STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2012-212639

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WALTER DOUGLAS BARCLAY,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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V. **The trial judge properly excluded a videotape of Appellant, made by Appellant's attorney at the hospital several hours after the collision, since the videotape was not proper impeachment evidence and Appellant failed to authenticate the videotape through the witness he sought to impeach. In any event, even assuming error, exclusion of the videotape was harmless where the videotape was cumulative to the testimony of Appellant's expert.**

VI. **Appellant's argument that the trial court should have dismissed his charges because the officers failed to record his conduct when they left the hospital is without merit, since S.C. Code § 56-5-2953 only requires videotaping of the suspect at the incident site, and since the arresting officer properly submitted an affidavit that it was impossible to produce a video recording at the incident site because Appellant needed emergency medical treatment.**

STATEMENT OF THE CASE

Appellant was indicted in Charleston County in April 2011 for one count of felony DUI with death resulting and one count of felony DUI with great bodily injury resulting. Pre-trial motions were heard on October 20-21, 2011, and, on October 24 through November 1, 2011, Appellant proceeded to trial before the Honorable Deadra L. Jefferson and a jury. The jury found Appellant guilty of felony driving under the influence, death resulting, but found Appellant not guilty of felony driving under the influence, great bodily injury resulting. Judge Jefferson sentenced Appellant to twelve years, and she denied Appellant's post-trial motions by order dated July 18, 2012. A timely notice of appeal was served and filed.

ARGUMENT

Background Facts

Around 6:00 pm on December 8, 2008, Appellant's pickup truck collided with a Geo Prizm driven by Alvero Antonio Garcia and occupied by Jose Santos Davilla. (R. p. 289-93; p. 366-92). Appellant's truck flipped over two times and a cooler containing several unopened beer cans was ejected. (R. p. 280, lines 17-20; p. 326; p. 365-68; p. 518-19). Appellant sustained a relatively minor injury to his head. (R. p. 488-92). Garcia died almost immediately from the trauma of the crash, and Davilla sustained injuries. (R. p. 314-15; p. 621-29; p. 877-82). After receiving reports that Appellant appeared intoxicated, and following an evaluation of the collision scene, officers determined they had probable cause to arrest Appellant for felony driving under the influence ("DUI"). (R. p. 322-28; p. 358-416; p. 546-55). Appellant's blood was drawn for testing at 9:50 pm that evening. (R. p. 754-60). Appellant was subsequently indicted for one count of felony DUI with death resulting and one count of felony DUI with great bodily injury resulting.

At trial, the State's theory of the case was that Appellant drank alcoholic beverages at his farm, became intoxicated, and, while driving home, crossed the center line into Garcia's lane of travel and hit Garcia's car in an offset frontal collision, killing Garcia and injuring passenger Davilla. (See R. p. 260-63). Several State's witnesses testified that, after the collision, Appellant smelled of alcohol and/or appeared intoxicated. (See R. p. 292; p. 313; p. 472; p. 490-91; p. 554-55; p. 760; p. 808). Appellant acknowledged that he drank alcohol at his farm prior to the collision. (R. p. 413; p. 760). In addition, the blood test revealed that Appellant's blood alcohol concentration was .208, more than two times the legal limit. (R. p. 919).

Deputy William Brinson, who was qualified as an expert in collision reconstruction, testified that the collision unquestionably occurred in Garcia's lane of travel. (See R. p. 391-92). The passenger in the Geo Prizm, Davilla, testified that Appellant's truck veered into the Geo's lane of travel and struck the Geo. (R. p. 656-57). Dr. Nicholas Batalis, the forensic pathologist, testified that Garcia died almost instantaneously from the extreme full-body blunt force trauma sustained as a result of the collision. (R. p. 878-81). Dr. Batalis also testified that Garcia had no illegal drugs or alcohol in his system at the time of the crash. (R. p. 880-81).

Appellant's theory of the case was that he was not sufficiently impaired by alcohol and that he did not cause the collision. (See R. p. 1155, lines 14-22). Appellant presented the testimony of several laypersons who testified that they briefly interacted with Appellant following the collision and that Appellant did not seem impaired by alcohol and/or did not smell of alcohol. (See R. p. 978-80; p. 992-93; p. 1049; p. 1061). One defense witness, Melody Bailey, testified that Davilla approached her with concerns that he would go to jail if he did not testify on the State's behalf at trial. (R. p. 1028). Bailey also testified that Davilla told her prior to trial that he did not feel the collision was Appellant's fault. (R. p. 1037). Appellant's last witness was Dr. Ronald Hargrave, who was qualified as an expert in emergency medicine. (R. p. 1083-85). Dr. Hargrave opined that, after reviewing Appellant's medical records as well as a videotape taken of Appellant at 12:35 am on the morning after the collision, Appellant was not significantly impaired by any substance in the hours following the collision. (See R. p. 1086-1116). He testified that Appellant's blood test result could have been tainted and that the blood test result of .208 was not consistent with his perceptions of Appellant. (R. p. 1102-03). However, he acknowledged on cross-examination that many of the people who interacted

with Appellant shortly after the crash noted that Appellant either smelled of alcohol or appeared intoxicated. (See R. p. 1109-15). He also acknowledged that Appellant exhibited some behavior that could have been caused by impairment, and that much of the material he reviewed, including the videotape of Appellant, came from a time period much removed from the time of the collision. (R. p. 1107-18).

The jury ultimately found Appellant guilty of felony driving under the influence, death resulting, as to the charge pertaining to Alvero Garcia, but found Appellant not guilty of felony driving under the influence, great bodily injury resulting, as to the charge pertaining to Jose Davilla.[1] (R. p. 1277, lines 1-8). The trial judge sentenced Appellant to twelve years. (R. p. 1301, lines 4-10).

I. The trial judge correctly refused to charge simple DUI as a lesser-included offense of felony DUI.

Whether or Not Simple DUI is a Lesser-Included Offense

Initially, the State has concerns regarding whether or not simple DUI is a lesser-included offense of felony DUI. First, in 1998, the simple DUI statute was amended to include additional requirements regarding a person's level of impairment.[2] See S.C. Code § 56-5-2930 ("It is unlawful for a person to drive a motor vehicle within this State *while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired.* . . . A person who violates the

[1] Note that, although there was testimony that Davilla could have sustained life-threatening injuries, there no testimony presented that Davilla actually sustained any "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ" as required by S.C. Code § 56-5-2945(B). (See R. p. 314-15; p. 620-29; see also p. 1202-03).

