directly quoted in testimony it was referenced from the witness stand.

(R.p. 221, line 25 through 222, line 2).

In arguing against a directed verdict, the prosecutor says that Investigator Strickland testified "with regards to what registered practitioners are supposed to do, what they're required to do with keeping the records," and says, "[t]hat goes directly to the matter of the statute itself," *without identifying any specific testimony by Investigator Strickland that explained the record-keeping requirements contained in state or federal laws or regulations*. (R.p. 221, lines 10-20).

Similarly, the prosecutor says that a pharmacist *insinuated* "what a practitioner is supposed to do" when she "elaborated that she also had to keep a record," and "[t]hat is directly from regulation 602(b) with DHEC." The pharmacist did *not* testify about the record-keeping requirements for physicians, however, or even "insinuate" a physician's specific record-keeping requirements through her testimony. (R.p. 221, line 25 through p. 222, line 2).

During defense counsel's argument for directed verdict at the close of the State's case, the Trial Court inquired of the State as to whether "any Federal statute or

regulation has been referred to," and the State responded without identifying any federal statute or regulation that was referred to:

> Your honor, with regards to that objection by defense, we would submit Investigator Strickland's testimony that his role in DHEC is equivalent to the DEA, that's based off State regulations, based off Federal law. And that does bring it under that purview...
>
> ...the State would submit that when Investigator Strickland referred to his job capacity as a DHEC agent, that his job is based off Federal law in the capacity of what he does investigating, and the likeness of a DEA agent which is based off Federal rules, regulations, and statutes. All of the testimony, Your Honor, goes to 44-53-390, Section (a) to further prove that this defendant knowingly and intentionally omitted keeping the records.

(R.p. 223, line 15 through p. 224, line 10).

The prosecutor reviews the testimony of the State's witnesses in closing, but he is reviewing testimony about the requirements under Appellant Webb's contract with the residency program and not state or federal law or regulations. The prosecutor tells the jurors that Appellant Webb was not permitted to moonlight, for example, which is solely a requirement of his employment contract with the residency program and is unrelated to any state or federal law or regulation. (R.p. 234, lines 9-12). The prosecutor also implies to jurors that they should convict Defendant because he did not comply with his training requirements for the residency program. (R.p. 236, lines 9-19).

The prosecutor, never identifying any actual record-keeping requirements from state or federal law or regulations, goes on to urge jurors to convict Defendant because he "moonlighted,' which "shows another rule that this Defendant broke," (R.p. 234, lines 11-12), because he wrote prescriptions that were "unusual" based on the time they were called in, (R.p. 235, lines 2-5), because the prescriptions he called in were for "heavily abused drug[s]," (R.p. 235, lines 6-12), and "to protect the patient[s]," (R.p. 237, lines 18-25).

Investigator Strickland's Testimony

Investigator Strickland did not testify as to any specific record-keeping requirements contained in state or federal law or DHEC regulations. He incorrectly testified that *there are no specific guidelines as to documentation*, without referencing any specific requirements from Article 3 of Title 44, a DHEC regulation, or federal law:

> We at the Board of – at DHEC don't have any specific guidelines as far as documentation, just has to be documented. It can be a memorandum of such as long as the document is readily available and upon request provided to inspector, no requirements going forward.

(R.p. 199, line 17 through p. 200, line 3).

Investigator Strickland goes on to state that the Bureau of Drug Control requires physicians to maintain records for two years, and states that it is "against the law" for a physician to fail to document or to lose their documentation:

Bureau of Drug Control requires two years on documentations, other may – the Medical Board may require more but as far as the Bureau of Drug Control we require two years.

(R.p. 201, lines 5-17).

Although Investigator Strickland testified as to some of what is required for licensing by LLR and the Board of Medical Examiners (which should have been excluded per the trial court's ruling on the State's motion in limine), at least one requirement of the Bureau of Drug Control (that a record must be kept for at least two years), and some of the record keeping requirements specific to pharmacists, neither Investigator Strickland nor any other witness provided testimony as to what the specific record keeping requirements are for physicians under Article 3 of Title 44, a DHEC regulation setting forth record keeping requirements, or any federal law setting forth record keeping requirements.

The jurors were not informed as to what specific records must be kept and what record keeping mechanism must be used, if any, and, therefore, could not have determined that Appellant Webb violated the specific requirements of Article 3 of Title 44, federal law, or state or federal regulations.

