THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2014-002105

City of Greer,

Respondent,

v.

Michael Edward Schulz,

Appellant.

Final Brief of Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR BY DENYING THE ADMISSIBILITY OF A NHTSA DOCUMENT THAT PERTAINED TO THE DANGERS OF TEXTING AND DRIVING?

II. DID THE TRIAL COURT ERR BY ALLOWING THE JURY TO VIEW THE RESPONDENT'S VISUAL AIDS DURING DELIBERATIONS?

STATEMENT OF THE CASE

On April 28, 2012, Michael Edward Schulz was arrested and charged with Driving Under the Influence (Ticket No. 10422 FI) and Open Beer in Moving Vehicle (Ticket No. 10432 FI). On September 27, 2013, the charges were tried to a jury. During trial, Appellant admitted guilt for the charge of Open Beer in Moving Vehicle. The jury returned a verdict of "guilty" as to the charge of Driving Under the Influence. Appellant filed a Notice of Appeal and the matter was heard before the Honorable Alison R. Lee on May 20, 2014. By Order filed August 26, 2014, the Circuit Court found that that Municipal Court did not commit an error of law or an abuse of discretion, and affirmed the conviction. This appeal followed.

FACTS

On April 28, 2012, as a result of an investigation pursuant to a 911 call about an erratic driver, Appellant Michael Edward Schulz was charged with the offenses of Driving Under the Influence (Ticket No. 10422 FI) and Open Beer in Moving Vehicle (No. 10423 FI). Appellant's case was called to trial on September 27, 2013.

During its opening statement, Respondent wrote several numbers on an easel as follows: 13, 3, 14, 47, 3/4, and 5/8. These numbers remained on the easel in front of the jury from this point until the conclusion of the trial.

Sgt. Fortenberry, the arresting officer, was Respondent's only witness. Sgt. Fortenberry testified that he responded to a 911 call about an erratic driver on E. Poinsett Street within the city limits of Greer (R. p. 15, lns 6-8). Approximately five (5) minutes after receiving the call from dispatch, Sgt. Fortenberry located a blue Ford Explorer in which the "driver's side wheels were touching the center line." He further testified that the vehicle was "drifting in his lane, drifting into oncoming lanes, hitting the fog line. At times he would even go off the side of the road on the right-hand side. And there were times he would also completely go into the oncoming traffic." Sgt. Fortenberry immediately activated his in-car camera (R. p. 15, ln. 17 – R. p. 16, ln. 6).

Soon after his initial observations, the vehicle passed outside the city limits of Greer traveling towards the town of Duncan, South Carolina. Sgt. Fortenberry radioed for the Duncan Police Department to respond to initiate a traffic stop. However, a Duncan officer could not respond soon enough, and Sgt. Fortenberry continued to follow the blue Ford Explorer through the town limits of Duncan and back into the County of Greenville. The vehicle returned to the city limits of Greer near or at S.C. Hwy 80 and Sgt. Fortenberry initiated a traffic stop (R. p. 16, ln. 9 – R. p. 17, ln. 14).

Sgt. Fortenberry testified that he observed the Appellant's vehicle drift over the fog line at least thirteen (13) times; drift completely into the opposite lane at least three (3) times; drift halfway over the double yellow line at least fourteen (14) times; and, weave in and out of its lane of travel at least forty-seven (47) times (R. p. __, lns. 8-20 (page omitted from Record on

Appeal)). Respondent wrote each of these traffic violations beside the respective numbers on the easel Respondent used during its opening statement.

Sgt. Fortenberry approached the blue Ford Explorer and immediately smelled a strong odor of alcoholic beverage and an open Bud Light can located in the center console cup holder. Appellant was the driver and only occupant in the vehicle. Appellant told the Officer that he was coming back from a wedding and admitted he had consumed two beers while at the wedding. Sgt. Fortenberry had Appellant step out of the car to administer sobriety tests -- the nine (9) step walk and turn test and the one leg stand test. All evidence regarding the Horizontal Gaze Nystagmus test was excluded by the trial court pursuant to Appellant's pretrial motion. Sgt. Fortenberry testified that the Appellant performed poorly on those two standardized field sobriety tests. Specifically, Sgt. Fortenberry observed three (3) out of four (4) clues on the one leg stand test and five (5) out of eight (8) clues on the nine step walk and turn (R. p. 18, ln. 1 – R. p. 20, ln. 18). Using the easel that remained in view of the jury, Respondent showed the jury that 3/4 and 5/8 represented the clues of impairment exhibited by Appellant for each sobriety test.

