STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002358

The State, Respondent,

vs.

Toaby Alexander Trapp, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly admitted the analyst's results of testing and the drugs into evidence because the State presented a proper chain of custody. Further, the issue is not preserved for review on appeal. Finally, Appellant specifically waived any objection to the results of the test by stating he did not object to the analyst's testimony, and only objecting to the admission of the drugs based on the failure to call an individual handling the drugs after testing.

II. The trial court did not err in admitting testimony regarding the search warrant, an evidence log form, a Form B provided with the evidence taken to SLED, the SLED Drug Analysis Request Form, or other testimony about the investigation into the record. The issue of a violation of the Confrontation Clause is not preserved for review on appeal. Further, none of the evidence was testimonial in nature and, therefore, Appellant's right to confrontation was not violated.

III. The trial court did not err in denying Appellant's motion to suppress as the search warrant was valid and properly supported by probable cause. Further, Appellant had a Franks v. Deleware hearing and failed to establish any falsity in the search warrant's affidavit, nor did he establish if there was a falsity its removal would have eliminated the probable cause for the warrant.

IV. The trial court did not err in suppressing Appellant's knowing and voluntary statement.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly admitted the analyst's results of testing and the drugs into evidence because the State presented a proper chain of custody. Further, the issue is not preserved for review on appeal. Finally, Appellant specifically waived any objection to the results of the test by stating he did not object to the analyst's testimony, and only objecting to the admission of the drugs based on the failure to call an individual handling the drugs after testing.

Appellant contends the trial court erred in finding the State presented a sufficient chain of custody for the admission of the drugs into evidence. First, the issue is not preserved because Appellant did not timely make an objection. Second, Appellant waived his objection to the admissibility of the analyst's report by specifically indicating he had no objection to her testimony. Third, the State did produce a proper and sufficient chain of custody as far as practicable for the admission of the analyst's test results and the drugs themselves. Finally, any error in admitting the drugs is entirely harmless given the cumulative nature to the testimony by the SLED drug analyst to which Appellant specifically indicated he had no objection.

Preservation

First, the issue is not properly preserved for review on appeal because Appellant did not renew his objection when the drug analyst presented her results. This issue is not properly preserved for review on appeal. In order to preserve an evidentiary issue for review on appeal, a contemporaneous objection must be made when the testimony is offered. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court), see also, State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)

(holding ordinarily an evidentiary ruling in limine is not final and an objection contemporaneous with the evidence's admission is required to preserve the issue for appeal). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523. In the instant case, the relevant testimony requiring a proper chain of custody is the admission of the SLED drug analyst's testimony the contents of the bags and pill bottle were crack cocaine and provided the crack cocaine's weight. See e.g., State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011) (finding "the ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be" and items received for testing were items taken from defendant); Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) (finding a chain of custody is required from the time the specimen is taken to the final custodian by whom it is analyzed).

Counsel did not contemporaneously object when the results of the SLED lab testing were admitted. The State is required to establish the chain of custody prior to admitting evidence regarding the crack cocaine or the analysis of the substance. Once the forensic analyst testified without objection that the substance analyzed in the first plastic bag was 10.0 grams of crack cocaine, any subsequent objection would be untimely. In this case, Appellant waited until the State offered the actual drugs into evidence to object, instead of objecting when the analysis of those drugs was admitted. (T.276-279; R. 252-255). As a result, the objection was not timely and the issue is not preserved for review on appeal.

Further, counsel for Appellant waived any issue regarding the sufficiency of the chain of custody when he stated: "I don't have an objection to her testifying as what she

found was crack." (T.279; R. 255). Once he waived his objection to her testimony regarding the test results, he waived any objection to the sufficiency of the chain of custody.

Merits

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

In order to admit the drug evidence:

> [A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.

State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007) (emphasis added) (citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)); see also State v. Kahan, 268 S.C. 240, 244–45, 233 S.E.2d 293, 294 (1977) (holding the standard stated in Benton v. Pellum had been met where the evidence was transported in accordance with normal protocol, even

though every person who may have handled it was not personally identified and there was no testimony regarding the care and handling of the item for an interval when it was being stored).

"South Carolina law does not require testimony as to the exclusion of any possibility of tampering." State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004). The Courts of this State have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the evidence was not established at least as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). When the identity of persons handling the specimen is established, evidence regarding its care goes only to the weight of the evidence and not its admissibility. Id.

