

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Lexington County
The Honorable Knox R. McMahon, Circuit Court Judge

Opinion No. 5157 (S.C. Ct. App. filed 7/10/13)
Appellate Case No. 2013-001970

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LEXIE DIAL, III,

PETITIONER.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The Court of Appeals properly affirmed the trial judge's conclusion that the arrest of Petitioner was lawful where Sgt. Dukes had jurisdiction to arrest Petitioner, pursuant to a valid arrest warrant, in Richland County by virtue of his status as a Special Deputy of the U.S. Marshal's Service who was a member of a federally-authorized fugitive task force. In any event, the arrest of Petitioner was proper as a citizen's arrest pursuant to S.C. Code § 17-13-10. Even assuming the arrest was unlawful, suppression of Petitioner's confession was not appropriate because the good-faith exception precluded application of the exclusionary rule. Finally, even if Petitioner's confession should have been excluded, its admission was harmless error because there was overwhelming evidence of guilt separate and apart from the confession.
- II. The Court of Appeals correctly affirmed the trial judge's denial of Petitioner's motion for mistrial after the mother of victim carried a small urn with her to the witness stand where the judge found no prejudice to Petitioner and where he cured any possible prejudice with an instruction to the jury.
- III. The Court of Appeals properly concluded that the denial of Petitioner's request to admit the original and amended pathologist's reports, if error, was harmless and would not have affected the outcome of trial.

STATEMENT OF THE CASE

Petitioner was indicted in Lexington County in July 2010 for homicide by child abuse. On April 11-15, 2011, he proceeded to trial before the Honorable R. Knox McMahon and a jury. The jury found Petitioner guilty as indicted. On April 19, 2011, Judge McMahon heard Petitioner's post-trial motions. The motions were denied, and Judge McMahon thereafter imposed a sentence of life without parole pursuant to S.C. Code Ann. § 16-3-85(D). A timely notice of appeal was served and filed.

On July 10, 2013, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. See State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013). Petitioner's request for rehearing was denied on August 22, 2013. Petitioner timely submitted a Petition for Writ of Certiorari. On August 6, 2014, this Court granted the Petition as to questions I, III, and IV. Petitioner's Brief was submitted on September 16, 2014, and this Brief of Respondent follows.

ARGUMENT

Brief Overview of Trial

On the evening of January 19, 2010, Petitioner was at his Lexington County home alone with the victim, his five-month-old son. (R. p. 285-86; p. 855-59). At 8:14 pm, Petitioner's father called 911 and indicated the victim was not breathing, and EMS, fire service, and law enforcement responded. (R. p. 226). At the scene, Petitioner claimed he fell while holding the victim and the victim hit his head on the coffee table. (R. p. 282). CPR was performed on the victim and he was ultimately transported to Lexington Medical Center. (R. p. 234-95). However, the emergency room doctor in Lexington determined that the victim needed services beyond the capabilities of the hospital, so he sent the victim to the Children's Hospital in Richland County. (R. p. 299-300). Early the next afternoon, the victim passed away. (R. p. 122).

The autopsy revealed that the victim had bilateral subdural hemorrhages and bilateral subarachnoid hemorrhages, extremely serious injuries not caused by a typical household fall. (R. p. 581-87; p. 753-54). The autopsy also revealed that the victim did not have a bruise on his head, proving his injuries did not result from hitting his head as Petitioner claimed. (R. p. 578-80). Retinal photographs revealed that the victim had hemorrhages "too numerous to count" in both eyes "in all quadrants to the back of the eyes," and that he had "retinoschisis," which is generally caused by violent back and forth acceleration, i.e., shaking. (R. p. 400-405). Dr. Webb-Wood, Dr. Cheeseman, Dr. Harper, and Dr. Luberoff all opined that the victim's injuries and death were the result of non-accidental trauma; specifically, shaken baby syndrome. (See R. p. 342, lines 15-17; p. 400-417; p. 455-466; p. 749-87). The pathologist listed the manner of death as

homicide. (R. p. 586, lines 3-8). After Petitioner was arrested, he confessed that he shook the victim in a fit of anger and frustration. (R. p. 115-16; p. 705-25; p. 1022-23). However, at trial, Petitioner claimed that he tripped over a steam cleaner while holding the victim and fell into a coffee table. (R. p. 857-58). The jury ultimately rejected Petitioner's trial testimony and found him guilty of homicide by child abuse. (R. p. 966).

- I. **The Court of Appeals properly affirmed the trial judge's conclusion that the arrest of Petitioner was lawful where Sgt. Dukes had jurisdiction to arrest Petitioner, pursuant to a valid arrest warrant, in Richland County by virtue of his status as a Special Deputy of the U.S. Marshal's Service who was a member of a federally-authorized fugitive task force. In any event, the arrest of Petitioner was proper as a citizen's arrest pursuant to S.C. Code § 17-13-10. Even assuming the arrest was unlawful, suppression of Petitioner's confession was not appropriate because the good-faith exception precluded application of the exclusionary rule. Finally, even if Petitioner's confession should have been excluded, its admission was harmless error because there was overwhelming evidence of guilt separate and apart from the confession.**

Relevant Facts

Prior to trial, Petitioner objected, pursuant to Jackson v. Denno, to the introduction of a statement he gave to Lt. Eric Russell of the Lexington County Sheriff's Office. (See R. p. 101). In a pre-trial hearing, Lt. Russell testified that he became involved in the investigation of Petitioner's case on January 20, 2010. (R. p. 103). He went to the hospital in Richland County after the victim was transferred there and spoke with the doctors regarding the nature of the victim's injuries. (R. p. 103; p. 106, line 2). While Lt. Russell was at the hospital conducting interviews, the victim passed away at 2:06 pm. (R. p. 104). Petitioner was not in custody at that time. (R. p. 104). After Petitioner went into the victim's room to say his final goodbyes, he was taken into custody in a private conference room down the hall. (See R. p. 104-105). This occurred

a few minutes after the victim's death. (R. p. 122-23). Petitioner was arrested for the offense of homicide by child abuse. (R. p. 123, lines 3-7). Sgt. Henry Dukes of the Lexington County Sheriff's Office made the actual physical arrest since he was a member of "the Sheriff's Department Task Force" and "had jurisdiction to make arrests in Richland County." (R. p. 105-106). At the time of Petitioner's arrest, there had been a warrant issued for inflicting great bodily harm upon a child. (R. p. 123, lines 19-22). The police were in the process of having this warrant recalled and having a warrant for homicide by child abuse issued. (R. p. 123-24). At the time Petitioner was arrested by Sgt. Dukes, the great bodily injury warrant was entered into NCIC, which meant that other jurisdictions could arrest Petitioner based upon the outstanding warrant. (See R. p. 157, lines 12-18).