[2] Before the amendment, the simple DUI statute, S.C. Code § 56-5-2030, read as follows: "It is unlawful for any person who is a habitual user of narcotic drugs or any person who is ***under the influence of intoxicating liquors***, narcotic drugs, barbiturates, paraldehydes or drugs, herbs or any other substance of like character, whether synthetic or natural, to drive any vehicle within this State" (emphasis added). Notably, the only case Appellant cites in support of his argument that simple DUI is a lesser-included offense, State v. Bodiford, 282 S.C. 378, 318 S.E.2d 567 (1984), was decided fourteen years prior to the amendment of the simple DUI statute. The State would also point out that Bodiford does not necessarily support Appellant's argument since it adds nothing to what S.C. Code § 56-5-2945 already says.

provisions of this section is guilty of the offense of driving under the influence. . . .") (emphasis added). Meanwhile, the felony DUI statute, enacted in 1983, was not amended to include these requirements. See S.C. Code § 56-5-2945 ("A person who, *while under the influence of alcohol* . . . drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence. . . ." (emphasis added). See Nelson v. Ozmint, 390 S.C. 432, 436-37, 702 S.E.2d 369, 371 (2010) (the canon of construction " *expressio unius est exclusio alterius* " or " *inclusio unius est exclusio alterius* " holds that "to express or include one thing implies the exclusion of another, or of the alternative"); State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."); State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (stating the reviewing court must presume the legislature did not intend a futile act).

Second, the simple DUI statute criminalizes and punishes conduct that is detrimental to the public at large, not conduct aimed at a particular victim, while the felony DUI statute criminalizes conduct that harms a particular private individual. Logically, since the targeted victims of the offenses are not the same, it would seem that one offense cannot be a lesser-included offense of the other.

Third, in that vein, the facts of Appellant's case illustrate the potentially absurd result that could occur if simple DUI were to be considered a lesser-included offense of felony DUI. See State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 650 (Ct. App. 2008)

(courts should reject a statutory interpretation which would lead to a plainly absurd result). Appellant hit a car occupied by two people and was charged with two counts of felony DUI. If simple DUI had been declared a lesser-included offense of felony DUI, and if the jury concluded that Appellant was sufficiently impaired by alcohol but was unable to conclude that the State had proven he was negligent and/or that he caused great bodily injury or death, the end result would be two convictions for simple DUI arising out of exactly the same conduct. Clearly, this would not be permissible. See State v. Brandt, 393 S.C. 526, 539, 713 S.E.2d 591, 598-99 (2011) (under the double jeopardy clause, a defendant may not be convicted of two separate crimes arising from the same conduct unless his conduct comprises two distinct offenses). Therefore, as the prosecutor stated below, it appears there is a "legal impediment" to simple DUI being a lesser-included offense of felony DUI. (R. p. 967, lines 7-13).

No Evidence Supports the Lesser Charge

Assuming, for argument's sake, that simple DUI is a lesser-included offense of felony DUI, Appellant's issue regarding why he was entitled to the charge is not preserved for appellate review, and in any event, the trial judge properly refused to give the lesser charge because there was no evidence supporting that Appellant was guilty of only that offense.

Issue Preservation

Appellant argues that Davilla's pre-trial statement to Melody Bailey, and Appellant's own statement to Sergeant Burrell, constituted evidence that Garcia rather than Appellant proximately caused the collision. (See Brief of Appellant, p. 4 & 7). However, Appellant never argued these particular points to the trial judge in support of his request for a charge on simple DUI. (See R. p. 957-62; p. 1122-28; p. 1140-50; p.

1263-70). The only factual argument Appellant provided in support of the charge was that the jury could disbelieve the testimony of Officers Brinson and Burrell regarding how the collision happened and therefore conclude the collision was the deceased victim's fault.[3] (See R. p. 1144, lines 14-20). Therefore, since Appellant made a different argument below, the trial judge was never given a fair opportunity to consider whether the evidence upon which Appellant now relies supported an instruction on simple DUI. (See R. p. 1363-65). See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments.").

Accordingly, the State submits that the arguments asserted on appeal are not preserved for review. See State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) & State v. Wigington, 375 S.C. 25, 35-36, 649 S.E.2d 185, 190 (Ct. App. 2007) (both holding that a party cannot argue one ground in support of a jury charge at trial and another ground in support of the charge on appeal); see also State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not argue one ground at trial and another ground on appeal); State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Howard, 396 S.C. 173, 181-82, 720 S.E.2d 511, 516 (2011) (where a party fails to raise particular arguments to the trial judge in support of an allegation of error, these arguments are not preserved for appellate review); State v. Adams, 332 S.C. 139, 144, 504 S.E.2d 124, 126-27 (Ct. App.

[3] This argument is without merit since the mere contention that the jury might accept the State's evidence in part and reject it in part does not entitle the defendant to an instruction on the lesser offense. State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976); State v. Tyndall, 336 S.C. 8, 22, 518 S.E.2d 278, 285 (Ct. App. 1999).

1998) (argument not preserved for appeal where precise issue not presented to the trial court).

Discussion

Error preservation concerns aside, the trial judge did not err by failing to instruct the jury regarding the offense of simple DUI pursuant to S.C. Code § 56-5-2930 as a lesser-included offense of felony DUI. The trial judge did not err in this regard because, although Appellant offered much *speculation* that Garcia was the one who crossed the center line and proximately caused the collision, there was no actual *evidence* presented to establish that fact.

"No instruction should be given by the trial judge, at the request of the defendant, which tenders an issue not presented or supported by the evidence." State v. Tyndall, 336 S.C. 8, 22, 518 S.E.2d 278, 285 (Ct. App. 1999). It is not error to refuse to charge a lesser-included offense unless there is evidence tending to show the defendant was guilty *only* of the lesser offense. Id. (citations omitted) (emphasis added); see also State v. Cude, 265 S.C. 313, 316, 218 S.E.2d 240, 241 (1975) (where there was no evidence from which the jury could conclude that the appellant was guilty of the lesser offense rather than the greater, there was no error on the part of the trial judge in refusing the requested instruction). The presence of evidence to sustain the lesser crime determines whether it should be submitted to the jury; the mere contention that the jury might accept the State's evidence in part and reject it in part does not entitle the defendant to an instruction on the lesser offense. State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976).