In South Carolina Dep't of Soc. Servs. v. Cochran, the South Carolina Supreme Court stated "we have never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case." South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005). The Court in Cochran found: "Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified." Id. Importantly, the Court noted: "Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." Cochran, 364 S.C. at 629 n. 1, 614 S.E.2d at 646 n. 1.

In State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011), the Supreme Court found the chain of custody was sufficiently established even though no testimony linked the

Officers who transported the drugs to SLED and the agent who analyzed the drugs. The Court found the failure to personally identify the technician at SLED that received the evidence as well as the exact handling of the evidence while in SLED's custody was not required to establish a chain of custody as far as practicable. See Hatcher, 392 S.C. at 95, 708 S.E.2d at 755. The Supreme Court stated:

> Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence."

Hatcher, 392 S.C. at 94-95, 708 S.E.2d at 754-55.

The Court in Hatcher concluded: "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be. The record here indicates the drugs received for testing were in fact, those taken from Hatcher without any alteration, tampering, or substitution." Id. Similarly, the Court previously has held: "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." Carter, 344 S.C. at 424, 544 S.E.2d at 837.

In the instant case, the State presented a full chain of custody as far as practicable establishing the drugs, which were seized from Appellant's residence, were the drugs that SLED tested and found to be approximately 21 grams of crack cocaine. While Investigator Bouknight, the narcotics officer and evidence custodian at the time the drugs were seized, had passed away prior to trial, the State presented ample evidence regarding

the individuals involved in the chain of custody as well as the manner in which the drugs were handled. (T.193; R. 169).

Captain Dennis, the supervising officer present at the scene and operating in a supervising role over Investigator Bouknight, testified Bouknight collected the drugs and other items found at Appellant's residence and Captain Dennis documented the items on the Return to the Search Warrant. (T.204-205; 253-254; R. 180-181; 229-230). He explained Bouknight acted as the narcotics evidence custodian during the time drugs were seized from Appellant's home. Captain Dennis testified the policy was for Bouknight to take charge of the evidence, including logging it into his evidence locker area which was secured. Captain Dennis explained only Investigator Bouknight had a key to the evidence locker so no one could access it without Bouknight. (T.233-234; R. 209-210).

According to Captain Dennis, Bouknight collected the drugs and other paraphernalia and placed them in manila envelopes. Lynn Black, the SLED drug analyst, testified the drugs she retrieved from the Best Evidence Bags for testing were inside manila envelopes. (T.292-293; R. 268-269). Captain Dennis testified the envelopes used to collect the bags and pill bottle containing crack cocaine were still within the Best Evidence Bags brought to court. (T.257-258; R. 223-234).

Captain Dennis also explained the routine procedure regarding drug evidence was to complete a Form B. He indicated the form was completed in the ordinary course of work when collecting and transporting drugs. (T.234-235; State's Exhibit 2; R. 210-211; 316). Bouknight completed a Form B in this case. Captain Dennis, who indicated he worked with Bouknight for ten years and knew his handwriting, identified the

handwriting on the Form as Bouknight's. (T.222; 236; R. 198; 212). The Form B contained a control number, which correlated with the Best Evidence Kit and was used for identification of the drugs to be taken to SLED for analysis.

On the Form B, Investigator Bouknight certified on October 9, 2011, he received from Appellant at Appellant's residence the following items:

> 1) plastic bag containing a quantity of white cookie-like substance; 2) plastic baggie containing a quantity of white cookie substance; 3) orange pill bottle containing a quantity of white cookie substance; 4) scale containing a quantity of white residue on it; 5) spoon with a quantity of white residue on it; and 6) quantity of white residue.

(T.236-237; State's Exhibit 2; R. 212-213; 316). Bouknight further certified: "On 10/21/11, I made delivery of the above-described substance or container to SLED of SLED in substantially the same condition as when I received it." The Form is signed by Bouknight. (T.237; State's Exhibit 2; R. 213; 316).