Following his arrest at the hospital, Petitioner was escorted to Sgt. Dukes' vehicle and transported to the Lexington County Sheriff's Department complex. (See R. p. 106, lines 21-23). Lt. Russell rode along, and when they arrived at an interview room of the Sheriff's Department, Sgt. Dukes left and Lt. Russell removed the handcuffs from Petitioner. (R. p. 107-108). Lt. Russell then gave Petitioner his Miranda rights, both orally and in writing, and Petitioner waived his rights and agreed to speak with Lt. Russell. (R. p. 108-112; see State's Exhibit # 63). Thereafter, Petitioner provided an oral statement that was largely consistent with prior statements he gave to people at the scene. (See R. p. 112; p. 127, lines 20-24). In this statement, Petitioner claimed that the victim was injured when his head hit the coffee table after Petitioner, who was holding the victim, tripped over something in the house and fell. (R. p. 112, lines 13-17). However, after Lt. Russell informed Petitioner that the doctors had told him that the injuries to the

victim could not have been caused by a single fall, Petitioner provided a second statement, first orally and then in writing. (R. p. 112-115). In this second statement Petitioner confessed that he shook the victim out of anger and frustration.¹ (R. p. 115-16). At the conclusion of the interview, Lt. Russell served the homicide by child abuse warrant on Petitioner at approximately 4:10 pm. (R. p. 135-36; p. 137, lines 1-25).

At the conclusion of the pre-trial hearing, Petitioner raised an issue about Sgt. Dukes' authority to arrest Petitioner in Richland County. (See R. p. 162-63; p. 167-70). However, he admitted that he had no evidence to contest the undisputed, un-contradicted evidence in the record that "Sgt. Dukes had [s]tate-wide jurisdiction by virtue of being on the U.S. Marshal's Task Force." (R. p. 167, lines 16-20; p. 168-170). The trial judge concluded that, "given the facts in the record, as I understand them at this point, Sgt. Dukes had the authority to make an arrest in Richland County." (R. p. 170, lines 14-16). Thereafter, both the State and the defense discussed Petitioner's confession in opening statements. (See R. p. 205, line 23 – p. 206, line 4; p. 209, lines 6-10).

Later in trial, Detective Grant testified that, after he and Lt. Russell talked with the doctors at the Richland County hospital, they believed they had probable cause to obtain an arrest warrant for Petitioner for inflicting great bodily injury upon a child. (See R. p. 135, line 1-3; p. 649). Therefore, they contacted another detective at headquarters, relayed to him the information constituting probable cause, and asked him to attempt to procure a warrant before a judge. (R. p. 649). After the warrant was obtained, because Petitioner was in Richland County as opposed to Lexington County, the warrant was entered into NCIC, "the national police computer." (R. p. 649, lines 20-22). Detective

¹ This statement was later admitted at trial, over Petitioner's objection, as State's Exhibit # 63. (See R. p. 705, lines 5-18).

Grant testified, over Petitioner's "hearsay" objection, that the warrant was obtained by "another officer who works with the U.S. Marshal's task force, where he has jurisdiction to make a legal arrest." (R. p. 649, line 24 – p. 650, line 5). He stated it was standard procedure to contact such officers with "[s]tate-wide jurisdiction" when an arrest needs to be made in another county. (R. p. 650, lines 13-17). He testified without objection that, in this case, Sgt. Henry Dukes was the officer contacted to make the arrest of Petitioner because he had state-wide jurisdiction. (R. p. 650, lines 18-21; p. 652, lines 7-12). Detective Grant also stated that, after the initial warrant had been entered into NCIC, the victim passed away, and they requested that the great bodily injury warrant be recalled and another warrant be obtained for homicide by child abuse. (R. p. 651, lines 8-16). After Petitioner was allowed to see the victim for a few minutes, he was escorted to a separate room and "discreetly placed into handcuffs" by Sgt. Dukes, the officer with state-wide jurisdiction. (R. p. 652, lines 3-12).

Next, Detective Rivera testified and confirmed that he was the officer who actually procured both arrest warrants for Petitioner in this case. (See R. p. 661-63). He testified that the great bodily injury warrant was entered into NCIC around 2:00 pm. (R. p. 662, lines 18-23). He explained that when officers are trying to serve a warrant outside the county, they enter the warrant in NCIC and the NCIC entry authorizes the arrest of the person outside of Lexington County. (R. p. 667, lines 2-24). Detective Rivera then contacted the detectives at the hospital in Richland County and advised them that the warrant had been entered into NCIC. (R. p. 663, lines 1-3). Shortly thereafter, Detective Rivera received a phone call from Lt. Russell and he then procured a second arrest warrant for homicide by child abuse, which was also subsequently entered into NCIC

about fifteen minutes after he received the call from Lt. Russell. (R. p. 663-64; p. 668, lines 1-8). Later, when Lt. Russell arrived at the Sheriff's Department, the warrant was turned over to him. (R. p. 664, lines 17-19). Detective Rivera testified without objection that Sgt. Dukes, who effected the arrest of Petitioner in this case, was one of several officers who had the ability to serve a warrant outside of Lexington County. (R. p. 669, lines 15 – p. 670, lines 1).

Henry Dukes was the next witness called to testify. He testified that, in January 2010, he was a sergeant with the Lexington County Sheriff's Department and was assigned to the U.S. Marshal's Service task force. (R. p. 670-71). After he stated that his involvement in the U.S. Marshal's fugitive task force gave him "particular abilities beyond just those of a regular Lexington County officer," Petitioner's counsel stated, "Excuse me, Your Honor. If he is going to testify that he had authority to arrest outside of Lexington County, that would be hearsay. We would require them to prove that with some documentation." (R. p. 671, lines 7-11). The jury was excused, and the judge asked Petitioner to clarify his objection. (R. p. 671, lines 12-17). Petitioner argued that in order for a Lexington County deputy to arrest someone outside of the jurisdiction of Lexington County, "there must be some governmental agreement to authorize the arrest, as you would have under certain statutes." (R. p. 671, lines 18-23). He asserted that the only way Sgt. Dukes could have authority to make an arrest outside of the county was with "some kind of governmental agreement that was approved by the Lexington County governing body." (R. p. 672, lines 3-11).

In response, the State argued that Sgt. Dukes, who had his U.S. Marshal credentials present in the courtroom showing his membership in the U.S. Marshal's Task

Force, is “certainly capable of testifying to his capabilities in that regard.” (R. p. 16-20). Further, the State pointed out that there was already un-objected-to evidence in the record regarding Sgt. Dukes’ state-wide jurisdiction and his ability to make the arrest of Petitioner. (R. p. 672, lines 21-23). Sgt. Dukes then testified outside the presence of the jury that he was a “special deputy, a sworn special deputy with the United States Marshal’s Service Task Force,” at the time he made Petitioner’s arrest. (R. p. 675, lines 6-17). Following this testimony, the State argued that Sgt. Dukes “has federal jurisdiction, based on his membership in the Marshal’s Service.” (See R. p. 674-77). The State also argued that under S.C. Code § 23-1-212 “and under the powers he had as a deputy marshal that an arrest in Richland County would be valid.” (R. p. 677, lines 8-19). Counsel noted that “it is accepted in the course of business of the State.” (R. p. 677, lines 20-21).