Appellant contends that Davilla's pre-trial statement to Melody Bailey, and Appellant's own statement to Sergeant Burrell, constituted evidence that Garcia rather than Appellant proximately caused the collision. In addition to not being preserved, as

discussed above, these arguments are without merit. As to the first statement, made by Davilla, Melody Bailey testified that "Mr. Davilla told me he did not want to testify that the collision was not Mr. Barclay's fault, he did not feel it was Mr. Barclay's fault and he wanted to know what I could do to help him because they had threatened to put him in jail if he did not appear and testify to that." (R. p. 1036, line 24 – p. 1037, line 4). A layperson's pre-trial statement regarding his "feelings" - without some further explanation - does not constitute evidence on the issue of proximate cause. Although Davilla's prior inconsistent statement may have been impeaching of the credibility of his trial testimony, it was not evidence that Garcia crossed the center line and proximately caused the collision.[4] See Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (pointing out the long-standing proposition that a lesser-included offense may not be charged merely on the theory the jury may disbelieve some of the evidence); see also State v. Fields, 356 S.C. 517, 523, 589 S.E.2d 792, 795 (Ct. App. 2003).

As to the second statement, in a conversation at the hospital after the collision, Sergeant Burrell informed Appellant - who appeared to be confused about why he was at the hospital - that he had been in a car crash and that he "killed somebody." (R. p. 554-55). Appellant responded that he had not been in a crash and that he "didn't kill anybody." (R. p. 555, lines 15-18). Taken in context, it is clear that Appellant was denying a collision even occurred rather than disputing proximate cause. Appellant's general denials do not constitute evidence on the issue of proximate cause. (See R. p. 554-55).

[4] Notably, Appellant's counsel elicited testimony at trial that Davilla previously signed an affidavit on October 7, 2010, indicating he did not wish to be involved in the case at all. (See R. p. 710-11). Appellant's counsel in closing argument stated that Davilla executed the affidavit because "Davilla could not say one way or the other how the collision happened" and that "he did not know how the collision happened." (R.p. 1182, lines 19-20; p. 1182, line 24 – p. 1183, line 13; see also R. p. 1183, lines 8-13 & lines 19-20; p. 1186, lines 1-3). Appellant's theory at trial was that Davilla was either not paying attention at the time the collision occurred or that he was blinded by lights in his eyes. (See, e.g., R. p. 1181-86).

As the trial judge properly concluded, the evidence presented at trial reflected that Appellant was guilty of only felony DUI. (See R. p. 1150; p. 1363-65). The evidence revealed that Appellant, who had a breath alcohol concentration of .208 nearly four hours after the crash, was driving under the influence of alcohol, crossed the center line and hit Garcia's car in Garcia's lane of travel, and that Garcia's death resulted. (See R. p. 292; p. 313; p. 326; p. 364; p. 391-92; p. 413; p. 472; p. 484; p. 490-91; p. 518; p. 554-55; p. 656-60; p. 760-63; p. 808; p. 877-82; p. 919). Quite simply, there is no evidence in the record that the victim, rather than Appellant, proximately caused the collision. Accordingly, the trial judge properly refused to give the jury an instruction on simple DUI pursuant to S.C. Code §56-5-2930.

II. The trial judge's instruction regarding the elements of felony DUI was proper where it advised the jury regarding the current and correct law of South Carolina.

Appellant argues that the trial judge committed reversible error by failing to instruct the jury that the offense of felony DUI requires proof that his faculties were "materially and appreciably impaired." With respect to the "driving under the influence" aspect of felony DUI, the trial judge instructed the jury as follows:

> The defendant is charged with felony driving under the influence. The State must first prove beyond a reasonable doubt that the defendant drove a vehicle while under the influence of alcohol. [Defining "driving."] The State must prove beyond a reasonable doubt that the defendant was sufficiently under the influence to impair his ability to drive with reasonable care with due regard for others and himself or as a reasonably prudent person must drive. It is not necessary to show that the defendant was in a helpless condition, passed out, or even intoxicated. On the other hand, the fact that the defendant drank an alcoholic beverage does not prove that the defendant was driving under the influence. (R. p. 1057, lines 3-23).

After the jury instructions were completed, Appellant objected to the fact that the judge had not informed the jury that the defendant had to be "materially and appreciably

impaired." (See R. p. 1265-66). The judge responded that the "materially and appreciably impaired" language was not contained in the felony DUI statute, although that language was contained in the simple DUI statute. (See R. p. 1266-70). The prosecutor argued that, even assuming the felony DUI statute was intended to incorporate the "materially and appreciably impaired" language, the judge's jury charge was nevertheless a correct statement of the law on the issue. (See R. p. 1268, lines 11-16). The judge concluded that, inasmuch as she had charged the exact language of the felony DUI statute, S.C. Code § 56-5-2945, in conjunction with "the cases interpreting certain provisions of that statute," her jury instruction was correct. (R. p. 1268-70). The judge reached a similar conclusion in her order denying Appellant's post-trial motion, and added that the language in the charge given "essentially parallels the language in the [simple] DUI statute and has the same connotation as 'materially and appreciably impaired.'" (See R. p. 1357-63).

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The substance of the law is what must be charged to the jury, not any particular verbiage." State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464. "[I]f the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to

the defendant. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." Id. at 263, 565 S.E.2d at 304. So long as the jury instructions given are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996).

In this case, the trial judge did not commit reversible error by failing to instruct the jury that the State had to prove Appellant was "materially and appreciably impaired." Generally, where the law governing a case is expressed in a statute, the court should charge the jury using the language of the statute. Field v. Gregory, 230 S.C. 39, 47-48, 94 S.E.2d 15, 20 (1956). In fact, the court may be guilty of error if it charges language that departs in an essential respect from the statute. Id. However, it is not error to qualify the wording of the statute to conform it to the construction given by the appellate courts. Id. Here, the trial judge charged the language from the felony DUI statute coupled with the language from case law interpreting the words in the statute.[5] (See R. p. 1257-59; see specifically p. 1257, lines 3-23). Therefore, the charge as a whole was correct and the judge committed no reversible error.