Viewing the evidence in the light most favorable to the State, there was no substantial evidence introduced by the State in this trial "which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced:"

> However, when ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926. Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.

State v. Bennett, 415 S.C. 232, 236-237, 781 S.E.2d 352 (S.C. 2016).

There was *no* testimony during the trial that referenced what specific records must be kept under Article 3 of Title 44, a DHEC regulation setting forth record keeping requirements, or any federal law setting forth record keeping requirements, how those records must be created and maintained, or how Appellant Webb violated the specific record keeping requirements of Article 3 of Title 44, any DHEC regulation setting forth record keeping requirements, or any federal law setting forth record keeping requirements,

The jurors in this trial were asked to find Appellant Webb guilty of violating record-keeping requirements, but they were not told what those record-keeping requirements are. Taking the evidence in the light most favorable to the State, there

was no evidence presented that was "sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt," and the Trial Court should have granted a directed verdict in Appellant Webb's favor.

Appellant Webb was Convicted of Violating the Terms of His Residency Contract

Although the State's witnesses did not inform the jurors of the specific record-keeping requirements contained in Article Three, DHEC regulations, and federal law, they did provide irrelevant information about the terms of Appellant Webb's residency contract, and the prosecutor, in closing, urged jurors to convict Defendant because he "moonlighted," which "shows another rule that this Defendant broke," (R.p. 234, lines 11-12), because he wrote prescriptions that were "unusual" based on the time they were called in, (R.p. 235, lines 2-5), because the prescriptions he called in were for "heavily abused drug[s]," (R.p. 235, lines 6-12), and "to protect the patient[s]," (R.p. 237, lines 18-25), all of which were improper bases for a conviction and unrelated to any specific record-keeping requirements contained in Article Three, DHEC regulations, or federal law.

The prosecutor reviews some of the requirements of Defendant's contract with the residency program in his closing argument, but not the relevant state or federal laws or regulations. The requirement of not moonlighting, for example, is a requirement of his employment contract with the residency program and is unrelated to any state or federal law or regulation. (R.p. 234, lines 9-12). The prosecutor tells jurors that Defendant did not comply with his training for the residency program. (R.p. 236, lines 9-19).

Pretrial, the State made a motion in limine asking the Court's approval to introduce these unrelated employment terms, and the Court denied the State's motion. The State argued that it should be able to introduce testimony by physicians to put "into contexts [sic] for a jury from a practical standpoint what a physician is allowed to do, what they're not allowed to do, what they're supposed to do." (R.p. 111, lines 2-12).

Appellant Webb objected to the testimony under Rule 404 because "they are offering testimony about a crime or an alleged crime for which he is not indicted, which then goes back to 404 and 404(b)" (R.p. 113, lines 11-17) and noted that "he's indicted under a particular code section 44-53-390, which craves reference of 44-53-340. But it does say in plain language that the record keeping requirements -- it references the record keeping requirements of that article, which is article 3. That is the plain language of the statute without question. So that's what he has to have violated in order to be guilty of this statute, not some other standard of care." (R.p. 125, lines 15-24).

Section 44-53-390 only references 1) Article 3, 2) DHEC regulations, and 3) federal law. It does not reference a standard of care, a doctor's employment contract, or any other source of record-keeping requirements.

The Trial Court agreed, suggesting that the State simply publish to the jurors any DHEC regulation that the State alleges Appellant Webb had violated. The Trial Court stated, "If it's a DHEC regulation just publish the regulation," (R.p. 99, lines 14-15), and "it's not violative of the language unless it's required to be kept or filed *under this article* or a record required to be kept *by this article*." (R.p. 103, lines 7-9 (emphasis added)).

The testimony heard by jurors that could have been a basis for conviction (and that was urged as a basis for conviction by the prosecutor in closing) did not include any record-keeping requirements from Article Three of Title 44, DHEC regulations, or federal law. The testimony that jurors did hear included:

- Investigator Strickland testified that DHEC does not "have any specific guidelines as far as documentation..." (R.p. 199, line 17 through 200, line 3),
- The Bureau of Drug Control requires physicians to maintain records for two years and it is against the law for a physician to lose their documentation even if it is beyond their control, (R.p. 201, lines 5-17),
- Licensing requirements of the LLR and Board of Medical Examiners, (R.p. 148, line 19 through p. 150, line 16),
- That Appellant Webb's contract with the residency program required him to keep records, (R.p. 151, lines 16-21),
- That Appellant Webb breached his contract by "moonlighting," (R.p. 151, line 22 through p. 152, line 12),
- The contents of Appellant Webb's contract with the residency program and his application to the residency program, (R.p. 156, line 15 through p. 157, line 11),
- The contents of Appellant Webb's Graduate Medical Education Training Agreement which prohibits "moonlighting," (R.p. 159, line 7 through p. 160, line 7),
- The residency program's prohibition on prescribing to family members, "a policy that may or may not be in the contract," (R.p. 160, line 11 through 161, line 7, 165, lines 3-11), and