Petitioner then argued that S.C. Code § 23-1-212 did not apply in this case because it “applies to full-time federal law enforcement officers employed by a federal or state agency.” (R. p. 678, lines 22-25). He also argued that “the only way a Lexington County officer can make an arrest outside of Lexington County is if they meet the requirements of 23-1-210 or -215 - if they are complied with.” (R. p. 679, lines 6-9). Petitioner argued that those statutes required “approval of a governing body” and there was no evidence of that in this case. (R. p. 679, lines 10-12). The State responded that the statutes referenced by Petitioner did not apply because they dealt with local and county law enforcement; therefore, approval of the Lexington County Council was not necessary. (R. p. 680, lines 6-10).

The State then called Katherine Luvisi, custodian of records for the General Counsel of the Lexington County Sheriff's Department, as a witness to introduce the Memorandum of Understanding regarding the Fugitive Task Force currently on file in Lexington County. (See R. p. 681-83). This document was marked as Court's Exhibit # 3. (R. p. 682, line 24). Subsequently, the State argued that, as stated in the Memorandum, the U.S. Marshal's Service has authority to investigate fugitive matters under federal law, specifically, under 28 U.S.C. § 566. (R. p. 684, lines 2-6; p. 688, lines 17-19; p. 689, lines 11-17). The State also pointed out that, as set forth in the Memorandum, the U.S. Marshal's Service is authorized to offer assistance "in the apprehension of people who are wanted." (R. p. 688, lines 13-16).

Counsel for the State argued that the facts of Petitioner's case were distinguishable from the facts of State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011), relied upon by Petitioner's counsel, and again pointed out that there was both *in camera* testimony and testimony before the jury that Sgt. Dukes had state-wide jurisdiction to arrest based upon his deputization as a United States Marshal. (R. p. 671, line 24 – p. 672, line 2; p. 685, lines 1-10). Therefore, counsel argued, Dukes effected Petitioner's arrest in accordance with his proper jurisdiction and the arrest was "the normal and usual practice in a case such as this." (R. p. 685, lines 11-13). Finally, the State argued that, even assuming Sgt. Dukes did not have proper authority to arrest Petitioner in Richland County, Petitioner's arrest was nevertheless proper as a citizen's arrest pursuant to S.C. Code § 17-13-10. (R. p. 685, lines 14-16).

Petitioner responded by asserting that State had not met the requirements of S.C. Code § 23-1-220 or § 23-1-216 and that Lexington County is not authorized to enter into

agreements “to extend jurisdiction.” (R. p. 686, line 24 – p. 687, line 4). He stated that Petitioner’s arrest occurred in Richland County, but there was “no agreement with Richland County, and [the State] ha[s] not met the requirements as necessary.” (R. p. 689, lines 3-7). He argued that S.C. Code § 23-1-212 “only applies to conduct of federal law enforcement agencies,” but that Sgt. Dukes was an officer employed by Lexington County. (R. p. 688, line 23 – p. 689, line 2). He also argued that the Memorandum of Understanding regarding the Fugitive Task Force did not apply because “there is no dispute that Lexie Dial was not a fugitive, running from anybody”; in fact, he contended, the testimony supported that Petitioner cooperated fully with law enforcement. (R. p. 687, lines 6-12). Finally, defense counsel asserted that “the citizen’s arrest is not an issue that would apply, even if the requirements of the statute were met.” (R. p. 687, lines 13-15).

The trial judge initially noted that Lt. Russell testified that Sgt. Dukes had state-wide jurisdiction to make arrests outside Lexington County. (See R. p. 689, lines 19-24). He also noted that Sgt. Dukes subsequently testified and presented credentials establishing that he was a “special deputy U.S. Marshal” who was properly sworn-in by the appointed U.S. Marshal. (R. p. 690, lines 3-13). The credentials authorized Sgt. Dukes to “carry firearms, make arrests, serve warrants, and conduct other business as directed by the U.S. Marshal.” (R. p. 690, lines 14-16). The Court then examined the Memorandum of Understanding regarding the agreement between the Sheriff of Lexington County and the United States Marshal, first noting that the document appeared to be properly signed. (R. p. 690, lines 17-22). The judge further stated that the Memorandum indicated that the primary mission of the task force is to “investigate and

arrest as part of joint enforcement operations persons who have active state and federal warrants for their arrest.” (R. p. 690, line 23 – p. 691, line 1). The judge quoted from the Memorandum that “[t]he intent of the joint effort is to investigate and apprehend local, state, and federal fugitives, thereby improving public safety and reducing violent crime,” and that “task force personnel may be required to travel outside of the jurisdiction to which they are assigned to further task force operations.” (R. p. 691, lines 2-9).

The court ruled that Petitioner’s case was clearly different from State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011), since in Boswell there was no arrest warrant and there was a 1999 “multi-jurisdictional agreement” between Calhoun and Lexington counties that had expired. (See R. p. 691, lines 10-19). See Boswell, 391 S.C. at 600-603; 707 S.E.2d at 269-71; see also S.C. Code § 23-1-210 (providing for multi-jurisdictional task forces between municipalities or counties).

The court stated that, looking at the evidence in the light most favorable to the defense, at the time of Petitioner’s arrest there was an arrest warrant issued for great bodily injury to a child, a felony, which was signed by a neutral and detached magistrate and was properly entered into the NCIC database. (R. p. 691, lines 12-24). The court found that the upgrade to the charge from great bodily injury to homicide by child abuse based upon the victim’s subsequent death did not change the analysis.² (R. p. 691, line 25 – p. 692, line 3). The court concluded that the arrest was valid since “it is a warrant arrest by an officer with the authority of Court’s Exhibit Number 3.” (R. p. 692, lines 4-5).

² The judge had previously ruled that, pursuant to State v. Retford, 276 S.C. 657, 281 S.E.2d 471 (1981), the upgrade of the charge upon the victim’s death did not serve as a basis to invalidate the arrest. (See R. p. 170, line 19 – p. 171, line 12). This ruling was not appealed.

Alternatively, the court ruled that the arrest was a valid citizen's arrest under S.C. Code § 17-13-10 and State v. Swilling, 249 S.C. 541, 155 S.E.2d 607 (1967). (R. p. 692-93). The judge pointed out that the arrest in Boswell was not a valid citizen's arrest because the charge was a misdemeanor, but in Petitioner's case, the charge was clearly a felony, and officers had "certain information that a felony had been committed which caused great bodily injury and finally the homicide by child abuse." (R. p. 692-93). The judge pointed out that in State v. Swilling, part of the issue involved whether the officers making the citizen's arrest were required to take the defendant before a magistrate under S.C. Code § 17-13-10, and the Swilling court found the defendant would not have been released in any event because he was charged with a capital offense. (R. p. 693, lines 9-16). In conclusion, the trial judge ruled that "[t]here was a valid arrest warrant in this case, and the arrest is valid." (R. p. 693, lines 17-18). Petitioner's confession was subsequently admitted at trial, over Petitioner's objection, as State's Exhibit # 63. (See R. p. 705, lines 5-18).