Investigator Bouknight transported the drugs in the Best Evidence Kit to SLED for analysis. According to Black, the drugs arrived on October 21, 2011, and were taken by Selena Kinard, a forensic technician with SLED. (T.271-272; R. 247-248). Ms. Kinard received the evidence, recorded it, and placed a bar code for identification within the lab. (T.272; R. 248). Black testified Kinard then placed the evidence in their evidence vault, roughly one minute after receiving it. (T.275; R. 251). Black testified SLED's policy would be to return evidence if at the time it is received it appears to have tampered with or was open. (T.274; R. 250).

Black testified the next person in the chain of custody was Patricia Crooks. Ms. Crooks, another forensic technician, retrieved the drug evidence from the storage area and took it to Black for analysis. She retrieved it on October 25, 2011. (T.276; R. 252).

Black identified the Best Evidence Bag and its contents at trial. She identified the lab number assigned to the first bag containing crack cocaine and identified her initials on the item number. She testified without objection the first bag contained 10 grams of crack cocaine. She verified the lab number she identified was the one designated earlier when Kinard took possession of the drugs from Bouknight.

After Appellant's counsel indicated he had no objection to Black testifying as what she found was crack, Black continued her identification and description of the items. (T.279; R. 255). She identified the second plastic bag containing crack cocaine by its lab number and her initials. She indicated the bag contained 7.3 grams of crack cocaine. (T.281-282; R. 257-258). Black then identified the orange plastic prescription bottle, indicated its lab number, and identified her initials. She then testified the bottle contained 4.0 grams of crack cocaine. (T.282; R. 258). Black testified without objection the total weight of crack cocaine identified was 21.3 grams. (T.282; R. 258).

Black stated after she tested the substances, she placed the Best Evidence Kit and contents into another plastic bag called a KPac. It was then heat sealed and a bar code was placed on the plastic bag along with Black's initials. (T.283; R. 259). Black indicated she maintained the evidence in a drug vault in her lab until November 2, 2011, when she took it back to Patricia Crooks. At trial, she identified the bag she heat sealed on October 25, 2011. She testified prior to the bag being opened at trial, it had remained in the same condition as when she sealed it. (T.284; R. 260).

Ben Chapman, the evidence custodian at the time of trial, testified he received the plastic bag containing the drug evidence when he became evidence custodian. He

indicated he brought it from evidence for trial and it was heat sealed until opened at trial. (T.298-300; R. App. 380- 381; R. 273).

Based on the above testimony and evidence, the State presented a sufficient chain of custody as far as practicable for the drug evidence collected. The State identified every person who handled the drugs, as well as the manner in which they were handled and the protocols under which all persons operated. It is clear from the testimony the drugs obtained from Appellant's residence were the same drugs tested by Black at SLED, and were the same drug evidence brought to trial.

The State is not required to present the testimony of every person who handled the drugs, nor must the State completely eliminate all possibility of tampering. Any issue with regard to the manner in which the evidence was handled went to the weight of the evidence to be assigned by the jury and not to its admissibility. There is no missing link in the chain of custody presented by the State. Every hour of the drug's whereabouts cannot be accounted for because Investigator Bouknight has passed away, but that has never been the standard to which the chain of custody is held. The State presented, as far as practicable, a chain of custody which identified every person who handled the drugs and the manner in which the drugs were handled. The evidence presented ensures the drugs seized from Appellant's residence were the same drugs tested by Black, and were the same drugs brought to trial by Chapman. Accordingly, the trial court did not abuse its discretion in admitting the testimony of the SLED analysts or the drugs into evidence.

II. The trial court did not err in admitting testimony regarding the search warrant, an evidence log form, a Form B provided with the evidence taken to SLED, the SLED Drug Analysis Request Form, or other testimony about the investigation into the record. The issue of a violation of the Confrontation Clause is not preserved for review on appeal. Further, none of the evidence was testimonial in nature and, therefore, Appellant's right to confrontation was not violated.

Appellant maintains the trial court erred in admitting various pieces of evidence as well as testimony because its admission violated Appellant's right to confrontation under the Sixth Amendment to the United States Constitution. The issue regarding a violation of the Confrontation Clause is not preserved for review on appeal. Further, none of the evidence was testimonial in nature, and much of it was presented during proffered testimony and not testimony before the jury at trial.

