

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge
App. Case No. 2014-000632

THE STATE,

vs.

KYLIE NILSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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Respondent,

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in denying the motion for continuance, and the issue is not preserved for review.

II.

The arresting officer videotaped the traffic stop and provided the video recording at trial, therefore the requirements of Section 56-5-2953 were met. (Appellant's Issues II & III).

III.

The magistrate did not err in not excluding evidence in the BA video that Nilson combined Xanax with alcohol where the evidence was relevant to explain Nilson's demeanor. Further, the issue is not preserved for review, an insufficient record has been provided for review, and any error is harmless where evidence of Xanax use presented in the BA video is cumulative to evidence in the roadside video that Nilson combined Xanax with alcohol. Additionally, the issue is abandoned on appeal as no authority was cited by Nilson in her brief to this Court. (Appellant's Issue IV).

STATEMENT OF THE CASE

Appellant Nilson was charged with unlawful alcohol concentration pursuant to S.C. Code § 56-5-2933. She failed to appear for trial. Her counsel was provided notice that the trial was set for date certain on October 8, 2013. The jury trial proceeded as scheduled on October 8, and Nilson was found guilty as charged. The Honorable Chief Magistrate Margie B. Livingston sentenced Nilson to a fine of \$1,229.50 or thirty days imprisonment. Magistrate Livingston also issued a bench warrant.

Nilson appealed to circuit court and the conviction was affirmed following oral argument on March 12, 2014, by the Honorable Benjamin H. Culbertson's order dated March 14, 2014.

STATEMENT OF FACTS

Respondent notes that Nilson's Statement of the Facts appears to be based on her counsel's recollection of the trial. A transcript of the trial was not produced for the circuit court and therefore, is not part of the record on appeal. The only proper sources for the Statement of Facts are the two video recordings designated by Nilson and the magistrate's return. Evidence indicates Nilson was drinking and taking Xanax, and her blood alcohol level exceeded the legal limit. The evidence concerning the traffic stop is summarized by the magistrate as follows:

Testimony was that Trooper Wilkes, an off-duty officer at the time, was following the defendant on Highway 501 East. She seemed to be having some driving problems, running on and off the road. He followed her (with no blue lights) until he later stopped her, inquiring if there were problems. Upon inquiry, he smelled the high and obvious odor of alcohol, called for an on-duty trooper. Trooper C. D. Weldon appeared and took over. Weldon's undertaking provided a video taping of all actions, to include Miranda rights, field sobriety test, and the arrest.

Answer to Criminal Appeal, p. 4.

Observing Nilson in the roadside video, it is fortunate that Trooper Wilkes stopped the vehicle even though he was off-duty. He might have saved Nilson's life.

ARGUMENT

I.

The trial court did not err in denying the motion for continuance, and the issue is not preserved for review.

Nilson complains the trial court erred in denying her motion for continuance because she claims her trial counsel did not give her adequate notice of the trial. Nilson and her counsel blame the State and the magistrate for this result even though she admits her counsel received notice of the trial. A party cannot complain of error induced by its own conduct. State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 *cert denied* 519 U.S. 1045 (1996). The Court of Appeals does not sit to relieve self-inflicted wounds. Rish v. Rish, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring). Despite this diversion of blame, the circuit court did not err in affirming the magistrate's denial of the motion for continuance.

Nothing beyond the magistrate's return exists in the record from which this Court could ascertain the propriety of the magistrate's ruling. The magistrate's return advises that the appellant bears responsibility to provide any transcribed record for an appeal. Answer to Criminal Appeal p. 2 (R. at ____). Nilson did not provide a transcript of the trial to the circuit court. Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). Without a transcribed record of the trial in magistrate's court, this Court is unable to determine what argument was presented by Nilson to the magistrate and what the magistrate's response to Nilson's argument might be. The record is incomplete, and therefore, the issue should not be

reviewed.

Even so, based on the limited record remaining for this Court's consideration, the magistrate did not err. The magistrate's return noted the case was continued three times for the State and two times for the defense. The magistrate's return also notes Nilson and her attorney were properly notified of the date of trial, which was set as a day-certain trial on October 8, 2013. Answer to Criminal Appeal, pp. 2-3.

At oral argument, Nilson alleged the State was at fault for not placing the case on the docket in the past. Further, in his brief to this Court, Nilson blames the State's "control" of the docket for her failure to appear. The State disagreed with Nilson's rendition of facts at oral argument, which Nilson repeats in her brief to this court. The State noted Nilson's argument was never raised to the magistrate. Nilson's attorney did not counter the State's recollection on this point. Cir. Ct. tr. p. 12. An argument advanced on appeal is not preserved for review if it was not raised and ruled on below. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006). An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the **exact** error. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011). It is unclear, beyond the excuse Nilson provided for her non-appearance, what grounds Nilson's counsel argued in the motion for continuance.