[5] The language in the judge's charge defining "under the influence" appears to be drawn from the driving under the influence cases decided before the 1998 amendment of the simple DUI statute. (See R. p. 1257, lines 13-23). See State v. Caldwell, 231 S.C. 184, 98 S.E.2d 259 (1957). ("'Under the influence'" means sufficiently under the influence as to impair the ability of such driver to operate the vehicle with reasonable care."); Dixon v. Weir Fuel Co., 251 S.C. 74, 160 S.E.2d 194 (1968) ("One may be under the influence as contemplated by the traffic laws without being drunk or passed out, or even intoxicated. One violates the traffic statute if he partakes of alcohol to the extent that he cannot drive a motor vehicle with reasonable care, or if he cannot drive as a prudent driver would operate a vehicle. The question is not whether the defendant is drunk or intoxicated, but whether his condition is such that he could drive with due regard for others and himself.").

III. Appellant's issue regarding admission of his blood test results is not preserved for appellate review where Appellant failed to make a germane contemporaneous objection and where Appellant is making a different argument on appeal than he made in the trial court. In any event, Appellant's blood test results were properly admitted where Missouri v. McNeely is not applicable since Appellant's case involved the consent exception; where even if Missouri v. McNeely was applicable the good faith exception would preclude suppression; and where admission of the blood test results, if error, was harmless because Appellant himself introduced the chemist's report containing the results and the challenged testimony was merely cumulative.

Issue Preservation

Appellant argues on appeal that the trial court erred by allowing into evidence his blood test results because, he contends, the drawing of his blood without a warrant constituted an unreasonable search and seizure under the Fourth Amendment and under Missouri v. McNeely, __ U.S. __, 133 S.Ct. 1552 (2013). This issue is not preserved for review. First, Appellant failed to make an appropriate contemporaneous objection when the blood test results were offered for admission. (See R. p. 918-19). The only contemporaneous objection Appellant made was on the ground of "foundation." (R. p. 919, lines 3-5). Appellant did not renew his pre-trial objections to the evidence. (See R. p. 918-19; see also p. 74-89; p. 224-28; p. 231-38). Accordingly, no issue - other than that of "foundation," which is not being argued on appeal - is preserved for appellate review. See State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001) (generally, making a motion *in limine* at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination; therefore, unless the motion *in limine* is made immediately prior to the introduction of the evidence in question, the moving party must make a contemporaneous objection when the evidence is introduced); see also State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005)

("If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.").

Second, the issue is not preserved because the argument Appellant makes on appeal does not comport with the argument made below. Appellant filed a pre-trial motion entitled "Defendant's Motion to Exclude Results of Blood Tests for Failure of State to Comply with Felony DUI Advisement of Rights and to Exclude Blood Test by Reason of Illegal Seizure of Defendant's Blood Without a Warrant." (See R, p. 1). The substance of Appellant's argument in this written pre-trial motion was that the State failed to advise Appellant of his rights prior to the taking of the blood sample and that Deputy Martin did not have, within his own personal knowledge, facts establishing probable cause, as required by S.C. Code § 56-5-2946, to believe Appellant committed felony DUI. (See R, p. 1-4). At the pre-trial suppression hearing, Appellant reiterated his argument that the blood was taken before Appellant was properly given his rights. (See R. p. 90-95; see also p. 228, lines 10-11). Appellant never made any argument concerning the Fourth Amendment and never argued below that a warrant was required before the police could obtain his blood.[6] Thus, in essence, Appellant's only argument below was that the State failed to meet its burden to prove it complied with the implied consent laws. Accordingly, the Fourth Amendment issue now raised on appeal is not preserved for review. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (an appellant is limited to the arguments he makes at trial); State v. Johnson, 363 at 58-59, 609 S.E.2d at 523 ("If a party fails to properly object, the party is procedurally barred

[6] As stated above, Appellant mentioned the Fourth Amendment in the caption of his written pre-trial motion to suppress. (See R, p. 1). However, his mere mention of the term in a caption is insufficient to preserve the specific argument he now raises on appeal. See State v. Bailey, 253 S.C. 304, 309-310, 170 S.E.2d 376, 379 (1969) (a general argument not specifying any grounds supporting it will not preserve an issue for review); see also State v. Jones, 392 S.C. 647, 655-56, 709 S.E.2d 696, 700-701 (Ct. App. 2011) (short, conclusory statements present nothing for review).

from raising the issue on appeal."); State v. Tucker, 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995) (a party may not argue one ground below and then argue different ground on appeal); see also Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 129-30, 64 S.E.2d 253, 258 (1951) (an issue was not preserved even though the trial court explicitly approached the issue; the appellant did not mention the issue in his directed verdict motion, and the trial court's discussion of the issue "d[id] not have the effect of enlarging the grounds upon which said motion was made.").

Discussion

Assuming the argument made on appeal is preserved for review, the argument is without merit because Missouri v. McNeely, __ U.S. __, 133 S.Ct. 1552, (2013), has no application to this case. In McNeely, the United States Supreme Court addressed a situation where a defendant *refused to consent* to a blood draw.[7] McNeely, 133 S.Ct. at 1557. In other words, the defendant withdrew the consent he had previously given pursuant to the state's implied consent law. Therefore, "consent" not being a valid exception to the usual warrant requirement, the Court had to determine whether the "exigency" exception applied. Id. at 1558-60.

In contrast, in this case, Appellant does not argue on appeal that the blood draw was not consensual. (See Brief of Appellant, p. 12-14). Indeed, all the evidence supports that Appellant never withdrew the consent he gave - by driving a motor vehicle in South

[7] The United States Supreme Court recognized the distinction between a case where a person is considered to have given consent pursuant to an implied consent statute and a case where a person revokes his consent under an implied consent law. See McNeely, 133 S.Ct. at 1566 (In rejecting the government's argument that a "totality of the circumstances approach" would undermine the governmental interest in preventing and prosecuting drunk driving offenses, the Court stated that "[a]s an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.") (citations omitted).

Carolina - under the implied consent law. (See R. p. 105-58; p. 754-60; R. p. 804-809). See S.C. Code § 56-5-2950 (A) ("A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs."). Accordingly, since the "consent" exception to the warrant requirement clearly applies in this case, Appellant's argument regarding McNeely is misplaced and is without merit. See State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement; one of the recognized exceptions is "consent") (citations omitted).