Preservation

Appellant contends several pieces of evidence were admitted in violation of his right to confrontation pursuant to the Sixth Amendment to the United States Constitution. Appellant never raised this issue at trial. At no time during the admission of any of the testimony he contends was wrongly admitted, nor during admission of any evidence, did he raise the issue of the confrontation clause. Appellant cites to numerous pages in the record in which he contends evidence was admitted in violation of his right to confrontation. However, none of those pages contain the requisite objection to the admission of the testimony based on his right to confront the witness. As a result, the issue is not preserved for review on appeal. . See State v. Langford, 400 S.C. 421, 446, 735 S.E.2d 471, 484 (2012) ("Constitutional issues are not exempt from issue preservation requirements."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741

(2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Merits

On the merits, much of the testimony and exhibits were admitted during pre-trial suppression and other hearings, which do not implicate the Confrontation Clause. Further, even if the Confrontation Clause applies, none of the testimony admitted is testimonial in nature and, therefore, its admission does not violate Appellant's rights under the Confrontation Clause.

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987) (citing California v. Green, 399 U.S. 149 (1970); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)).

The United States Supreme Court (USSC) explained the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" Crawford v. Washington, 541 U.S. 36, 51 (2004).The Court then defined testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id.

Applicability of Confrontation Clause at Pre-trial Hearing

The Confrontation Clause is a trial right, and should not be applicable to pre-trial hearings such as the suppression hearing in this case. "This constitutional right, which applies to the states through the Fourteenth Amendment, guarantees a defendant **in a criminal trial** the right to cross-examine the witnesses against him." State v. Henson, 407 S.C. 154, 161, 754 S.E.2d 508, 512 (2014) (emphasis added) (citing Pointer v. Texas, 380 U.S. 400, 403–04 (1965)). "The right to confrontation has been referred to as a '**trial right**.'" Starnes v. State, 307 S.C. 247, 249, 414 S.E.2d 582, 583 (1991) (emphasis added) (quoting Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)); see also, Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) ("opinions of this Court show that the right to confrontation is a *trial* right") (italics in original). "[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses **appearing before the trier of fact.**" Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (emphasis added). South Carolina many years ago acknowledged the importance of the right to confrontation **at trial** stating: "And one of the indispensable conditions of such due course of law is, that **prosecutions** be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." State v. Campbell, 30 S.C.L. (1 Rich.) 124, 125 (Ct. App. 1844) (emphasis added).

Multiple Courts considering the issue have found the Confrontation Clause is solely a trial right and does not apply to pre-trial hearings. See Ebert v. Gaetz, 610 F.3d 404, 414 (7th. Cir. 2010) ("because the court considered the statement at a suppression hearing, not Ebert's trial; the Confrontation Clause was not implicated"); United States v. Morgan, 505 F.3d 332, 339 (5th Cir. 2007) (holding "Crawford does not apply to the foundational evidence authenticating business records in preliminary determinations of the admissibility of evidence"); Vanmeter v. State, 165 S.W.3d 68, 74-75 (Tex. App. 2005) (concluding "Crawford did not change prior law that the constitutional right of confrontation is a trial right, not a pretrial right which would transform it into a 'constitutionally compelled rule of discovery.'"); State v. Woinarowicz, 720 N.W.2d 635 (N.D. 2006); People v. Brink, 31 A.D.3d 1139 (N.Y.A.D. 2006); People v. Felder, 129 P.3d 1072 (Colo. App. 2005) (all of which held that Crawford is not applicable to pretrial suppression hearing because right of confrontation is a trial right).

The USSC has explained the "purposes of confrontation" in California v. Green. The Court explained, confrontation:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
> (2) forces the witness to submit to cross examination, the "greatest legal engine ever invented for the discovery of truth"; [and]
> (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009) (quoting California v. Green, 399 U.S. 149 (1970) (footnote omitted)). The considerations explained by the

USSC are most applicable at trial and not during a suppression hearing. Even Crawford, when analyzing the historical importance of the right to confront witnesses, indicates it is to prevent evidence being used against a defendant to determine his guilt when he did not have the ability to put that evidence to the test of cross-examination.

Additionally, pre-trial hearings are not bound by the same rules and restrictions as trial. For example, pursuant to Rule 104(a), SCRE: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges."[1] As a result, it would seem illogical to apply Confrontation Clause requirements to the pre-trial hearing when hearsay can be considered under the Rules.