Further, the State's administration of criminal dockets is not relevant to this case. Regardless of whether the case should have appeared on prior dockets, an assertion unsupported by the record, there is simply no nexus between this assertion and Nilson's failure to appear for the date certain trial. Unlike the defendant in State v. Langford, 400 S.C. 271, 735 S.E.2d 471 (2012), Nilson never moved for a speedy trial. Further, the separation of powers concern expressed in Langford is not present in the instant case, as the decision whether or not to grant Nilson a continuance was in the magistrate's hands, not the prosecution's.¹

Additionally, the magistrate did not abuse his discretion in denying the motion for continuance. The case was set for a date certain. Notice was provided to Nilson's trial counsel. A trial court's denial of a motion for continuance is left to the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion resulting in prejudice to the defendant. State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Reversals from the denial of a defendant's motion for continuance are as "rare as the proverbial hens' teeth." State v. Mansfield, 343 S.C. 66, 73, 538 S.E.2d 257, 260 (Ct. App. 2000) (citation and internal quotation marks omitted). Nothing in the record indicates the magistrate abused her discretion, notwithstanding Nilson's unwarranted attacks on the State.

¹ Although the State contends Langford is wholly inapplicable to the instant case, the State reserves the right to argue at an appropriate time that Langford was wrongly decided, should that time arrive.

II.

The arresting officer videotaped the traffic stop and provided the video recording at trial, therefore the requirements of Section 56-5-2953 were met. (Appellant's Issues II & III).

Nilson contends the magistrate erred in denying Nilson's motion to dismiss based on Nilson's contention that the videotaping requirements of S.C. Code § 56-5-2953 were not met. A video recording was supplied by the arresting officer as required by statute. Nilson raises this allegation into two parts. Respondent addresses both issues in this section. Review is limited by the fact that Nilson failed to provide a transcript of the proceedings to the circuit court. Accordingly, the facts for this Court to consider come only from the magistrate's return, which explains the evidence at trial as follows:

Testimony was that Trooper Wilkes, an off-duty officer at the time, was following the defendant on Highway 501 East. She seemed to be having some driving problems, running on and off the road. He followed her (with no blue lights) until he later stopped her, inquiring if there were problems. Upon inquiry, he smelled the high and obvious odor of alcohol, called for an on-duty trooper. Trooper C. D. Weldon appeared and took over. Weldon's undertaking provided a video taping of all actions, to include Miranda rights, field sobriety test, and the arrest.

Answer to Criminal Appeal, p. 4. A thorough review of the five-sentence summary reflects that the magistrate did not abuse her discretion in finding the video recording met the requirements of the statute.

Section 56-5-2953(A) requires:

A person who violates . . . Section 56-5-2933 . . . must have his conduct at the incident site and the breath test site video recorded.

(1)(a) The video recording at the incident site must:

- (i) not begin later than the activation of the officer's blue lights;
- (ii) include any field sobriety tests administered; and
- (iii) include the arrest of a person for a violation of . . . Section 56-5-2933 . . . and show the person being advised of his Miranda rights.

(Emphasis added).

Section 56-5-2953(B) requires the **arresting officer** to produce the video recording described or submit an affidavit explaining the failure to produce the video recording.

Specifically, the statute requires the following:

(B) Failure by the **arresting officer** to produce the video recording required by this section is not alone a ground for dismissal of any charge . . . if the **arresting officer** submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, . . . was in an inoperable condition In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's 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. . . . 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.**

(Emphasis added).

The magistrate found Trooper Weldon, not Trooper Wilkes, was the arresting officer.

The magistrate further found the video recording provided by Trooper Weldon met the videotaping requirements of section 56-5-2953. The magistrate found “Wilkes, though an important core witness, was not the arresting officer.” Answer p. 4. The magistrate found that because Trooper Weldon was the arresting officer and produced a video recording, Trooper Weldon did not need to produce an affidavit attesting to why Trooper Wilkes did not videotape the stop. Answer p. 4.

The magistrate’s ruling was correct. On point is State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). In that case, a State Transport Police Officer initiated blue lights and pulled Landis over to the side of the interstate. A State Trooper then took over the stop after the transport officer removed Landis from his car. The trooper performed the field sobriety test and placed Landis under arrest for DUI. The stop was not videotaped and the trooper submitted an affidavit attesting that the videotape machine in his patrol vehicle was inoperable at the time of Landis’ arrest. Id. at 100-01, 606 S.E.2d at 504.