However, even assuming a warrant was required in Appellant's case pursuant to the rationale of McNeely, the exclusionary rule would not apply since the officers were acting in good faith when they obtained Appellant's blood sample. The blood sample was taken on December 8, 2008. At that time, binding South Carolina Supreme Court precedent indicated that a warrant for a suspect's blood was not required as long as the police had probable cause that the suspect had committed felony DUI.[8] See State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989). Appellant was tried in October 2011, and McNeely was subsequently decided on April 17, 2013.

[8] Like many jurisdictions, South Carolina interpreted Schmerber v. California, 384 U.S. 757 (1966), to mean that the natural metabolism of alcohol in a person's bloodstream was an exigent circumstance justifying an exception to the usual warrant requirement. See Williams, 297 S.C. at 292, 376 S.E.2d at 774; see, e.g., State v. Shriner, 751 N.W.2d 538 (Minn. 2008); State v. Bohling, 494 N.W.2d 399 (Wis. 1993); State v. Woolery, 775 P.2d 1210 (Idaho 1989).

At the time of Appellant's blood draw, the officers were justified in relying on State v. Williams as opposed to Missouri v. McNeely, which would not be decided for another five years. The officers followed the requirements of the implied consent statutes and acted in a good faith belief that a warrant was not required. Therefore, the exclusionary rule does not apply. See State v. Brown, 401 S.C. at 95, 736 S.E.2d at 270 (holding that the exclusionary rule should not be applied where the officers carried out their search in accordance with existing appellate precedent, since excluding the evidence would serve no deterrent purpose); Narciso v. State, 397 S.C. 24, 32, 723 S.E.2d 369, 373 (2012) ("[E]xcluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."); Davis v. U.S., 131 S.Ct. 2419, 2434 (2011) ("It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to the governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.") (citation omitted); see also Herring v. U.S., 555 U.S. 135 (2009) & Arizona v. Evans, 514 U.S. 1 (1995). Because the good-faith exception applies, the blood test results were properly admitted at trial.

Finally, assuming it was error to admit the blood test results, the error was harmless. During the testimony of the chemist, the State introduced the blood test results over Appellant's "foundation" objection. (R. p. 919, lines 1-8). Subsequently, on cross-examination and without reserving any objection to the blood test results, Appellant's counsel introduced the chemist's report into evidence. (R. p. 922, lines 1-8; see also p. 1199, lines 17-24). The chemist's report containing the blood test results was merely cumulative to the chemist's testimony about the results. Therefore, any error in admitting the blood test results was harmless beyond a reasonable doubt. See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During the course of the trial certain testimony was admitted over the objection of [appellant's] counsel. Thereafter, counsel for the appellant cross-examined the witness thereabout *without reserving the objection previously made*. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured.") (emphasis added); State v. Sullivan, 277 S.C. 35, 45, 282 S.E.2d 838, 844 (1981) (indicating that a defendant cannot complain of an error which results from his own conduct or to which his conduct has contributed); State v. Johnson, 298 S.C. 496, 498-99, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence.").

IV. Assuming the issue is properly before this Court, the trial judge properly admitted evidence of an empty liquor bottle found in the vicinity of Appellant's truck at the collision scene where the evidence was relevant to the charge of felony DUI. In any event, even if the judge erred in admitting this evidence, such error was harmless where the evidence was merely cumulative to other evidence in the record and where its admission was insignificant in the context of the entire record.

Issue Preservation

In a pre-trial written motion, Appellant argued that evidence relating to the Jim Beam bottle should be excluded because the State destroyed the evidence prior to trial.

(See R. p. 13-14). Appellant also argued that the photograph of the Jim Beam bottle was irrelevant under Rule 401 because it was "found somewhere in the woods" and that admission of the photograph was improper because, under Rule 403, the probative value of the photograph was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and the potential for the jury to be misled. (See R. p. 14). In the pre-trial hearing, Appellant briefly argued that photographs of the Jim Beam bottle were not relevant, but made no argument regarding Rule 403. (See R. p. 37-39). In fact, most of Appellant's pre-trial hearing argument focused on the fact that the bottle had been destroyed prior to trial and that Appellant was therefore unable to have it fingerprinted. (See R. p. 39-51). Later in trial, when the State offered three photographs relating to the Jim Beam bottle into evidence, Appellant's counsel stated, "Objection, Your Honor." (R. p. 515, lines 23-25). After a bench conference, the trial judge stated she was admitting the photographs over Appellant's objections on "relevance, spoliation, and the other issues raised are as to weight and that can be covered in cross-examination." (R. p. 516, lines 2-11). The judge did not rule on any issue regarding Rule 403 nor did Appellant request that she do so. (R. p. 516).

Based on the foregoing, the State submits that no issue with regard to Rule 403 is preserved for appellate review.[9] Although Appellant mentioned Rule 403 in his written pre-trial motion in a summary fashion, he did not raise a Rule 403 issue at the pre-trial hearing or in his objection during trial. (See R. p. 14; p. 37-51; p. 515-16). The trial

[9] It is also arguable that the entire issue is unpreserved because Appellant cross-examined Investigator Kjellman about the Jim Beam bottle without reserving an objection to the testimony. (See R. p. 533-38). See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During the course of the trial certain testimony was admitted over the objection of [appellant's] counsel. Thereafter, counsel for the appellant cross-examined the witness thereabout *without reserving the objection previously made.* The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured.") (emphasis added).

judge consequently did not issue a ruling regarding Rule 403. (See R. p. 515-16). Accordingly, the Rule 403 argument made on appeal is not preserved for review. See State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011), *reversed on other grounds by* Op. No. 27328 (S.C. Sup. Ct. filed Oct. 30, 2013) (Davis Adv. Sh. No. 46 at 15) (Rule 403 argument not preserved for appellate review where the particular argument was not raised to or ruled upon by the trial judge).

Furthermore, on appeal, Appellant's issue statement contends that the trial court committed reversible error by allowing evidence of an empty Jim Beam bottle found near the collision scene because, *inter alia*, it was more prejudicial than probative under Rule 403, SCRE. However, no Rule 403 issue is properly before this Court because, although Appellant quotes Rule 403 in his brief, Appellant does not make any actual argument regarding Rule 403 and does not discuss the probative versus prejudicial value of the evidence. (See Brief of Appellant, p. 17-19). See State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700-701 (Ct. App. 2011) (finding an argument to be abandoned on appeal where, although appellant's issue statement mentioned the argument, the body of his brief focused on a different issue and appellant provided no case law or authority in support of his particular argument); see also State v. Jones, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001). Instead, Appellant's focus appears to be on the State's purported inability to establish the relevance of the evidence. (See Brief of Appellant, p. 17-19). Therefore, the State submits that no Rule 403 issue is presented for review.