Initially, most of the testimony and discussion of other evidence, such as the search warrant, complained of by Appellant as violating his constitutional right to confront witnesses occurred during pre-trial hearings out of the presence of the jury. The testimony was not admitted during trial in front of the trier of fact, but was merely admitted to address the admissibility of the drugs and other evidence which would be admitted at trial to establish Appellant's guilt. As a result, the Confrontation Clause requirements for admissibility of the evidence did not apply and the trial court did not err in allowing the testimony during a pre-trial hearing.

Application of Confrontation Clause

Even assuming the testimony and evidence admitted during a pre-trial hearing could invoke the Confrontation Clause, none of the testimony or evidence admitted violated the Confrontation Clause. Crawford prohibits the admission of testimonial, out-of-court statements unless two conditions are met: the witness is unavailable at trial

[1] This Rule is identical to the Federal Rule. See Rule 104(a), FRE.

and the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 68.[2] The USSC further articulated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." As a result, the Court "exempted [nontestimonial] statements from Confrontation Clause scrutiny altogether." Id. Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." Davis v. Washington, 547 U.S. 813, 821 (2006) (citing Crawford, 541 U.S. at 51). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Id.

In Davis, 547 U.S. 813 (2006), the USSC announced the "primary purpose" test for determining whether an out-of-court statement is testimonial in nature. The Court explained statements are testimonial where their primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." Id., at 822. In Michigan v. Bryant, 562 U.S. 344 (2011), the USSC further expounded on the primary purpose test, indicating the Court must consider "all of the relevant circumstances." Id. at 369. The Court found where an out-of-court statement's primary purpose is "to create a record for trial" or "creating an out-of-court substitute for trial testimony" then the statement is testimonial and falls within the requirements of Crawford and the Confrontation Clause.

In Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173 (2015), the USSC explained: "Our Confrontation Clause decisions . . . do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of

[2] Of course if the declarant testifies at trial, and is subject to cross-examination, there can be no violation of the Confrontation Clause in the admission of prior, out-of-court statements.

in-court testimony." Id. at 2183. The Court stated: "We have never suggested . . . that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'" Id. (citing Bryant, 562 U.S. at 358).

Appellant contends testimony by Captain Dennis violated the Confrontation Clause because he was relaying information learned from another investigator, Investigator Sprengs. This information was not testimonial in nature, but was instead information between an investigator and his supervisor during the course of the investigation. It is not information clearly intended for later criminal prosecution, but instead, was information necessary for a determination of the next steps to be taken during the ongoing investigation. The statements were not attempts to establish evidence to prove some past occurrence, but instead were statements about events actually occurring at the time of the statements. See e.g., Davis v. Washington, 547 U.S. 813, 827 (2006) (911 call non-testimonial in part because it describes ongoing events and not an attempt to prove prior events). Additionally, the evidence was not admitted for the truth of the matter asserted, and Crawford only applies to hearsay statements not ones admitted for a reason other than the truth of the matter asserted. See Crawford, 541 U.S. at 59 n.9 ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.")(citing Tennessee v. Street, 471 U.S. 409, 414 (1985)); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding that agent's testimony concerning information received from another agent "was offered not

for its truth but only to explain why the officers and agents made the preparations that they did in anticipation of the appellant's arrest.").

Appellant further contends the evidence log and Form B created as part of the chain of custody of the drugs in this case are testimonial and their admission violated the Confrontation Clause.[3] However, as the USSC has explicated: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009). As detailed by Captain Dennis the Form B is created as part of the routine business practice of the Sheriff's Department. (T.235-236; R. 211-212). Further, the SLED analyst testified the chain of custody evidence log was maintained in the regular course of business by SLED. (T.271; R. 247).

Additionally, the South Carolina Supreme Court analyzed a similar evidence log or chain of custody printout in State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013). The Court found:

> Indeed, the evidence logs do not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items; thus, the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their "primary purpose" is not to constitute evidence in a criminal trial.

Id. at 352, 751 S.E.2d at 660. The same analysis and result apply in the instant case regarding the evidence log and the Form B.

[3] It should be noted the evidence log was never admitted into evidence. While it was discussed by the SLED drug analyst regarding who handled the drugs at SLED, the report was never admitted.