Subsequent to the jury's review of the in-car video, Respondent questioned Sgt. Fortenberry regarding the differences between impaired driving and "texting and driving". Sgt. Fortenberry testified that, "[i]n my experience, when somebody's texting they can go over into, partially into an oncoming lane, but when they realize they're in that lane, they jerk their vehicle back. It's almost like it's a natural reaction. When they're looking down, they're doing whatever with their telephone. Then they realize they're out of their lane of travel they'll jerk back so they can hurry up and get back into their proper lane" (R. p. 21, lns. 6-11). Later in the trial, Sgt. Fortenberry testified again, based upon his experience, as to the differences between impaired driving and "texting and driving" (R. p. 46, lns. 12-15).

To explain the difference he saw in Appellant's driving compared to bad driving caused by "texting and driving", Sgt. Fortenberry testified that Appellant "...was constantly drifting. With oncoming cars that were coming, he'd drift over into their lane and then he'd just kind of drift back. There was no urgency in his driving, from what I observed, to get back into the proper lane of travel" (R. p. 21, lns. 12-15).

Appellant never told Sgt. Fortenberry during the stop, and even after he was arrested for Driving under the Influence, that he was "texting and driving" (R. p. 21, lns. 16-17).

Based upon "multiple traffic violations... the odor of alcohol coming from the vehicle, from his person while talking with him, and open container inside the vehicle, as well as not performing well on sobriety tests..," Sgt. Fortenberry arrested Appellant for Driving Under the Influence and Open Beer in Moving Vehicle and transported him to the Duncan Police Department for a Datamaster test (R. p. 38, lns. 21-24). After advising Appellant of his implied consent rights, the Appellant refused the test (R. p. 21, ln. 18 – p. 22, ln. 6).

During the course of direct examination, the following exhibits were admitted into evidence by the City and published to the jury: a picture of the open can of "Bud Light" beer found inside Appellant's vehicle; the in-car video (with redactions); the Datamaster video; and, the SLED Breath Alcohol Analysis Test Report.

Appellant's cross-examination of Sgt. Fortenberry focused primarily on the possibility that Appellant's driving was due to "texting and driving" rather than impaired driving (R. p. 23, ln. 12 – p. 26, ln. 19; R. p. 27, ln. 23 – R. p. 29, ln. 14; R. p. 33, ln. 1 – R. p. 37 ln. 25; R. p. 39, ln. 19 – R. p. 41, ln. 14; R. p. 46, lns. 2-25). On multiple occasions Sgt. Fortenberry admitted the danger of "texting and driving". However, Sgt. Fortenberry also testified that in his experience the poor driving exhibited by Appellant matched impaired driving rather than "texting and

driving" (e.g., R. p. 21, ln. 12 – 15; R. p. 39, ln 21 – R. p. 41, ln. 14; R. p. 46, lns. 2-5). Sgt. Fortenberry never denied that "texting and driving" was dangerous or that it caused bad driving. Rather, he articulated on several occasions why he believed that Appellant was not "texting and driving" based upon his driving patterns.

Appellant sought to *further* cross-examine Sgt. Fortenberry about the dangers of texting and driving through the use of a document published by the National Highway Traffic and Safety Administration (NHTSA). Respondent objected on the bases of hearsay and that Appellant never provided the document to the Respondent in response to its reciprocal discovery request. Initially, the Court sustained the objection on the basis of hearsay (R. p. 47, lns. 3-4), but overruled Respondent's objection as to the discovery violation (R. p. 56, lns. 13-14).

Appellant stated that he was not offering the document into evidence, but wanted to use data contained in the document to attack the credibility of or impeach Sgt. Fortenberry (R. p. 47, lns. 5-9). In fact, Appellant never marked the document as an exhibit or formally sought to introduce the document into evidence. Moreover, Appellant never provided Respondent with a copy of the document.

In the jury's presence, Sgt. Fortenberry admitted that NHTSA was authoritative as to highway safety, but denied any knowledge "with any publications that NHTSA has done in relation to texting and driving" (R. p. 48, lns. 4-14). Sgt. Fortenberry further admitted the reliability of NHTSA standards set forth in the NHTSA "impaired driving" manual because he was familiar with the standards through his training with the South Carolina Criminal Justice Academy (R. p. 49, lns. 1-18). In fact, Appellant extensively cross-examined Sgt. Fortenberry about data contained in the NHTSA impaired driving manual to impeach Sgt. Fortenberry's testimony regarding Appellant's sobriety.

The Court excused the jury to address the issue. Appellant was allowed the opportunity to make a proffer of evidence (R. p. 61, ln. 8 – R. p. 62, ln. 21). In his testimony, Sgt. Fortenberry never claimed that NHTSA did not do a study regarding texting and driving or that NHTSA is not authoritative, but rather, that he could not comment on a document for which he had no knowledge, training or familiarity (R. p. 50, lns. 1-5). The Court found that Appellant could ask Sgt. Fortenberry if he knew there was study done showing the dangers of texting and driving, but not ask him about the details of a study of which he has no knowledge (R. p. 50, lns. 16-21). The Court further found that although he did not know conclusively if NHTSA qualified as a public authority that would allow the document to overcome the hearsay objection pursuant to Rule 803(8), or make it self-authenticating pursuant to Rule 902(5), that it was not possible for Appellant to lay a proper foundation *through* Sgt. Fortenberry (R. p. 57, lns. 9-15).