- That pharmacists, generally, have record-keeping requirements and the State's pharmacist witness "would hope the doctor also keeps it." (R.p. 189, lines 11-22).

None of these facts are a proper basis for conviction under Section 44-53-340. Despite the Court's ruling that the State limit their case to the record-keeping requirements of Article Three, DHEC regulations, and federal law, and the Court's admonishment to "just publish the regulation," (R.p. 99, lines 14-15, p. 103, lines 7-9), the prosecutor did not publish the regulation and failed to inform the jurors of 1) what the record-keeping requirements were that applied to Appellant Webb and 2) how Appellant Webb violated those record-keeping requirements.

The Trial Court Attempted to Direct a Verdict Post-Trial

It is apparent from the Trial Court's language and reasoning in its post-trial Order Granting Motion in Arrest of Verdicts (R.p. 1-8) that the Trial Court recognized that it was in error for not granting the directed verdict motion. The Trial Court discussed the standard for directed verdict, as opposed to a judgment in arrest of verdict, in its Order, finding that:

> ...there is another equally compelling principle, when the case rests entirely on circumstantial evidence, such as the absence of evidence or "when the evidence fails to positively prove the guilt of the accused to the exclusion of any other reasonable hypothesis," State v. Dobson, 281 S.C. 36, 38, 314 S.E.2d 310, 311 (1984), such evidence is too speculative to support a finding that "a person knowingly or intentionally" did "fraudulent[ly] omit any material information from,

any application, report, or other document to be kept… under this article, or any record required to be kept by this article…" Section 44-53-390(a)(4), S.C. Code of Laws Ann. (1976).

(R.p. 5).

In the Trial Court's "Findings of Facts," the Court found that:

- "No evidence of Federal law regarding keeping records was offered by the State or received by the Court;"
- "No direct reference to any specific law contained within Title 44, Chapter 53, Article 3, regarding record keeping was offered by the State or received by the Court;"
- "No direct reference to any specific DHEC rule, commonly known as regulations, regarding record keeping was offered by the State or received by the Court;" and
- "No request to charge on the law by the State, other than Sections 44-53-390(a)(4) and 44-53-340, was offered to the Court and no other statutory or regulatory law was charged to the jury."

(R.p. 6).

The Trial Court went on to find that:

The jury in this case would necessarily have had to find the Defendant guilty, without the benefit of the law regarding what records must be generated and maintained under Federal law and any additional rules the Department issues, pursuant to Title 44, Chapter 53, Article 3… Section 44-53-340, and 44-53-

390(a)(4), S.C. Code Ann. (1976), with which the Defendant was charged with violating in each of the indictments.

(R.p. 6-7).

The Trial Court also addressed the effect of Appellant Webb's statement in its Order, finding that:

> There was no direct testimony or other evidence that the Defendant did not maintain any record required to be produced and maintained, but, to the contrary, there was his statement to the effect that he had, and, moreover, his explanation as to why he could not produce, when demanded by the State's investigator, the records that he had produce and maintained, as related in State's Exhibit 1, was a reasonable hypothesis to the exclusion of the State's hypothesis that the Defendant did unlawfully, "knowingly or intentionally… furnish false or fraudulent material information in, or omit any information from, any application, report, or other document required to be kept or filed under this article, or any record required to be kept by this article." Id.

(R.p. 7).

In the "Conclusions of Law" section of the Trial Court's Order, the Trial Court cites the correct standard for granting a directed verdict, stating:

> 1. On motion of the defendant… or on its own motion, the court shall direct in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall

consider the existence or non-existence of the evidence and not its weight. Rule 19, SCRCrimP.

2. "It is fundamental that an accused can be convicted only upon proof beyond a reasonable doubt of every essential element necessary to constitute the crime charged." Gray v. Leeke, *supra*.

3. "Here, the jury was permitted to 'infer' or 'conclude' that the missing [report or other document required to be kept – though none were particularly defined or designated by the State] were fraudulently [omitted] unless he physically produced evidence to the contrary." Id.