On appeal to the Court of Appeals, Petitioner argued that "[t]he trial judge erred in ruling that Henry Dukes had authority to arrest Lexie Dial as a United States Marshall (sic) under S.C. Statute 23-1-220 or as a citizen pursuant to S.C. Code 17-13-10." (Final Brief of Appellant, p. 10). The Court of Appeals found that Dukes, as a specially deputized member of the U.S. Marshals task force, had the same arrest authority as the Richland County Sheriff pursuant to the Memorandum of Understanding and 28 U.S.C. § 564. State v. Dial, 405 S.C. 247, 255, 746 S.E.2d 495, 499 (Ct. App. 2013). The Court of Appeals concluded that, since the Richland County Sheriff would have had the power

to arrest someone within his county pursuant to an arrest warrant, Petitioner's arrest was lawful and that "the MOU was valid pursuant to its cited federal authority." Id.

Issue Preservation

Initially, the State submits that some of the arguments Petitioner makes in his Brief of Petitioner regarding the legality of his arrest extend beyond the arguments made below and in the Court of Appeals. (See Final Brief of Appellant, p. 10-12). Petitioner's issue statement in the Court of Appeals was as follows: "The trial judge erred in ruling that Henry Dukes had authority to arrest Lexie Dial as a United States Marshall (sic) under S.C. Statute 23-1-220 or as a citizen pursuant to S.C. Code 17-13-10." (See Final Brief of Appellant, p. 10). Before this Court, Petitioner raises issues never raised or ruled upon in the trial court and never raised or ruled upon in the Court of Appeals. (See Brief of Petitioner, p. 4-7). For example, Petitioner now argues that although the Memorandum of Understanding "requires the participating agency to refer cases for investigation to the District Fugitives Task Force (DFTF) at which time cases will be adopted at the discretion of the District Chief Deputy," Petitioner's "case was never referred to anyone and no one outside the Lexington County Sheriff's Department had any involvement in Petitioner's case before his arrest." (Brief of Petitioner, p. 5).

It is not only unfair but impermissible for Petitioner to raise new arguments in the Supreme Court. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review ... Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." (citation omitted)); I'On, L.L.C. v. Town of Mt.

Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (discussing the “long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments” and stating that imposing preservation requirements on an appellant “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments”); Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (pointing out that “error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure, as noted by the Chief Justice, that we do not reach issues which were not ruled upon by the trial court”); see also Plyler v. State, 309 S.C. 408, 413, 424 S.E.2d 477, 480 (1992) (“Moreover, since this issue was raised for the first time upon certiorari, Plyler’s conviction and sentence is also affirmed on procedural grounds.”).

Accordingly, the State submits that this Court should not consider any new arguments made to the Supreme Court that were not made in Petitioner’s argument to the trial judge and in Petitioner’s brief to the Court of Appeals.

Discussion

The Memorandum of Understanding (“MOU”) regarding the Fugitive Task Force, Court’s Exhibit # 3, under which Sgt. Dukes was operating when he effected Petitioner’s arrest in Richland County, states, in pertinent part:

This Memorandum of Understanding (MOU) is entered into by the Lexington County Sheriff’s Dept. and the United States Marshals Service (USMS) pursuant to the Presidential Threat Protection Act of 2000 (Public L. 106-544, § 6 December 19, 2000, 114 Stat. 2718, 28 USC § 566 note.) As set forth in the Presidential Threat Protection Act of 2000 and directed by the Attorney General, the USMS has been granted authority to direct and coordinate permanent Regional Fugitive Task Forces consisting of

Federal, state, and local law enforcement authorities for the purpose of locating and apprehending fugitives.

The authority of the USMS to investigate fugitive matters as directed by the Attorney General is set forth in 28 USC § 566. The Director's authority to direct and supervise all activities of the USMS is set forth in 28 USC § 561(g) and 28 CFR 0.111. The authority of United States Marshals and Deputy U.S. Marshals to, "in executing the laws of the United States within a State . . . exercise the same powers which a sheriff of the State may exercise in executing the laws thereof" is set forth in 28 USC § 564. Additional authority is derived from 18 USC § 3053 and Office of Investigative Agency Policies Resolutions 2 & 15. See also "Memorandum for Howard M. Shapiro, General Counsel, Federal Bureau of Investigation" concerning the "Authority to Pursue Non-Federal Fugitives", issued by the U.S. Department of Justice, Office of Legal Counsel, dated February 21, 1995. See also: Memorandum concerning the Authority to Pursue Non-Federal Fugitives, issued by the USMS Office of General Counsel, dated May 1, 1995. See also: 42 USC § 16941(a) (the Attorney General shall use the resources of federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements.

The primary mission of the task force is to investigate and arrest, as part of joint law enforcement operations, persons who have active state and federal warrants for their arrest. . . .

. . . State or local fugitive cases will be entered into NCIC (and other applicable state or local lookout systems) as appropriate by the concerned state or local agency. . . .

. . . Non-USMS law enforcement officers assigned to the task force will be deputized as Special Deputy U.S. Marshals. . . .

Task force personnel may be required to travel outside of the jurisdiction to which they are normally assigned in furtherance of task force operations. . . .

(See Court's Exhibit # 3, p. 1-2).³

³ Other jurisdictions have also created United States Marshal's Service fugitive task forces pursuant to similar MOUs. See, e.g.,:

https://agendalink.co.fort-bend.tx.us/docs/2013/CCTR/20131126_2533/12518_MOU-Violent%20Offenders%20Task%20Force.pdf;

http://www.cor.mt.gov/content/Resources/Contracts/MOU/MOU_US_Marshals_Service_VOTF.pdf.

It is undisputed that Sgt. Dukes was, at the time of Petitioner's arrest, a properly sworn-in Special Deputy U.S. Marshal who was authorized to "carry firearms, make arrests, serve warrants, and conduct other business as directed by the U.S. Marshal." (R. p. 690, lines 14-16). It is also undisputed that the MOU between the Sheriff of Lexington County and the United States Marshal was properly signed and was therefore in effect at the time of Petitioner's arrest. (See Court's Exhibit # 3, p. 4). Finally, it is undisputed that the MOU creating the fugitive task force indicates that its primary mission is to investigate and arrest "persons who have active state and federal warrants for their arrest." (See Court's Exhibit # 3, p. 1). Thus, the MOU, consistent with federal law,⁴ appears to define "fugitive" in a broad sense, referring to persons with active warrants for arrest who are located outside the jurisdiction where the crime occurred.

The testimony established that Petitioner's outstanding arrest warrant for great bodily injury to a child was properly entered into NCIC; therefore, Petitioner could properly be arrested outside of Lexington County. (See R. p. 667, lines 2-24).