Discussion

Error preservation concerns aside, the trial judge properly allowed evidence regarding the Jim Beam bottle because the State established that the evidence was relevant. "Relevant evidence" refers to evidence that has a tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. State v. Lyles, 379 S.C. 328, 336-37, 665 S.E.2d 201, 206 (Ct. App. 2008). "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Id. (citations omitted). The existence of a logical connection to the facts in debate makes evidence relevant and admissible. Id. at 340, 665 S.E.2d at 207. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the rules of evidence], or by other rules promulgated by the Supreme Court of South Carolina." Id. at 337, 665 S.E.2d at 206. A trial judge's decision regarding the relevancy of evidence should only be overturned for a clear abuse of discretion. Id. at 339, 665 S.E.2d at 207 (citations omitted).

The evidence regarding the Jim Beam bottle was relevant in this felony DUI case because the circumstantial evidence warranted an inference that the empty bottle belonged to Appellant. The collision involved an extremely violent crash after which Appellant's truck rolled over twice; this, unsurprisingly, caused unrestrained items to be ejected from Appellant's vehicle. (See R. p. 368, lines 23-25). The bottle was found on the side of the road at the collision scene, about ten feet from Appellant's cooler, in close proximity to Appellant's burst beer cans and to his truck.[10] (See R. p. 25-26; p. 280, lines

[10] There is some question about whether or not the Jim Beam bottle was moved to the side of the road, along with the burst beer cans and the cooler, by Appellant's neighbor before the police arrived. Although the prosecutor told the judge that she believed testimony to that effect would be forthcoming (see R. p. 30; p. 33-34), the only evidence regarding items being moved was Jose Davilla's rather vague testimony that Ray Woods, who was friends with Appellant, "got the cooler, got the beer." (R. p. 704, lines 18-22; see also R. p. 1059-61). Appellant did not ask that the evidence regarding the Jim Beam bottle be withdrawn on the ground that the prosecutor's expected testimony was not elicited. In any event, even assuming the items had been moved, they were apparently moved only a short distance from in the roadway to the side of the road. (See R. p. 30; p. 33-34; see R. p. 704, lines 18-22). Either way, the Jim Beam bottle was in close proximity to Appellant's truck after the collision and was near the cooler and beer cans Appellant admitted

17-20; p. 326, lines 19-21; p. 355-56; p. 518-19; see p. 1394-96). Appellant did not dispute that the particular road involved was not "a road with random patches of litter everywhere." (R. p. 37). Further, Investigator Kjellman specifically testified that it appeared that the Jim Beam bottle had "freshly been put there." (R. p. 536, lines 12-14). Importantly, Appellant appeared to be intoxicated after the crash and had a blood alcohol level of .208 nearly four hours after the collision. (See R. p. 292; p. 313; p. 364, lines 4-6; p. 919, lines 7-16). Under the circumstances, there was a reasonable inference to be drawn that the empty Jim Beam bottle came from Appellant's truck. Therefore, evidence regarding the bottle was relevant because it tended to make more probable a fact in controversy; that is, that Appellant was driving while under the influence of alcohol. Accordingly, the trial judge did not err in admitting this evidence.

Even assuming the trial judge erred in admitting evidence relating to the Jim Beam bottle, the State submits that such error would have been harmless. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). Error is harmless beyond a reasonable doubt if

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were his. (See R. p. 280, lines 17-20).

it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). Additionally, "[u]nder settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

First, the photographs depicting the Jim Beam bottle were merely cumulative to previous testimony about the liquor bottle being found at the scene. (See R. p. 365-66; see R. p. 516-17). Prior to Investigator Kjellman's testimony, Detective Brinson testified that he observed at the scene a cooler, some beer cans, and a liquor bottle. (R. p. 365, lines 22-25). Although Appellant objected immediately after this testimony, he did not state the grounds for his objection on the record but instead requested a bench conference, which was not recorded. (See R. p. 366, lines 1-6). The judge's ruling on the objection is unclear since she simply stated, "[p]roceed," and Appellant's counsel did not thereafter seek to place his ground for objecting on the record and did not request that the testimony about the liquor bottle be stricken. (See R. p. 366). See York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review."); State v. Harry, 321 S.C. 273, 280, 468 S.E.2d 76, 80 (Ct. App. 1996) (issue not preserved where counsel objected without stating any grounds and raised no further issue after an unrecorded bench conference). Therefore, the photographs of the Jim Beam bottle were merely cumulative to evidence already in the record and any error in admitting the photographs was harmless. See Blackburn, 271 S.C. at 329, 247 S.E.2d at 337.

Second, admission of the Jim Beam bottle was harmless because of its insignificance in the context of the entire record. The testimony about the Jim Beam

bottle took up less than ten pages in the transcript of a trial that took place over a period of nine days. (See R. p. 365, lines 24-25; p. 518, line 20 – p. 520, line 19; p. 533, line 1 – p. 538, line 18). The bottle was not mentioned in the opening statements or in the State's closing argument.[11] (See R. p. 260-88; p. 1216-44). Defense counsel elicited testimony that the bottle appeared dusty and dirty and suggested that the bottle was probably trash that had been left in the woods previously. (See R. p. 533; p. 536-37; p. 1192, lines 2-5). Additionally, Investigator Kjellman acknowledged on cross-examination that she did not know how the bottle came to be where it was found. (R. p. 533, line 24 – p. 534, line 1). Defense counsel also fully exploited the fact that the police department had destroyed the evidence before trial and that the State could not show that Appellant's fingerprints were on the bottle. (See R. p. 534-39; p. 610-11; p. 1191-92).