(R.p. 7-8).

Although the Trial Court initially denied Appellant Webb's motions for directed verdict, the Trial Court appears to have recognized its error and the Trial Court attempted to grant Appellant Webb's motion for directed verdict post-trial, citing the standard for granting a directed verdict and discussing at length the State's "failure of competent evidence tending to prove the charge in the indictment."

For the reasons stated above, as supported by the Trial Court's reasoning, Findings of Fact, and Conclusions of Law contained in the Trial Court's post-trial Order Granting Motion in Arrest of Verdicts, (R.p. 1-8), including the State's failure at trial to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping requirements, and the Trial Court's Findings of Fact and Conclusions of Law in

the Order Granting Judgment in Arrest of Verdicts, (R.p. 1-8), this Court should reverse the Trial Court's denial of directed verdict.

II. **Whether the trial court erred in denying Appellant Webb's Motion for New Trial where Appellant Webb was charged with failing to keep or produce records pursuant to S.C. Code Section 44-53-390(a)(4), but the State failed to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping requirements.**

The original Trial Court intended to grant a directed verdict or a new trial in this matter, as is evidenced by the Court's findings of fact and conclusions of law contained in the Court's Order granting Appellant Webb's motion for verdict in arrest of judgment.

Under the section titled "Findings of Facts," the Trial Court stated:

- "No evidence of Federal law regarding keeping records was offered by the State or received by the Court;"
- "No direct reference to any specific law contained within Title 44, Chapter 53, Article 3, regarding record keeping was offered by the State or received by the Court;"
- "No direct reference to any specific DHEC rule, commonly known as regulations, regarding record keeping was offered by the State or received by the Court;" and

- "No request to charge on the law by the State, other than Sections 44-53-390(a)(4) and 44-53-340, was offered to the Court and no other statutory or regulatory law was charged to the jury."

(R.p. 6).

The Trial Court went on to find that:

> The jury in this case would necessarily have had to find the Defendant guilty, without the benefit of the law regarding what records must be generated and maintained under Federal law and any additional rules the Department issues, pursuant to Title 44, Chapter 53, Article 3... Section 44-53-340, and 44-53-390(a)(4), S.C. Code Ann. (1976), with which the Defendant was charged with violating in each of the indictments.

(R.p. 6-7).

Not only was there no evidence produced at trial regarding the record-keeping requirements that Appellant Webb was charged with violating, there *was* evidence produced that Webb did maintain records. In its Order, the Court found that:

> There was no direct testimony or other evidence that the Defendant did not maintain any record required to be produced and maintained, but, to the contrary, there was his statement to the effect that he had, and, moreover, his explanation as to why he could not produce, when demanded by the State's investigator, the records that he had produce and maintained, as related in State's Exhibit 1, was a reasonable hypothesis to the exclusion of the State's hypothesis that the Defendant did unlawfully, "knowingly or intentionally... furnish false or fraudulent

material information in, or omit any information from, any application, report, or other document required to be kept or filed under this article, or any record required to be kept by this article." Id.

(R.p. 7).

In the "Conclusions of Law" section of the Trial Court's Order, the Trial Court cites the correct standard for granting a directed verdict, stating:

1. On motion of the defendant... or on its own motion, the court shall direct in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider the existence or non-existence of the evidence and not its weight. Rule 19, SCRCrimP.

2. "It is fundamental that an accused can be convicted only upon proof beyond a reasonable doubt of every essential element necessary to constitute the crime charged." Gray v. Leeke, *supra*.

3. "Here, the jury was permitted to 'infer' or 'conclude' that the missing [report or other document required to be kept – though none were particularly defined or designated by the State] were fraudulently [omitted] unless he physically produced evidence to the contrary." Id.

(R.p. 7-8).

Although the Trial Court initially denied Appellant Webb's motions for directed verdict, the Trial Court appears to have recognized its error and the Trial Court attempted to grant Appellant Webb's motion for directed verdict post-trial, citing the standard for granting a directed verdict and discussing at length the State's "failure of competent evidence tending to prove the charge in the indictment."

In granting Appellant Webb's motion for verdict in arrest of judgment, the Trial Court chose the one remedy presented to it that was not permitted under South Carolina law. The Trial Court's intent – to grant a directed verdict or new trial based on the insufficiency of the State's evidence – is clear from the Trial Court's Order, and a directed verdict or new trial is necessary and appropriate based on the Trial Court's Findings of Fact and Conclusions of Law.