Accordingly, Sgt. Dukes, based upon his status as a member of the federally-authorized

⁴ See Hogan v. O'Neill, 255 U.S. 52, 56 (1921) ("To be regarded as a fugitive from justice it is not necessary that one shall have left the state in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which by the law of the state constitutes a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another state."); Strassheim v. Daily, 221 U.S. 280, 285 (1911) ("[A]ll that is necessary to convert a criminal under the laws of a state into a fugitive from justice is that he should have left the state after having incurred guilt there."); see, e.g., Gee v. State of Kansas, 912 F.2d 414, 418 (10th Cir. 1990) ("A fugitive from justice is a person who is 1) suspected of or has been convicted of committing a crime, 2) sought by the jurisdiction so that the jurisdiction may subject the person to its criminal justice system, and 3) has left the jurisdiction and is found within the boundaries of another. Thus, 'all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after having incurred guilt there.'") (citations omitted); White v. Armontrout, 29 F.3d 357, 359 (8th Cir. 1994) (rejecting defendant's contention that he was not a fugitive because he had no notice of the charges at the time he left the state, noting "[t]hat argument has long been rejected by the courts"); see also King v. Noe, 244 S.C. 344, 347, 137 S.E.2d 102, 103 (1964) (a fugitive from justice may be defined as "a person who, having committed or been charged with a crime in one state, has left its jurisdiction and is found within the territory of another when it is sought to subject him to the criminal process of the former state"); Ex parte Swearingen, 13 S.C. 74, 79-80 (1980) (defendant was a "fugitive from justice" where he committed an offense in another state and was subsequently found in South Carolina; the defendant needed not actually "flee," in the literal sense of the term, from the other state).

fugitive task force created by the MOU, had proper jurisdiction to arrest Petitioner in Richland County, since Sgt. Dukes, as a United States marshal, had the same arrest powers as the sheriff of Richland County. See 28 U.S.C. § 564 (“United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.”); see also Presidential Threat Protection Act of 2000, Public L. 106-544, § 6 December 19, 2000, 114 Stat. 2718, 28 USC § 566 note; 28 USC § 561(g); 28 USC § 566(e)(1)(B); 28 CFR 0.111; 18 USC § 3053; see also Authority of FBI Agents, Serving as Special Deputy United States Marshals, to Pursue Non-Federal Fugitives, 19 U.S. Op. Off. Legal Counsel 33 (1995).

Even assuming Sgt. Dukes did not have proper jurisdiction to make an official arrest of Petitioner outside Lexington County, the trial judge correctly ruled that the arrest was nevertheless valid as a citizen’s arrest pursuant to S.C. Code § 17-13-10. This code sections states as follows:

Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.

S.C. Code § 17-13-10. In this case, Sgt. Dukes had “certain information” that a felony had been committed, since he received information regarding probable cause for Petitioner’s arrest from trusted fellow officers and was physically present when the victim passed away at the hospital. (See R. p. 695-96; see also p. 702-703). See State v. Swilling, 249 S.C. 541, 558, 155 S.E.2d 607, 617 (1967) (the term “certain information” in the citizen’s arrest statute “means the existence of reasonable grounds to suspect the

party arrested may be guilty of a felony,” not the actual fact that a felony has been committed).

Moreover, although Sgt. Dukes did not take Petitioner *directly* “to a judge or magistrate,” such a strict interpretation of the citizen’s arrest statute has not been required. See State v. Swilling, 249 S.C. at 556, 155 S.E.2d at 616 (“We may assume that, under the [citizen’s arrest] statute, upon arresting the defendant without a warrant, the officers were required to take him before a judge or magistrate *within a reasonable length of time thereafter*.” (emphasis added)). Dukes did take Petitioner to the Lexington County Sheriff’s Department complex, of which the jail and the bond court is a part.⁵ (R. p. 726, lines 2-8). Dukes’ taking Petitioner to a location where judges are in fact found and where Petitioner would necessarily be taken before a judge within a reasonable time “to be dealt with according to law” clearly satisfied the statutory requirement of taking Petitioner “to a judge or magistrate.” See S.C. Code § 22-5-510(B); Rule 2(a), SCRCrimP. Therefore, since all of the statutory requirements were met, Petitioner’s arrest qualified as a proper citizen’s arrest under S.C. Code § 17-13-10.

However, even if the trial judge erred in concluding that Petitioner’s arrest was valid, the exclusionary rule should not apply because the officers were acting in good faith when Petitioner was arrested. Sgt. Dukes and his fellow officers acted under an objectively reasonable and good faith belief that Dukes had state-wide jurisdiction to arrest Petitioner in Richland County by virtue of his status as a Special Deputy of the U.S. Marshal’s Service who was a member of the federally-authorized fugitive task force

⁵ In fact, Petitioner was served with the homicide by child abuse arrest warrant the same day around 4:10 pm, was thereafter taken to the county jail, and subsequently appeared before a judge for a bail proceeding. (See R. p. 106; p. 137; p. 724-26). The bond court, jail, and Sheriff’s Department are all located at 521 Gibson Road in Lexington. This complex is known as the “James R. Metts Law Enforcement Complex.”

created by the MOU. (See R. p. 106; p. 649-50; p. 662-69; p. 670-76; p. 694-96; p. 702-703). Therefore, the exclusionary rule should not apply and suppression of Petitioner's confession was not warranted. See Davis v. U.S., 131 S.Ct. 2419, 2427 (2011) ("Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.' For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.") (citations omitted); Herring v. U.S., 555 U.S. 135 (2009) (good faith exception applied where an officer reasonably believed that the defendant had an outstanding arrest warrant but that belief was actually incorrect due to a negligent bookkeeping error by another police employee); see also Arizona v. Evans, 514 U.S. 1 (1995).

A few other points also merit consideration by this Court. First, it may be a significant factor in this case that a proper arrest warrant had been issued for Petitioner at the time he was arrested and that this arrest warrant had been entered into NCIC. Cf. State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011) & State v. Burgess, 408 S.C. 421, 759 S.E.2d 407 (2014) (in cases addressing arrests purportedly made pursuant to state statutes, both repeatedly emphasizing the fact that the invalid arrests were warrantless arrests). What this means is that Petitioner's arrest was, in a word, inevitable. Second, it is significant that after Petitioner was arrested by Sgt. Dukes in Richland County, he was transported to the Lexington County Sheriff's Department. It is arguable that any defect in territorial jurisdiction was cured when Petitioner arrived in Lexington County where he

could properly be held pursuant to the Lexington County arrest warrant. Further, after arriving at the Lexington County Sheriff's Department, Petitioner was interviewed not by Sgt. Dukes, but by Lt. Russell, the lead investigator in the case. Notably, at the time Petitioner gave his confession, he was unaware of any territorial jurisdiction issues and therefore the fact that his arrest was made in Richland County could not have had any impact upon his decision to confess, particularly where he was not even interviewed by the arresting officer. No issues with the voluntariness of the statement are on appeal and therefore the fact that Petitioner's statement was given freely and voluntarily is the law of the case. See Ex parte Morris, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (an unappealed ruling becomes the law of the case). The State submits that where Petitioner's arrest was inevitable, and his statement was given in the county where the arrest warrant originated and to a person other than the arresting officer, the fact that the arrest occurred in Richland County did not result in any prejudice to Petitioner.