Finally, Appellant seems to contend references to the search warrant obtained were testimonial and, therefore, violated the Confrontation Clause.[4] The search warrant, like the evidence logs, was not primarily prepared for purpose of creating evidence at trial. It was created to assist law enforcement during the investigation, and does not have as its primary purpose proving any fact necessary to show Appellant's guilt or creating a substitute for trial testimony.[5] As a result, a search warrant, and the references to it, are not testimonial in nature and, therefore, do not implicate the Confrontation Clause.

Further, any discussion of the search warrant was not for the truth of the matter asserted, but was to provide testimony regarding the progress and process of the investigation as well as to address challenges to the admissibility of evidence raised by Appellant. As a result, the testimony was properly admitted as it would not raise Confrontation Clause scrutiny. See Crawford, 541 U.S. at 59 n. 9 (The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

Accordingly, the trial court did not err in admitting testimony from Captain Dennis regarding what he learned from Investigator Sprengs, testimony about the evidence log from SLED, the Form B certification prepared by Investigator Bouknight, or the testimony regarding the search warrant and its return.

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[4] It is also important to note the search warrant was never admitted into evidence at trial, and was marked as Defendant's Exhibit 11 for identification because the main consideration of the search warrant came during pre-trial hearings related to Appellant's Franks v. Delaware argument which will be addressed in a subsequent issue.

[5] The Return to the search warrant was a primary point of discussion during the hearings regarding the admissibility of the drugs. The Return was created by Captain Dennis, who was present to testify and be cross-examined so there is no Confrontation Clause implication by the discussion of the Return. See State v. Anderson, Op. No. 27558 (S.C. Sup. Ct. filed August 5, 2015) (Shearouse Adv. Sh. No. 30) (right to confront witness satisfied when witness testified at trial and was subject to cross-examination, so no Confrontation Clause violation could occur).

III. The trial court did not err in denying Appellant's motion to suppress as the search warrant was valid and properly supported by probable cause. Further, Appellant had a Franks v. Deleware hearing and failed to establish any falsity in the search warrant's affidavit, nor did he establish if there was a falsity its removal would have eliminated the probable cause for the warrant.

Appellant contends the trial court erred in failing to grant Appellant a hearing and to suppress the evidence seized pursuant to the search warrant based on a lack of probable cause. Appellant clearly had a hearing on the issue, as the State presented testimony from Captain Dennis and both the State and Appellant's counsel made significant arguments. Further, Appellant failed to demonstrate any falsity in the affidavit presented to the magistrate to obtain the search warrant, and he did not establish any alleged falsity would have eliminated probable cause for the warrant. Finally, the officers were in the house pursuant to Appellant's invitation to investigate a burglary, and, therefore, had a right to search the premises as part of the investigation.

In order to obtain a search warrant in South Carolina, an affiant must present a sworn affidavit to a judge establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant."). "A search warrant may issue only upon a finding of probable cause." Bellamy, 336 S.C. at 143, 519 S.E.2d at 349; see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). "A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or

evidence of a crime will be found in a particular place." State v. Kinloch, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014).

Under the Fourth and Fourteenth Amendment of the United States Constitution, a defendant has a right "to challenge misstatements in a search warrant affidavit" even after a search warrant is issued. State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000). In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court identified the process for raising such a challenge. Pursuant to the process identified in Franks, a defendant is constitutionally entitled to a hearing on the validity of a search warrant affidavit if "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and "if the allegedly false statement is necessary to the finding of probable cause[.]" Id. at 155-156. Then, if such a preliminary showing is made, the defendant is entitled to a hearing where he must prove his allegations of falsity or a reckless disregard for the truth by a preponderance of the evidence. Id. at 156. Assuming the allegations are proven during the hearing **and** the search warrant affidavit's remaining content is insufficient to establish probable cause, the trial judge should then void the search warrant and exclude the evidence discovered during the search "to the same extent as if probable cause was lacking on the face of the affidavit." Id.