This Court, after finding that the grant of a verdict in arrest of judgment was not the proper remedy, remanded this case with instructions for the lower court to consider Appellant Webb's new trial motion.

Upon remand, a different judge denied Appellant Webb's Motion for New Trial and Motion to Reconsider, stating:

> The State doesn't have to introduce regulations for them to follow. The State doesn't have to introduce the law on burglary first degree. The State prosecutes facts and then the judge says: Alright, jury, you find the facts... The State doesn't tell the jury what the law is, the defense attorney doesn't tell the jury what the law is, the judge tells the jury what the law is.

(R.p. 373, line 18 through p. 374, line 2).

The lower court is correct that, in a burglary case, the prosecution does not need to inform the jury of any statutory requirements. In this case, however, Appellant Webb was charged with failing to maintain records in compliance with S.C. Code Section 44-53-390(a)(4), which references any statute contained within Article Three, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping requirements. The jury cannot know if a defendant has failed to comply with the requirements of Article Three, DHEC regulations, or federal law if they do not know what record-keeping requirements are contained in Article Three, DHEC regulations, and federal law.

The prosecutor failed to produce any evidence of 1) what the record-keeping requirements are and 2) how Appellant Webb violated those specific requirements.

This Court should find that it was an abuse of discretion to deny Appellant Webb's Motion for New Trial in light of the original trial judge's express findings of fact in the Order Granting Judgment in Arrest of Verdicts that no evidence of federal law, state law, or DHEC rule was offered by the State or received by the Court, no request to charge was made by the State, no jury instruction was given by the Court to the jury regarding the record-keeping requirements, and that there was uncontradicted evidence in Appellant Webb's statement that he had kept the records as required, lost them through no fault of his own, and did not "knowingly or intentionally" fail to maintain the required records. (R.p. 7).

For the reasons stated above, including the State's failure at trial to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping

requirements, and the Trial Court's Findings of Fact contained in the Order Granting Judgment in Arrest of Verdicts, this Court should reverse the Trial Court's denial of Appellant Webb's Motion for New Trial.

III. Whether the trial court erred in failing to charge the jurors on the relevant laws and regulations that contain the requirements for record-keeping pursuant to S.C. Code Section 44-53-390(a)(4) where defense counsel failed to request an appropriate jury instruction and failed to object to the jury instructions that were given.

Undersigned counsel notes that the remaining issues contained in Sections III, IV, V, and VI, were not preserved for appeal by trial counsel.

South Carolina appellate courts have consistently refused to apply the plain error rule. Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review, See, Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997), State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16 (S.C. 2011), "except in flagrant cases and where prejudice clearly appears." Johnson v. Charleston and Western Carolina Railway Company, 234 S.C. 448, 108 S.E.2d 777 (1959). See also, South Carolina State Highway Dept. v. Nasim, 179 S.E.2d 211, 255 S.C. 406 (S.C. 1971), Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (S.C. 1994).

Appellant Webb believes that the unpreserved appellate issues described below are flagrant errors, and prejudice clearly appears in that Appellant Webb was convicted of violating record-keeping requirements that were never provided to the jurors. The

prosecution did not provide any record-keeping requirements contained in Article Three, DHEC regulations, or federal law to the jurors, and the Trial Court did not provide any record-keeping requirements contained in Article Three, DHEC regulations, or federal law to the jurors, and yet Appellant Webb was convicted of violating the record-keeping requirements contained in Article Three, DHEC regulations, or federal law. (R.p. 228, line 15 through 231, line 5).

The State did not make a request for the Court to charge the record-keeping requirements contained in Article Three, DHEC regulations, or federal law. There was no objection by the defense or request for additional jury instructions on state or federal law and regulations regarding the requirements for record-keeping, even after the Court says, "any exception will be welcome." (R.p. 230, line 23).

The Court's jury instruction on the law includes:

> Now, the defendant -- excuse me, the statute itself speaks to this and it is unlawful for a person to knowingly or intelligently -- excuse me, knowingly or intentionally to furnish false or fraudulent material, information in, or omit any material information from any applicant, report, or other document required to be kept or filed under this article or any record required to be kept by this article. Persons registered to manufacture, distribute or dispense controlled substances under this article shall keep records and maintain inventories in conformance with the record keeping and inventory requirements of Federal law and with any additional regulations by Department of Health and Environmental Control.