Harmless Error

Finally, even assuming Petitioner's confession should have been suppressed, its admission would not warrant a new trial in this case because there was overwhelming evidence of Petitioner's guilt independent of the confession. It was undisputed that Petitioner was the only person with the victim when the injury which ultimately killed the victim occurred. (R. p. 285-86; 855-59). The autopsy revealed that the victim had bilateral subdural hemorrhages and bilateral subarachnoid hemorrhages, extremely serious injuries not caused by a typical household fall. (R. p. 581-87; p. 753-54). The autopsy also revealed that the victim did not have a bruise on his head, proving his injuries did not result from hitting his head as Petitioner claimed. (R. p. 578-80). Retinal

photographs revealed that the victim had hemorrhages “too numerous to count” in both eyes “in all quadrants to the back of the eyes,” and that he had “retinoschisis,” which is generally caused by violent back and forth acceleration, i.e., shaking. (R. p. 400-405). Dr. Webb-Wood, Dr. Cheeseman, Dr. Harper, and Dr. Luberoff all opined that the victim’s injuries and death were the result of non-accidental trauma; specifically, shaken baby syndrome. (See R. p. 342, lines 15-17; p. 400-417; p. 455-466; p. 749-87). The pathologist listed the manner of death as homicide. (R. p. 586, lines 3-8). Petitioner’s claim that the injury occurred because he fell while holding the victim was wholly inconsistent with the overwhelming medical evidence. No rational juror could find that the victim’s catastrophic injuries came about in the manner suggested by Petitioner rather than due to shaken baby syndrome. Therefore, the State submits that any error in the admission of Petitioner’s confession was harmless beyond a reasonable doubt. See State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621-22 (1997) (any error in failing to suppress the defendant’s statements was harmless where there was overwhelming evidence of guilt). Petitioner is not entitled to a new trial on this ground.

II. The Court of Appeals correctly affirmed the trial judge’s denial of Petitioner’s motion for mistrial after the mother of victim carried a small urn with her to the witness stand where the judge found no prejudice to Petitioner and where he cured any possible prejudice with an instruction to the jury.

Relevant Facts

The victim’s mother, Misti Richard, was called as the fourteenth witness at Petitioner’s trial. (See R. p. 5). As Ms. Richard proceeded to the witness stand, the trial judge, from his unique vantage point on the bench, noticed that Ms. Richard had a small object in her hand and asked the jurors to step out for a moment. (See R. p. 498, lines 10-

19). After Ms. Richard explained that the object in her hand was an urn containing the victim's ashes, the judge stated that Ms. Richard would not be allowed to sit on the witness stand with the urn in her hand. (R. p. 498, lines 14-19). The judge then stated that he was not "fussing at" Ms. Richard and that since she "approached the witness stand in a very low-grade manner" he did not believe "any members of the jury would have seen [the urn] or know[n] what it was." (R. p. 499, lines 1-5). Notably, the urn was not readily identifiable as such since it was a small, heart-shaped box. (See R. p. 500-502).

At that point, Petitioner's counsel moved for dismissal of the case on the ground of prosecutorial misconduct. (R. p. 499, lines 16-17). Counsel argued that Ms. Richard's walking to the stand with the urn was an "obvious ploy to gain the sympathy of the jury." (R. p. 499, lines 17-19). Defense counsel "guessed" that the jurors figured out what the object was. (R. p. 499, lines 20-22). Counsel argued that there was "no way that the defendant can get a fair trial when the child's ashes were in place in the courtroom." (R. p. 499, lines 23-25). The State's attorney responded that, although she had been aware that Ms. Richard had the object in her pocket, she had not ever been aware of what the object was. (R. p. 500, lines 3-7). Counsel indicated that she had not known what it was and did not believe there was any way the jury could have known what it was either. (R. p. 500, lines 8-11). She argued that Petitioner suffered no prejudice at all merely from Ms. Richard walking up to the witness stand with the urn. (R. p. 500, lines 12-13).

The trial judge then requested that the clerk of court measure the urn with a ruler. (R. p. 500-501). The object measured just shy of three inches in width, two-and-a-half inches in length, and one inch in depth. (R. p. 501, lines 4-7). The urn was bronze in color. (R. p. 501, lines 8-9).

In making his ruling, the trial judge first pointed out the “small size” of the object, “the manner in which the witness approached the clerk to be sworn in” - that is, with “her left side and left posterior” toward the jury, cupping the object in both hands - and the fact that the judge himself “wasn’t sure and I had a much better view of [Ms. Richard] than any member of the jury panel - I wasn’t sure that was what it was but out of an abundance of caution I directed the jurors outside the courtroom to take the matter up.” (R. p. 501, lines 11-25). The judge then stated that he found credible the statement of the prosecutor that she had no knowledge that Ms. Richard had approached the witness stand with the urn in her hands. (R. p. 502, lines 1-6). Therefore, the judge denied Petitioner’s motion to dismiss based upon prosecutorial misconduct. (R. p. 502, lines 7-8).

Petitioner’s counsel then moved for a mistrial, although he noted he did not necessarily want to move for a mistrial but felt that he was forced to do so. (R. p. 502, lines 10-15; see also p. 503, lines 1-3). He stated that “we’ve already had one episode of crying in front of the jury in the courtroom, and now [Ms. Richard] has been holding it in her hands as she walked in front of the jury with it, placed it on the table.” (R. p. 502, lines 16-19). Counsel stated that the urn is “shaped like a heart” and that “obviously some of the jurors were likely to figure out what it was.” (R. p. 502, lines 19-21). Counsel indicated that, based upon these things, he felt that Petitioner’s “chances of having a fair trial has been severely prejudiced.” (R. p. 502, lines 22-23).

The trial judge again stated he did not believe there was any intentional misconduct “or any misconduct whatsoever” on behalf of the State’s attorneys. (R. p. 503, lines 10-12). He also noted it was his observation that “the State was as surprised as perhaps everyone else in the courtroom that Ms. Richard had that item.” (R. p. 503, lines

13-15). The judge stated he did not agree with Petitioner's assessment that the jury knew what the object was; in fact, the judge did not necessarily agree "that the jury even saw the item." (R. p. 504, lines 3-7). The judge indicated that he would be happy to give whatever curative instructions Petitioner wished, and pointed out that he had previously instructed the jurors that their verdict could not be based upon passion, prejudice, sympathy, or any other arbitrary factors, but only upon the evidence produced in the courtroom. (R. p. 504, lines 1-2 & lines 11-15; see also p. 233, lines 10-24). The judge stated he would be happy to reiterate that same instruction or say nothing at all, upon Petitioner's request, but stated he was denying the motion for mistrial. (R. p. 504, lines 16-21). Petitioner's counsel requested that the judge instruct the jurors that "the actions of a witness in trying to take the urn to the witness stand was a blatant attempt to gain the sympathy of the jury, and that they are to specifically disregard that and those efforts by the witness." (R. p. 505, lines 18-22). The State objected to this curative instruction. (R. p. 506, lines 10-11).