Importantly, considering that (1) Appellant acknowledged that the cooler and unopened beer cans were his; (2) Appellant admitted to drinking at his farm; (3) there was plenty of evidence in the record establishing that Appellant appeared impaired by alcohol; and (4) Appellant's blood alcohol concentration was .208 nearly four hours after the crash, the evidence of the empty liquor bottle was not significant enough so as to affect the outcome of trial. (See R. p. 280, lines 17-20; p. 292; p. 313; p. 326; p. 413, lines 5-7; p. 472; p. 490-91; p. 554-55; p. 760; p. 808; p. 919, lines 7-8). Finally, it is apparent that the jurors were not improperly swayed to convict based upon the Jim Beam bottle because they returned a "not guilty" verdict as to one of the charges. (See R. p. 1277, lines 1-5). Accordingly, even if it was error to admit evidence regarding the Jim Beam bottle, such error was harmless beyond a reasonable doubt since the evidence was insignificant in the context of the entire record and admission of the evidence did not

[11] Notably, the prosecutor in closing referenced the cooler and beer cans, which Appellant admitted were his, but did not mention the Jim Beam bottle. (See R. p. 1220-21).

affect the outcome of trial. See State v. Lyles, 379 S.C. at 345-46, 665 S.E.2d at 210 (error that has no impact of the outcome of the case is harmless); see also State v. Tapp, 398 S.C. 376, 390-91, 728 S.E.2d 468, 475-76 (2012).

V. The trial judge properly excluded a videotape of Appellant, made by Appellant's attorney at the hospital several hours after the collision, since the videotape was not proper impeachment evidence and Appellant failed to authenticate the videotape through the witness he sought to impeach. In any event, even assuming error, exclusion of the videotape was harmless where the videotape was cumulative to the testimony of Appellant's expert.

Appellant argues that the trial court committed reversible error by excluding a videotape made by Appellant's attorney at the hospital, contending that the videotape would have impeached Deputy Brinson and Sergeant Burrell's testimony regarding Appellant's impairment and confusion after the collision. To the contrary, the trial judge did not err by disallowing the videotape. First, the videotape was not appropriate impeachment evidence. Appellant attempted to offer the videotape to impeach Sergeant Burrell during his testimony.[12] (See R. p. 556-59). Specifically, Appellant wished to impeach Burrell's testimony about his observations of Appellant at the hospital.. (See R. p. 554-73). The videotape depicts a conversation between Appellant and his attorney, and the only person who can be seen in the videotape is Appellant. (See Video). Sergeant Burrell is not depicted in the videotape making any observations or talking to Appellant, and he did not testify that he was present when Appellant's attorney made the videotape. (See Video; see R. p. 556-611). Therefore, the videotape was not proper impeachment evidence since Appellant failed to show it was made contemporaneously

[12] To the extent Appellant argues that the videotape would have impeached both officers, this argument is misplaced because Sergeant Burrell was the only officer on the witness stand at the time Appellant sought to use the videotape for impeachment purposes. (See R. p. 558-75).

with Sergeant Burrell's observations.[13] In other words, the videotape was not relevant as impeachment evidence to be used during Sergeant Burrell's testimony.

Second, Appellant failed to properly authenticate the videotape under Rule 901, SCRE. Again, Sergeant Burrell was the witness Appellant sought to impeach using the videotape. (See R. p. 556-59). Sergeant Burrell was apparently not involved in the filming of the videotape and is not depicted in the videotape. (See Video). Appellant could not, and did not attempt to, authenticate the videotape through the witness he sought to impeach. (See R. p. 554-611). Accordingly, since Appellant failed to lay a proper foundation under Rule 901, the trial judge properly prevented Appellant from using the tape as impeachment evidence during Sergeant Burrell's testimony.

Appellant also asserts that the trial judge's ruling ignored Rule 104, SCRE, and that the trial judge should have held a hearing regarding the authenticity of the videotape outside the presence of the jury. (See Brief of Appellant, p. 25-26). Initially, this argument is not preserved for appellate review because Appellant never made this argument below and never requested such a hearing.[14] (See R. p. 558-75). See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (an objection should be addressed to the trial court in "a sufficiently specific manner that brings attention to the exact error;" if a party fails to do this, he is

[13] In fact, the trial record reflects that the videotape was made at about 12:35 am on December 9, 2008, but it appears that Sergeant Burrell's observations were made sometime earlier that evening during Appellant's first trip to the hospital. (See R. p. 1116, lines 3-5; R. p. 554-57; p. 197-209; see also p. 157-84; p. 410-16; p. 472-73; p. 575, lines 19-24). To the extent the testimony in the record is unclear on this point, see State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 870 n1 (1975) ("The burden of proof is on the appellant to convince this Court that the lower court was in error. In order to do this he must place in the record sufficient testimony to serve as a foundation for his argument.") (citation omitted). Notably, the trial judge repeatedly warned Appellant that the timeline was unclear. (See R. p. 568-69; p. 571-72; p. 575-76). Importantly, defense counsel's assertions at trial regarding the time frame did not constitute evidence.

[14] Although Appellant's counsel mentioned Rule 104 when he requested that the judge "conditionally admit" the videotape, he did not make the argument now being made on appeal. (See R. p. 573, lines 18-24).

procedurally barred from raising the issue on appeal). In any event, Appellant's Rule 104 argument is without merit since the videotape would have had to be authenticated before the jury, not merely in a hearing outside the presence of the jury.

Appellant further contends that the trial judge's ruling violated Appellant's right to present a complete defense. This issue is not preserved for appellate review because Appellant never made this argument to the trial judge. (See R. p. 558-77). See Patterson at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."). In any case, as discussed above, the trial judge properly excluded the videotape because the videotape was not proper impeachment evidence and because the videotape could not be authenticated by the witness on the stand. While the videotape may have been admissible in another context, it was not admissible during Sergeant Burrell's testimony to impeach him. Therefore, Appellant was not deprived of his right to present a complete defense. See Lyles at 343, 665 S.E.2d at 209 ("Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission.") (citation omitted).

Finally, even assuming the trial court somehow erred by excluding a videotape which was not relevant impeachment evidence and was not authenticated, the error would have been harmless. Appellant's expert, Dr. Hargrave, testified that he reviewed the videotape of Appellant taken at the hospital and that "it did not appear that [Appellant] was significantly impaired. (See R. p. 1101-02). Dr. Hargrave further testified that Appellant's appearance on the video was not consistent with significant impairment; that Appellant did not have bloodshot eyes; that Appellant was lucid, oriented, and cooperative; and that Appellant did not slur his speech. (R. p. 1102, lines 3-7).