(R.p. 252, lines 3-14).

There were no objections from the defense or further requests to charge. (R.p. 259, lines 1-7). However, this Court should find that is clearly prejudicial and plain error when a Trial Court charges a jury that a defendant is accused of failing to "keep records and maintain inventories in conformance with the record keeping and inventory requirements of Federal law and with any additional regulations by Department of Health and Environmental Control" but does not charge the jury as to what is contained within "the record keeping and inventory requirements of Federal law and... any additional regulations by Department of Health and Environmental Control."

For these reasons, this Court should find that the Trial Court's failure to charge the jury on the law that they were asked to convict Appellant Webb of violating was plain error, reverse Appellant Webb's convictions, and remand the case for a new trial.

IV. Whether the trial court erred in failing to grant a new trial or directed verdict and instead granting a judgment in arrest of verdicts, where defense counsel failed to object.

Defense counsel did not object to the Trial Court's grant of a judgment in arrest of verdict. Indeed, defense counsel captioned his post-trial motion "Motion for New Trial *and/or Judgment in Arrest of Verdict*." (R.p. 19-20).

However, undersigned counsel asks this Court to find that the Trial Court's grant of a Judgment in Arrest of Verdict, a remedy that does not exist in criminal cases in South Carolina state courts, was a flagrant error resulting in clear prejudice to Appellant

Webb when the Trial Court, citing the standard for directed verdict or the grant of a new trial, instead granted a Judgment in Arrest of Verdict that was reversed on appeal.

For these reasons, this Court should find that the Trial Court's misinformed grant of Judgment in Arrest of Verdict was plain error, reverse Appellant Webb's conviction, and remand the case for a new trial.

V. Whether the State's assertion that Appellant Webb was not permitted to recreate the records in question when they were lost or destroyed due to circumstances beyond his control, making it impossible for him to comply with the statute in question, violated his right to Due Process under the Fifth and Fourteenth Amendments where defense counsel failed to object.

Appellant Webb, in his statement which was introduced into evidence by the State, (R.p. 169, lines 4-6), affirmed that he did make and keep documentation each time medications were prescribed for the patients in question. However, the documentation and records were among papers that were lost when Appellant Webb was removed from his home during his divorce. Because the documentation was lost due to circumstances beyond Appellant Webb's control, Appellant Webb could not provide the documentation to Investigator Strickland when it was requested. (R.p. 169, lines 4-6). This evidence was uncontradicted at trial.

Investigator Strickland testified before the jury that Appellant Webb would be guilty of the crime charged, even though Appellant Webb had created and maintained

the documentation, if it was impossible for Appellant Webb to produce the documentation due to an impossibility caused by circumstances beyond his control:

> Q. ...Let's assume for the sake of our discussion that the records were made, they were in the possession of the wife in the family home from which he had been expelled, and he didn't have access for whatever reason. The attorney wouldn't him [sic] have them, wife wouldn't let him have them. What would have then been his recourse to produce the records or to produce a record if those records were unavailable to him? What would a practitioner have to do in order to comply with this particular statute?
>
> A: He would have to have produced some sort of record. Some sort of record that could have been verified.
>
> Q: ...but, at that point if they are unavailable by virtue of some family court order or whatever. If he can't show you something, then he's in violation of this statute?
>
> A: By law, yes.
>
> Q: House burns down, he's in violation of this law.
>
> A: Technically speaking.
>
> Q: House gets flooded, he's in violation of the law....

(R.p. 213, line 18 through p. 214, line 14).

Furthermore, Investigator Strickland testified before the jury that Appellant Webb would not be permitted to recreate records that had been lost or destroyed through no fault of his own:

Q: And that's exactly what I wanted to get to. Would he have been permitted at that time, upon being notified or being requested to produce these records, would he have been permitted to recreate the records under HIPPA guidelines in order to comply with the statute?

A: He is not allowed to recreate records.

(R.p. 214, lines 16-21).

Upon further cross-examination, Investigator Strickland acknowledged that it might be reasonable to allow a physician to recreate records that were lost and destroyed, if they were provided to him within a "reasonable time frame."

Q: Right. So, but just to be clear, in order to comply with this statute if Doctor Webb sent a letter to each of the patients indicating that the records were lost or destroyed, and then sent a recreated record with their opportunity to review it for any amendments; that in and of itself per the Bureau of Drug Control would not rectify the situation?

A: If I would have been provided that as I'm a reasonable investigator, I would have taken that into consideration.