The judge found that the curative instruction requested by the defense was inappropriate inasmuch as the judge had not questioned Ms. Richard and had no evidence that her bringing the urn with her was in fact an attempt to gain sympathy from the jury panel. (R. p. 506, line 19 – p. 507, line 9). The judge declined to give the requested instruction but offered to give a general curative instruction if the defense wished him to do so. (R. p. 507, lines 7-9). Petitioner's counsel indicated that although he would have preferred the requested charge, he would accept a general curative instruction in light of the court's ruling. (R. p. 507, lines 10-21). Before the jury returned to the courtroom, the judge admonished all the witnesses regarding controlling their emotions in light of the

defendant's right to a fair and impartial jury. (R. p. 509, lines 4-23). When the jurors returned, the judge instructed them that they could not allow themselves to be swayed by sympathy, prejudice, passion, public opinion, emotion, or any other arbitrary factors, since the defendant was entitled to a fair and impartial trial. (R. p. 510, lines 5-22). He also instructed the jurors that they were required to carefully and impartially consider all of the evidence in the case and follow the law as the judge instructs it to them. (R. p. 510, lines 9-12). Subsequently, at the post-trial motions hearing, the judge reaffirmed his ruling regarding the denial of Petitioner's mistrial motion and specifically concluded that the urn incident "did not inflame the passions of the jurors" even if they did see Ms. Richard holding an item. (R. p. 982, lines 11-19).

On appeal to the Court of Appeals, Petitioner argued that "[t]he trial judge committed reversible error by denying defense counsel's motion for a mistrial after the deceased child's mother, Misti Richards (sic), brought a heart-shaped urn with her up to the witness stand in full view of the jury, when this act was extremely prejudicial to Mr. Dial." (Final Brief of Appellant, p. 17). The Court of Appeals found that any error or possible prejudice was cured by the judge's curative instruction since Petitioner could not establish that any juror actually saw the item in Richard's hands or that the item was recognizable as an urn if in fact a juror did see it. State v. Dial, 405 S.C. at 258-59, 746 S.E.2d at 500-501.

Argument

"A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006) (citations omitted). The granting of a motion for

mistrial is an extreme measure that should be taken only where an incident is so harmful that the prejudicial effect can be removed in no other way. State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). In order to receive a mistrial, the party must show both error and resulting prejudice. See id. (citations omitted). In determining whether to grant a mistrial, the court should determine whether or not the mistrial is dictated by manifest necessity or the ends of public justice. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002). “The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law.” State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000).

Petitioner contends that Court of Appeals erred in affirming the trial judge’s denial of his mistrial motion based upon the urn, arguing that “[t]he jury could not help but be moved by the sight of the child’s remains being carried around by his mother.” (Brief of Petitioner, p.7). To the contrary, the Court of Appeals properly affirmed because the trial judge acted within his discretion when he denied Petitioner’s mistrial motion. The judge, who personally witnessed the incident and was therefore in the best position to determine any potential prejudice from it, concluded that the jurors either did not see the object in Ms. Richard’s hands or were not able to tell what the object was. He pointed out that the small urn measured three inches by two-and-a-half inches and was one inch deep and that the urn would not have been obvious to the jurors because of the way Ms. Richard approached the witness stand and held the object cupped in her hands. In that vein, there is absolutely no evidence in the record showing that any jurors saw the urn, knew what it was, or were prejudiced against Petitioner because of it. Cf. State v.

Paige, 375 S.C. 643, 649, 654 S.E.2d 300, 303-304 (Ct. App. 2007) (no actual or inherent prejudice to defendant based upon spectators wearing buttons containing the victim's picture where there was "absolutely no evidence of record that the jurors in this matter were ever exposed to these button photos, and, if they were, whether they could perceive that they depicted the victim"). Contrary to Petitioner's argument, the incident with the urn in this case was a far cry from the deliberate, staged display of a shrouded baby carriage during the solicitor's closing argument in State v. Northcutt, which the jurors obviously all observed. (See Brief of Petitioner, p. 8). See State v. Northcutt, 372 S.C. 207, 222-23, 641 S.E.2d 873, 881-82 (2007).

Further, the trial judge properly concluded that even if the jurors did see that Ms. Richard had an object in her hands when she approached the witness stand, the incident was not so prejudicial as to inflame the passions of the jurors. Assuming the jurors somehow figured out that the small object Ms. Richard carried to the stand was an urn containing the victim's ashes, it was obviously no surprise to the jurors that the victim was deceased, and the fact that his mother carried his ashes with her in an urn did not in any way suggest that Petitioner was the one who killed the victim. Instead, a reasonable juror would perceive the carrying of the victim's urn to be a normal sign of the grief occasioned by the loss of a loved one.

Petitioner failed to meet his burden to show that he suffered any tangible prejudice from the urn incident. See State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) ("The burden on motion for mistrial because of anything occurring during trial is upon movant to show not only error, but resulting prejudice." (citation omitted)); State v. Paige, 375 S.C. at 648, 654 S.E.2d at 303 ("Ideal conditions, it is true, are not to

be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result.” (citation omitted)); see also State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) (“The burden is upon the Petitioner to satisfy this court that there has been prejudicial error.” (citations omitted)); State v. Bonneau, 276 S.C. 122, 125, 276 S.E.2d 300, 301 (1981) (“It is, of course, incumbent upon an Petitioner in this court to prove that he was denied a fair trial.”); State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 897-98 (Ct. App. 2005) (“To warrant reversal, an Petitioner must show both error and resulting prejudice.” (citations omitted)).

Finally, even assuming Petitioner was somehow prejudiced, the trial judge cured any conceivable prejudice when he promptly delivered a thorough instruction advising the jurors that they could not allow the verdict to be influenced by passion, sympathy, or prejudice. (See R. p. 510, lines 5-22). Notably, this instruction had already been given once previously and was again repeated during the final jury instructions. (See R. p. 233, lines 10-24; p. 956, lines 2-13). See, e.g., State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) (“A curative instruction is usually deemed to cure an alleged error.”); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) (it is the duty of the jury to take the law from the court in the case on trial and “[i]t must be presumed that they do so.”); State v. Ard, 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998) (citation omitted) (discussing the presumption that juries follow their instructions and that a proper instruction by the court cures most errors), *overruled on other grounds by State v. Shafer*, 340 S.C. 291, 304, 531 S.E.2d 524, 531 n. 12 (2000). Therefore, since any possible

prejudice was cured by the judge's instruction, Petitioner was not entitled to a new trial. The Court of Appeals properly affirmed the denial of Petitioner's mistrial motion.

III. The Court of Appeals properly concluded that the denial of Petitioner's request to admit the original and amended pathologist's reports, if error, was harmless and would not have affected the outcome of trial.