In the instant case, the trial judge committed no error in denying Appellant's suppression motion because Appellant failed to establish the search warrant affidavit contained any false information. Appellant attempted to argue that photographs which showed Appellant's bedroom and dresser first showed the dresser without the pill bottle

containing crack cocaine, and later photographs showed the pill bottle sitting on the dresser. First, there is no evidence supporting Appellant's claim the pill bottle was not originally located on the dresser. No testimony established the sequence of the photographs, and it is just as likely the photographs with the pill bottle on the dresser were taken before the subsequent pictures after the evidence was seized by the officers. Additionally, Captain Dennis testified he arrived, and was shown the bottle by Investigator Sprengs. The bottle was sitting on the dresser when he saw it. (T.30; R. 15). The location of the pill bottle was further corroborated at trial by the testimony of Deputy Epps who indicated Investigator Sprengs walked into the bedroom "looked on the dresser which I believe was to the right of the door and noticed a large amount of crack in a pill bottle." Deputy Epps also observed the crack in the pill bottle on the dresser. (T.154-155; R. 134-135).

Additionally, even if the pill bottle was not located originally on the dresser it does not render the affidavit provided to the magistrate false. The affidavit specifically indicated: "Once arriving and officers started processing the scene, a bottle containing a quantity of a white rock like substance believed to be crack cocaine and a razor blade with a white residue on it was observed in plain view in a bedroom of the residence." (Search Warrant Affidavit, Defendant's Exhibit 11; R. 308-313). The affidavit does not specify the pill bottle was found on top of the dresser. It merely indicates it was found in plain view in the bedroom. As a result, even if the officer saw the pill bottle on the floor or in some other location in the bedroom and subsequently moved it to the dresser to obtain better pictures, it does not render the affidavit false. No testimony or evidence indicates the bottle was not found in plain view in the bedroom, even if the photographs

and argument of counsel regarding their order are sufficient to show the bottle was not found on the dresser.

Even if the statement in the Affidavit that "a bottle containing a quantity of a white rock like substance believed to be crack cocaine and a razor blade with a white residue on it was observed in plain view in a bedroom of the residence" is false in the sense the pill bottle was not seen in plain view, the removal of the fact it was found in plain view does not eliminate probable cause. The Affidavit specifically explained the officers were present at Appellant's house responding to a call regarding a break in and the theft of $7,000.00 in cash. The Affidavit further established the officers started processing the scene, and it was in processing the crime scene they located the drugs. (Search Warrant Affidavit, Defendant's Exhibit 11; R. 308-313). There is no contention the officers were not entitled to enter the bedroom to process the scene pursuant to Appellant's report of a burglary. As a result, whether the drugs were found in plain view, or were found anywhere in the bedroom pursuant to the processing of the scene as a result of the call to the scene regarding a burglary, the magistrate had probable cause to issue the search warrant.

Finally, even if the search warrant is deemed invalid, the officers could search the property and seize the drugs pursuant to the consent granted by Appellant when he called asking for officers to respond to his residence to investigate a burglary. "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. These exceptions include the following: . . . (6) consent . . . ." State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266, (2012) (internal citation and quotation marks omitted). Here Appellant called officers to his house to conduct an investigation

into a burglary. It is clear the officers would have to process the scene, including the bedroom, in order to investigate the burglary. Appellant placed no limitation on the consent he gave officers to enter his property and investigate the burglary. As a result, the search and seizure of the drugs was proper even absent a warrant supported by probable cause.

Accordingly, the trial court did not err in concluding Appellant failed to demonstrate any false statement in the Affidavit and in denying Appellant's motion to suppress the drugs seized as a result of the search warrant.

IV. The trial court did not err in suppressing Appellant's knowing and voluntary statement.

Appellant contends the trial court erred in admitting Appellant's statement to Captain Dennis regarding the drugs found in Appellant's bedroom. He contends the trial court did not properly analyze the facts presented under a totality of the circumstances. Further, he maintains there is no credible evidence Miranda[6] was given to Appellant, and no evidence Appellant gave a statement. The facts presented at the Jackson v. Denno[7] hearing completely belie the arguments presented by Appellant.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The circuit court must examine the totality of circumstances surrounding the statement and determine whether the State has carried its burden of proving the statement was given voluntarily. State v. Miller, 375 S.C. 370, 382, 652 S.E.2d 444, 450 (Ct. App. 2007). The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). When reviewing a trial court's ruling concerning voluntariness, the appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda. In order to

[6] Miranda v. Arizona, 384 U.S. 436 (1966).
[7] Jackson v. Denno, 378 U.S. 368 (1964).

introduce into evidence a confession, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and, if the result of custodial interrogation, was taken in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). To determine the voluntariness of a statement, the circuit court must first conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009). "The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

In Miranda v. Arizona, the United States Supreme Court (USSC) created procedural safeguards to protect an individual's right against compelled self-incrimination, holding:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. 436, 478–79. Failure to comply with these constitutional safeguards renders the person's statements inadmissible against that person. Id. The USSC has

embraced a flexible approach regarding Miranda warnings whereby courts consider the totality of the circumstances. See Wyrick v. Fields, 459 U.S. 42, 47–49 (1982).