Q: Okay. And what would have been the timeframe for that?

A: A reasonable timeframe.

(R.p. 215, lines 11-20).

Despite this admission that it would be reasonable to allow a physician to recreate a record that had been lost or destroyed, Investigator Strickland testified that he cautioned Appellant Webb "about creating the record" and that he had instructed Appellant Webb *not* to recreate the records:

Q: At that time you cautioned him about creating the record.

A: Correct.

Q: Okay. And told him that you would not give him an opportunity to do that.

A: Correct.

(R.p. 216, lines 2-6).

After testifying that it would be reasonable to allow Appellant Webb to recreate the records but that he had instructed Appellant Webb not to recreate the records, Investigator Strickland then testifies that, if Appellant Webb had recreated the records, Appellant Webb would only have had one hour to recreate the records and provide them to him:

Q: Okay. Alright. And if he has now sent such a letter and such a recreated record to the three individuals contained in these indictments, it is your position that that does not -- even if he has done that, that does not cure his situation here?

MR. MARTIN: Objection, Your Honor. I think we're asking something that's not in evidence or even been spoken about.

THE COURT: Restate your question.

MR. HUMPHRIES: I will because I have to lay a foundation.

Q: If Doctor Webb ha,[sic] since your meeting with him, sent letters pursuant to HIPPA indicating that the records are lost and they've been recreated along with a recreated record inviting them to view it, amend it. If he has done that is it still the position of your Drug Control that he is not in compliance with this statute?

A: I can't speculate to that. However, the records do have to be readily retrievable, which is defined as usually one hour or less. So, I would say that does not meet.

(R.p. 216, line 7 through p. 217, line 1).

The records in question were lost or destroyed during Appellant Webb's divorce proceedings when he was removed from his home, a fact that was uncontradicted by any testimony or evidence from the State. (R.p. 169, lines 4-6 (Appellant Webb's statement)).

By instructing Appellant Webb that he could not recreate the records in question despite their loss or destruction, and by informing the jurors of the same, Investigator Strickland made it impossible for Appellant Webb to comply with the statute. Even worse, Investigator Strickland testified before the jurors that, if the records were lost or destroyed through no fault of Appellant Webb, it would be impossible for Appellant Webb to comply with the statute, essentially instructing the jurors – incorrectly – on the law and providing the jurors with his opinion on the ultimate issue of guilt.

This testimony – which confused the jury by stating incorrect and contradictory standards that Appellant Webb was expected to comply with, none of which were record-keeping requirements contained in Article Three, DHEC regulations, or federal law, and implying that it wasn't necessary to find that a violation is knowing and intentional – was flagrant and clearly prejudicial.

For these reasons, this Court should find that the State's assertion that Appellant Webb was not permitted to recreate the records in question when they were lost or destroyed due to circumstances beyond his control, making it impossible for him to comply with the statute in question, violated his right to Due Process under the Fifth and Fourteenth Amendments and was plain error, reverse Appellant Webb's conviction, and remand the case for a new trial.

VI. Whether the State's repeated references to uncharged conduct or prior bad acts violated Rules 403 and 404(b), SC Rules of Evidence, where the trial court denied the State's motion in limine to raise the uncharged conduct, but Appellant Webb's trial counsel did not make a contemporaneous objection when the State's witnesses testified.

Prior to the start of trial, the State made a motion in limine requesting the Court's permission to address additional prescriptions that are not referenced in Appellant Webb's indictments. (R.p. 59, line 7). Although Appellant Webb's indictments only made reference to a prescription of Phentermine, the State moved the Court to allow

them to elicit testimony regarding additional, uncharged, prescriptions for Temazepam, Ambien, and Alpraxolam. (R.p. 59, lines 14-24).

After some discussion, the State says, "...we will proceed today and not worry about amending the indictment," (R.p. 67, lines 12-13), and the Trial Court denies the State's motion to elicit testimony regarding the uncharged prescriptions. (R.p. 68, line 1).

Appellant Webb also made a motion in limine to exclude testimony about 1) the board action against his license, 2) an unrelated dismissed charge, and 3) unrelated allegations raised in his divorce proceedings. (R.p. 91, line 10 through p. 93, line 2). "And if it's not material then it is not admissible under 402. And also, that there is no exception under 404(b) to get that kind of information in because it absolutely has no bearing on whether or not he is able to produce records related to his prescribing practice." (R.p. 93, lines 6-13).