This Court found that the trooper was the arresting officer, and therefore, the requirements of the videotaping statute were met when an affidavit he prepared was submitted to defense counsel. This Court rejected the argument that the transport officer was the arresting officer, finding the plain language requirements of the statute were met. In finding the trooper was the arresting officer, this Court noted he conducted the field sobriety test and placed Landis under arrest. Id. at 103, 606 S.E.2d at 506-07.

In the instant case, Trooper Weldon clearly was the arresting officer who executed the field sobriety tests, advised Nilson of her Miranda rights, and made the arrest. Accordingly, the magistrate correctly determined Trooper Weldon was the arresting officer and the

statutory requirements were met by the video recording provided by Trooper Weldon.

III.

The magistrate did not err in not excluding evidence in the BA video that Nilson combined Xanax with alcohol where the evidence was relevant to explain Nilson's demeanor. Further, the issue is not preserved for review, an insufficient record has been provided for review, and any error is harmless where evidence of Xanax use presented in the BA video is cumulative to evidence in the roadside video that Nilson combined Xanax with alcohol. Additionally, the issue is abandoned on appeal as no authority was cited by Nilson in her brief to this Court. (Appellant's Issue IV).

Nilson complains the jury heard her admit to taking Xanax during videotaping in the BA room and the magistrate erred in failing to exclude this statement because it was not relevant because Nilson was prosecuted for unlawful alcohol concentration.

First, Nilson cites no authority in her brief, and therefore, her arguments are conclusory and should be considered abandoned on appeal. State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal); State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding the argument was so conclusory that it was deemed abandoned).

Second, no evidence in the record indicates the magistrate ruled on the alleged objection, which appears to be on the ground of relevance. The magistrate did not rule on the evidentiary issue in the return, and Nilson made no motion to remand so that the return could be modified to include the issue. Nilson was obligated to do so in order for the circuit court and this Court to review the issue. See Price v. Pickens County, 308 S.C. 64, 416 S.E.2d 666

(Ct. App. 1992); State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984); State v. Adams, 244 S.C. 323, 137 S.E.2d 100 (1964). Without a transcript of the proceedings, this Court cannot determine the propriety of the trial court's ruling, so this issue should not be reviewed. An issue must be raised to and ruled upon by the circuit court in order to be considered on appeal. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002).

Further, the evidence has logical relevance because her ingestion of Xanax helps explain Nilson's demeanor during videotaping. Note that Nilson fell asleep in the patrol car about thirty-four minutes into the roadside video.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence is "evidence having any 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." Rule 401, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. Sweat, 362 S.C. at 127, 606 S.E.2d at 513. In the instant case, on

the limited record before this Court, Nilson fails to demonstrate the magistrate abused her discretion.

Additionally, any error in admission is harmless because it is cumulative to the extensive discussion between Trooper Weldon and Nilson in the patrol car during the roadside videotaping. Nilson admits several times to taking two Xanax pills with the alcohol she consumed (three beers) and admits she should not drink while taking the medication. See State's Exhibit #1 at approximately 16:30 to 18:30 and 21:30 to 22:00. Nilson admits taking Xanax for the last time at six or seven p.m. State's Exhibit #1 at 29:00-29:30. Admission of improper evidence is harmless where it is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989); State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001) (when other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless).

Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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STATE OF SOUTH CAROLINA,

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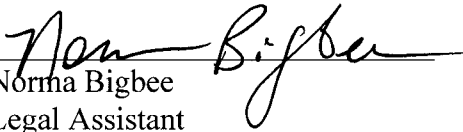
KYLIE NILSON,

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: M. Gregory McCollum, Esquire, 1012 38th Ave. North, Suite 202, Myrtle Beach, SC 29577.

I further certify that all parties required by Rule to be served have been served.

This 31ST day of December, 2014.


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ALAN WILSON
ATTORNEY GENERAL

December 31, 2014

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The Honorable Jenny A. Kitchings
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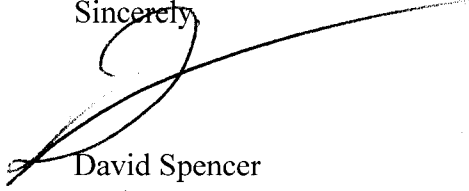
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Re: **State v. Kylie Nilson**
Appellate Case No: 2014-000632

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,



David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: M. Gregory McCollum, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)