Accordingly, since the videotape would have been merely cumulative to Dr. Hargrave's testimony about the videotape, the exclusion of the videotape was harmless. See State v. Patterson, 290 S.C. 523, 528, 351 S.E.2d 853, 856 (1986) (exclusion of medical records as impeachment evidence was harmless error where the medical records would have been cumulative to the testimony of the pathologist); State v. Beckham, 334 S.C. 302, 319-20, 513 S.E.2d 606, 614-15 (1999) (erroneous exclusion of certain impeachment evidence was harmless as it was cumulative to other evidence of an impeaching nature); State v. Brown, 344 S.C. 302, 309, 543 S.E.2d 568, 571-72 (Ct. App. 2001) (trial court's exclusion of defendant's proffered videotape was harmless error where the videotape was cumulative to other evidence presented at trial). In addition, exclusion of the videotape could not reasonably have affected the outcome of trial - especially considering that the videotape was taken over six and a half hours after the collision - in light of all the other testimony and evidence that was presented relating to Appellant's level of impairment. See State v. Sherard, 303 S.C. at 176, 399 S.E.2d at 597 (appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result).

VI. Appellant's argument that the trial court should have dismissed his charges because the officers failed to record his conduct when they left the hospital is without merit, since S.C. Code § 56-5-2953 only requires videotaping of the suspect at the incident site, and since the arresting officer properly submitted an affidavit that it was impossible to produce a video recording at the incident site because Appellant needed emergency medical treatment.

Appellant argues that the trial judge should have dismissed his charges because the officers failed to record his conduct when they transported Appellant from the hospital to the detention center. Appellant bases this claim on S.C. Code § 56-5-2953, entitled "Incident site and breath test site video recording."[15] Under this code section, "a

[15] This section was amended effective February 10, 2009. However, the current version of the statute and the version in effect in 2008 are, in pertinent part, the same.

person who violates [driving under the influence provisions] must have his conduct at the incident site and the breath test site video recorded." S.C. Code § 56-5-2953 (A). Under subsection (A), the video recording "at the incident site" must not begin later than the activation of the officer's blue lights; must include any field sobriety tests administered; and must include the arrest of a person for driving under the influence ("DUI") or a probable cause determination that the person violated the felony DUI law and show the person being advised of his Miranda rights. S.C. Code § 56-5-2953 (A)(1)(a)(i)-(iii).

However, subsection B of the statute provides, in pertinent part:

> Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county *or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment*, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic collision investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording. S.C. Code § 56-5-2953 (B) (emphasis added).

In this case, Appellant does not assert on appeal that any officer *at the incident site* was derelict in his videotaping duties. Indeed, Deputy Brinson, the arresting officer,

submitted an affidavit pursuant to § 56-5-2953 (B) indicating that it was physically impossible for him to produce a video recording at the incident site because Appellant needed emergency medical treatment. (See R. p. 162-64; see p. 1392-93). Appellant does not challenge the propriety of this affidavit and does not dispute the factual assertions contained therein. Instead, Appellant asserts that officers should have videotaped his conduct as he left the hospital over four hours after the collision as he smoked a cigarette before entering the patrol car and as he was riding in the car on the way to the detention center. (See Brief of Appellant, p. 27-29). Appellant relies on subsection (B)'s requirement that, "as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section." Appellant's reliance on the above statement is misplaced. First, that statement modifies only the "road blocks, traffic collision investigations, and citizens' arrests," etc., exception under subsection (B). This exception need not be reached in this case since Deputy Brinson properly submitted a sworn affidavit pursuant to (B)'s previously-listed exception pertaining to recording being impossible because the defendant needed emergency medical treatment. (See R. p. 1392-93). See State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317-18 (Ct. App. 2012) (failure to comply with the video recording requirement is excused if (1) the officer submits an affidavit that the video equipment was inoperable; or (2) if the arresting officer submits an affidavit that it was impossible to produce the video because the defendant needed emergency medical treatment or exigent circumstances existed; or (3) in circumstances including, but not limited to, road blocks, traffic collision investigations, and citizen's arrests, etc.; or (4) for any other valid reason based upon the totality of the circumstances).

In any event, subsection (B) still relates back to "the provisions of this section," which provisions clearly require videotaping of the defendant's conduct *only* at the "incident site." The statute does not contemplate video recordings taking place as the defendant leaves the hospital over four-and-a-half hours after a collision. (See R. p. 290, lines 10-12; p. 612, lines 21-25). See Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (the primary rule of statutory construction is to ascertain and give effect to the intent of the legislature; where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court cannot impose another meaning) (citations omitted). A requirement that police produce a video recording at the hospital over four-and-a-half hours after a collision does not comport with the plain language of the statute or the spirit of the statute. If the legislature wanted to require that video recordings be made at locations other than the "incident site" it would have said so and would have titled the statute differently. See S.C. Code § 56-5-2953 ("*Incident site* and breath test site video recording.) (emphasis added); see also State v. Johnson, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute.") (citation omitted). Accordingly, Appellant's argument that the officers should have videotaped him in the hospital parking lot as he smoked a cigarette and during the ride to the jail is without merit. Where the arresting officer properly submitted a sworn affidavit excusing his failure to produce a video recording of Appellant's conduct at the incident site pursuant to S.C. Code § 56-5-2953 (B), the trial judge correctly denied Appellant's motion to dismiss the charges.[16] (See R. p. 226-31).

[16] Even if Deputy Brinson had not submitted the affidavit under subsection (B), a video recording was not

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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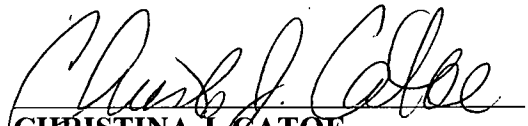

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required because Deputy Brinson was conducting an investigation of a traffic collision and Appellant was arrested at the hospital. See State v. Manning, 400 S.C. at 266, 734 S.E.2d at 318. Furthermore, a video recording was not required under the totality of the circumstances because Appellant and Deputy Brinson were never at the incident site at the same time. (See R. p. 153, lines 13-15). See id. at 266, 734 S.E.2d at 318-19.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2012-212639

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WALTER DOUGLAS BARCLAY,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.

CHRISTINA J. CATOE

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **JOHN B. SHUPPER**, Post Office Box 90623, Columbia, South Carolina 29290, this **9th** day of **December, 2013.**

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SWORN to before me this 9th day of December, 2013.

Notary Public for South Carolina.
My Commission Expires: 5/11/2014