Relevant Facts

On cross-examination, Dr. Janice Ross, the forensic pathologist, identified her original death report and her amended death report. (R. p. 588-591). She indicated that the original report was created following the autopsy and was thereafter transmitted to the coroner's office "to give the coroner an idea of how to word the death certificate." (See R. p. 588, lines 15-19). She prepared the original report to state that the cause of death was "head hit object." (R. p. 588-589). When she returned to the office and reviewed her notes, she decided to change the report because she realized that "the head could have been hit by something or could have hit an object," so she entirely removed the language about the cause of death "in order to open up the possibilities because the investigation was still going on." (R. p. 589, lines 19-24; p. 590, lines 13-23). She then called the coroner's office to notify him to submit the second death certificate instead of the first. (R. p. 590, lines 2-12).

Later in trial, Petitioner sought to admit both the original and amended reports, arguing that Dr. Ross changed the report after having a "conversation with someone from the Sheriff's Department." (R. p. 841, lines 5-15). The prosecutor disagreed, stating that her recollection of the testimony was "completely the opposite" of what defense counsel stated and that Dr. Ross actually testified that she changed the report after reviewing her notes and then contacted the coroner's office to let him know of the amendment. (R. p.

841, line 24 – p. 842, line 11). The trial judge ruled that the documents would not be allowed into evidence because the doctor’s testimony about her change to the report and her reason for the change was clear and was already in evidence. (R. p. 842-44). The judge also noted that the defense was free to make its arguments about how the change allegedly fit in with the State’s case against the defendant. (R. p. 843, line 14 – p. 844, line 18). At the post-trial hearing, the judge elaborated that he felt the written documents would unduly highlight the issue. (R. p. 983, line 20 – p. 984, line 4).

On appeal to the Court of Appeals, Petitioner argued that “[t]he trial judge committed reversible error in refusing to admit into evidence defense exhibits #2 and #3 – death certificates on Joshua Dial – when these exhibits were reports generated by the forensic pathologist Janice Ross, and documented her about-face as to cause of death after she spoke with the Coroner.” (Final Brief of Appellant, p. 21). The Court of Appeals specifically rejected Petitioner’s argument that Dr. Ross altered the report after speaking with the coroner and concluded that any error in failing to admit the two reports was harmless where the reports were not actually in conflict; Dr. Ross testified to the exact change to the report and the reasons for the change; Petitioner had the opportunity to fully cross-examine Dr. Ross regarding the reports and the change; and the admission of the documents themselves would not have affected the outcome of trial. State v. Dial, 405 S.C. at 261-62, 746 S.E.2d at 502-503.

Discussion

Petitioner contends that the trial judge should have admitted the two reports and that failure to admit the reports deprived him of a “powerful piece of documentary evidence.” (Brief of Petitioner, p. 10). The State disagrees with this assertion where,

again, the first report contained a description stating, "head hit object," while the second document did not contain any description and simply had a blank space. The reports were not "conflicting" as Petitioner claims, and the doctor's amendment leaving a blank space was not as dramatic as Petitioner suggests. In fact, Dr. Ross's testimony was necessary to explain the change to the report and the reason for the change.

Petitioner asserts that the trial judge's exclusion of the two reports is in "direct conflict" with this Court's ruling in McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). In McKnight, this Court found trial counsel ineffective after she "just forgot" to introduce the autopsy report into evidence in McKnight's second trial because the autopsy report was a "powerful piece of documentary evidence that was crucial to McKnight's defense" since the autopsy report would have served as hard evidence to undermine the conclusion of the only doctor who opined that cocaine alone caused the baby's death. McKnight at 54-55, 661 S.E.2d at 365. This Court pointed out that, since even McKnight's own expert could not rule out cocaine as a cause of death, the introduction of the autopsy report listing three causes of death was especially important. Id. at 55, 661 S.E.2d at 365.

The issue being raised in Petitioner's case is not at all the same as the issue in McKnight. Again, in this case, the written reports themselves show nothing but a change from "head hit object" to a blank space. Dr. Ross's testimony made explicitly clear that this precise change was made and she also clearly explained the reason for the change. The jury's having copies of the written reports would not have added anything to the defense case and certainly would not have been a "powerful piece of documentary

evidence” as was the autopsy report in McKnight.⁶ The McKnight case does not support Petitioner’s position and does not afford Petitioner relief.

It is the State’s position that, for the reasons discussed above, the trial judge’s exclusion of the reports did not constitute an abuse of discretion. However, even assuming the trial judge committed error by disallowing the reports, the Court of Appeals properly concluded that such error was entirely harmless. As stated above, the written reports are not “conflicting” as Petitioner claims. Dr. Ross’s testimony in front of the jury fully explained the change to the report and her reason for the change. Petitioner had the opportunity to fully cross-examine Dr. Ross about the death certificates and the changes made to them. The reports themselves would have been cumulative and were insignificant when considered in the context of the entire record. Admission of the reports would not have affected the outcome of trial, especially considering the overwhelming evidence of Petitioner’s guilt. Accordingly, any error with respect to the judge’s exclusion of the reports was harmless beyond a reasonable doubt. See, e.g., State v. Patterson, 290 S.C. 523, 528, 351 S.E.2d 853, 856 (1986) (where defense sought to introduce medical records, this Court found the records would have been cumulative to testimony and therefore any error in exclusion of the records was harmless beyond a reasonable doubt.); State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial); State v. Keenon, 356 S.C. 457, 459, 590 S.E.2d 34, 35 (2003) (holding that the trial court’s error

⁶ As the trial judge pointed out, both certificates reflect that the manner of death was “homicide” (R. p. 843, lines 8-13), and both reports contain the same “Immediate Cause of Death,” specifically, “Subdural Hemorrhage & Cerebral Edema; Closed Head Injury; Blunt Force Injury of Head.” (See R. p. 1005-1006). Notably, Dr. Luberoff subsequently explained that the term “blunt force head trauma” includes trauma which occurs when a child’s brain “moves around within the skull and hits the skull” as a result of violent shaking. (R. p. 752, line 21 – p. 753, line 17).

was harmless because of the overwhelming evidence of the defendant's guilt). Petitioner is not entitled to a new trial on this ground.


CONCLUSION

For the reasons discussed above, the State submits that this Court should affirm Petitioner's conviction and sentence for homicide by child abuse.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 17, 2014

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Lexington County
The Honorable Knox R. McMahon, Circuit Court Judge

Opinion No. 5157 (S.C. Ct. App. filed 7/10/13)
Appellate Case No. 2013-001970

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

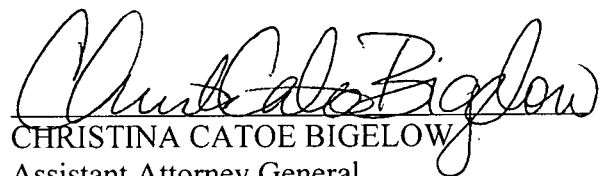
v.

LEXIE DIAL, III,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the **Brief of Respondent** in the above-referenced case has been served upon **H. WAYNE FLOYD**, Post Office Box 3972, West Columbia, South Carolina 29171, this **17th day of October, 2014**.


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