The Trial Court grants the motion to exclude as to the dismissed criminal charge. (R.p. 94, lines 6-9). The State agrees as to the action before the State Board of Medical Examiners, the judge and State agree that there can be testimony about "generally the regulation," but "no pending action outside of the case in front of you." (R.p. 94, lines 10-20). Although the Court's ruling is unclear, it appears that the defense, State, and Court agree that there can be references to Defendant's divorce but not the specific allegations made during the divorce. (See, R.p. 94, line 21 through 96, line 12).

Despite the pretrial rulings, the State introduced testimony regarding the action before the State Board of Medical Examiners. Investigator Strickland testified before the jury that "I was notified by an investigator with the South Carolina Board of Medical

Examiners the LLR and they had an open investigation on Mr. Webb and noticed some questionable controlled substance prescribing for immediate family members and was notified that the Bureau of Drug Control may want to look into it." (R.p. 198, lines 13-18).

Detective Strickland goes on to testify that, "Throughout my investigation I ultimately found that *19 prescriptions* were authorized by the defendant for patients that I was unable to determine a valid patient/practitioner relationship." (R.p. 202, line 22 through p. 203, line 3 s(emphasis added)). Defense counsel did not make a contemporaneous objection during Strickland's testimony.

This testimony, particularly in light of the Trial Court's pretrial rulings, was flagrant and clearly prejudicial. For these reasons, this Court should find that the State's repeated references to uncharged conduct or prior bad acts violated Rules 403 and 404(b), SC Rules of Evidence and was plain error, reverse Appellant Webb's conviction, and remand the case for a new trial.

CONCLUSION

This Court should reverse Appellant Webb's conviction and remand this case with instructions to direct a verdict of acquittal because Appellant Webb was charged with failing to keep or produce records pursuant to S.C. Code Section 44-53-390(a)(4), but, as the Trial Court stated in its Findings of Fact in its Order Granting Motion in Arrest of Verdicts, the State failed to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping requirements.

In the alternative, this Court should find that it was an abuse of discretion to deny Appellant Webb's Motion for New Trial in light of the original trial judge's Findings of Fact in the Order Granting Judgment in Arrest of Verdicts that no evidence of federal law, state law, or DHEC rule was offered by the State or received by the Court, no request to charge was made by the State, no jury instruction was given by the Court to the jury regarding the record-keeping requirements, and that there was uncontradicted evidence in Appellant Webb's statement that he had kept the records as required, lost them through no fault of his own, and did not knowingly or intentionally fail to maintain the required records. See R.p. 1-8.

Finally, Appellant Webb asks this Court to reverse his conviction based on plain error because 1) the Trial Court failed to charge the jurors on the relevant laws and regulations that contain the requirements for record-keeping pursuant to S.C. Code Section 44-53-390(a)(4), 2) the Trial Court chose to grant a motion in arrest of judgment – a remedy that doesn't exist in South Carolina criminal court - instead of ordering a new trial or directed verdict, 3) the State's assertion that Appellant Webb was not permitted to recreate the records in question when they were lost or destroyed due to circumstances beyond his control, making it impossible for him to comply with the statute in question, violated his right to Due Process under the Fifth and Fourteenth Amendments, and 4) the State's repeated references to uncharged conduct or prior bad acts violated Rules 403 and 404(b), SC Rules of Evidence, the Court's pretrial rulings, and the State's pretrial agreement.

Respectfully Submitted,

Lacey Thompson
Thompson Defense Firm
Attorney for the Defendant
604 16th Ave. North
Myrtle Beach, S.C. 29577
Phone: 843-444-6122
lthompson@grandstrandlaw.com

Attorney for Appellant John Alexander Webb

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Court of General Sessions
Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2023-001578

John Alexander Webb,.....Appellant,

vs.

The State,.....Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, dated August 2, 2024 on the following electronically by email:

SC Court of Appeals
ctappfilings@sccourts.org

J. Benjamin Aplin, Esq.
baplin@scag.gov

Alan McCrory Wilson, Esq.
agwilson@scag.gov

Jimmy A. Richardson, Esq.
richj@horrycountysc.gov

Mary Ellen Walter, Esq.
Walter.maryellen@horrycountysc.gov

Seth Oskin, Esq.
oskins@horrycountysc.gov

George Henry Martin III, Esq.
martinge@horrycountysc.gov

Mindi Ellison
Paralegal
Thompson and Hiller Defense Firm

August 2, 2024