In the instant case, the trial court conducted a Jackson v. Denno hearing outside the presence of the jury. (T.111; R.96). The State called Captain Dennis to testify regarding the statement given by Appellant. Captain Dennis indicated he arrived to the scene, was briefed about the drugs, and then spoke with Appellant. At the time, Appellant was handcuffed and there is no contention he was not in custody. (T.112; R. 97).

Captain Dennis indicated he provided Appellant with his Miranda warnings. He testified he told Appellant:

> He was advised that he had the right to remain silent. That anything you say or did could be used against him in a court of law. That he had the right to an attorney, to have him or her present with him during any type of questioning. He also was advised if he did not have any money for questioning, that the Court would provide an attorney to him without cost to him. I always stop at that point and advise, you know, at some point they could possibly end up paying $40.00 dollars or whatever later on down the road for an attorney if they so desire to get one. And then the last thing that I advise them is, is that anytime during the questioning if they don't want to answer any more questions, they can say Robert, I don't want to talk to you anymore until I talk with my attorney.

(T.113-114; R. 98-99). Captain Dennis asked Appellant if he understood his rights and Appellant indicated he did. Appellant then indicated he wished to talk with Captain Dennis about the drugs in the pill bottle found in the bedroom. (T.114; R. 99).

Captain Dennis testified Appellant did not appear to have any difficulty understanding the rights read to him. He further explained Appellant did not appear

intoxicated or otherwise unable to understand his rights. (T.114-115; R. 99-100). Captain Dennis indicated Appellant voluntarily spoke with him about the drugs. (T.115; R. 100).

Captain Dennis then testified:

> I asked him, I said, you know, what about the drugs that we found in your room. And he was like, Man, I forgot about those. And I said, Well, how could you forget about something like that. And he said, well, he said, whenever I called 911 the dispatcher told us, you know, don't touch anything, don't go back in the house, wait for law enforcement. And he said, that's what I did. So we, you know, during that time we just pretty much continued to talk kind of back and forth.

(T.115; R. 100). Captain Dennis then explained the search warrant to Appellant. Appellant also indicated the drugs that would be found would be crack cocaine. (T.116; R. 101).

Appellant did not testify or put up evidence at the Jackson v. Denno hearing. After the hearing, the trial court allowed both parties to present argument regarding the statement. The trial court found Miranda was properly read and the statement given was voluntary. (T.123; R. 108).

While Appellant's counsel may have a different opinion regarding the evidence and may wish this Court agree with his evidence, this Court is not to reweigh the evidence but only to determine whether there is evidence to support the trial court's conclusion the statement was knowing and voluntary and was given after the appropriate warnings were read. Captain Dennis' testimony established Miranda warnings were read prior to the statement, and Appellant voluntarily talked with Captain Dennis about the drugs in the pill bottle. Any issues regarding whether a report was created or the exact

timing of the questioning inure to the weight to be given the evidence by the jury, not its admissibility.

Accordingly, the trial court's decision the statement was knowingly and voluntarily made is supported by the evidence presented at the Jackson v. Denno hearing, and the admission of the statement should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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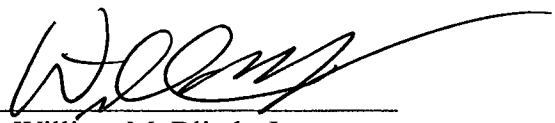
BY: 
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December 2, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002358

The State, Respondent,

vs.

Toaby Alexander Trapp, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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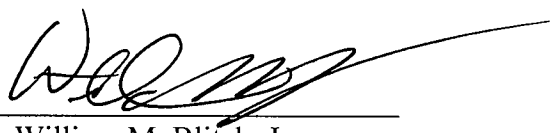
BY: 
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December 2, 2015

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 2nd day of December, 2015.

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