In comparison, the trial Judge explained to Appellant that Appellant was able to cross-examine the officer with the NHTSA impaired driving manual because Sgt. Fortenberry studied that manual (R. p. 57, ln. 23 – R. p. 58, ln. 12).

Based upon the proffer, the only data Appellant sought to introduce was that texting was among the worst of all driving distractions, and that "sending or receiving a text takes a driver's eyes from the road for an average of 4.6 seconds, the equivalent at 55 miles per hour of driving the length of a football field blind" (R. p. 62, lns. 12-14).

After Respondent rested, Appellant testified that he attended a wedding on the day of his arrest where he consumed two (2) beers. He left the wedding early after a bad argument with his fiancé, who at the time was pregnant with his child (R. p. 67, lns. 11-17). He took with him in his vehicle an open can of beer, but testified he did not consume any of the beer while driving.

Appellant admitted to very poor driving, but contended that it resulted from texting with his fiancé while driving, rather than from any impairment by alcohol (R. p. 68, lns. 1-5).

Appellant further testified that had a bad knee due to an injury he sustained during his career as a college football player, and that this previous injury, as well as his anxiety, affected his performance on the sobriety tests (R. p. 68, lns. 14-19; R. p. 69, lns. 2-16). Appellant further testified that refused the breath test because he did not trust the machine to produce an accurate result (R. p. 70, 16-18).

STANDARD OF REVIEW

"The appellate's court review in criminal cases is limited to correcting the order of the circuit court for errors of law." State v. Johnson, 396 S.C. 182, 720 S.E.2d 516, 518, citing City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 800 (2007).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY DENYING THE ADMISSILITY OF A NHTSA DOCUMENT THAT PERTAINED TO THE DANGERS OF TEXTING AND DRIVING.

The trial court properly denied the admissibility of the NHTSA document from evidence for several reasons. Furthermore, any error regarding the admissibility of the document was harmless error.

Issue not Preserved for Appeal

This issue is not properly preserved for appeal because Appellant failed to submit the NHTSA document into evidence as either a Court or Defense exhibit. During the proffer, the Court allowed Appellant sufficient opportunity to lay a foundation to prove admissibility (R. p. 61, ln. 8 – R. p. 64, ln. 14). Prior to the proffer, the parties thoroughly argued their position as to the document's admissibility (R. p. 50, ln. 11 – R. p. 61, ln. 6). Appellant never introduced the document into the record. Appellant also never introduced the NHTSA document on appeal to Judge Lee.

Neither this Court nor Respondent can possibly determine if the document is the same document Appellant sought to introduce at trial. This Court is precluded from reviewing the document on appeal because it was not properly preserved.

Rules 608(c), 803(8), and 902(5)

"A trial judge has considerable latitude in ruling on admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Brockmeyer, 406 S.C. 324, 354, 751 S.E.2d 661 (2013).

The record clearly demonstrates that Appellant was attempting to impeach Sgt. Fortenberry with the NHTSA document to show that Sgt. Fortenberry did not appreciate or was uninformed as to the degree of danger caused by "texting and driving". However, Sgt. Fortenberry previously admitted to the dangers of "texting and driving". He also admitted that NHTSA was authoritative. He was simply unfamiliar with the document itself and unable to competently testify about its contents.

Rule 608(c) allows for impeachment evidence to show "[b]ias, prejudice or any motive to misrepresent." Here, there is no basis to contend that Sgt. Fortenberry was misrepresenting

anything. He admitted to the dangers of texting and driving, but determined, based on his experience, that Appellant's driving pattern appeared to be impaired driving.

Therefore, the trial Judge did not commit error or abuse his discretion. The record established that the primary basis to exclude the document as evidence was Appellant's inability to lay a foundation to impeach Sgt. Fortenberry with the information contained in the document (R. p. 50, lns. 16-21; R. p. 57, lns. 9-15). As a result, the trial court provided a proper basis to deny the admissibility of the document.

Appellant contends, and even the circuit court found without even reviewing the document, that the document qualifies as a public record pursuant to Rule 803(8) and self-authenticating pursuant to Rule 902(5). Respondent agrees that NHTSA qualifies as a public authority; however, the inquiry does not end there for a document to be admissible under Rule 803(8) and authenticated through Rule 902(5). For example, as set forth above, proving that a document is authentic, or that which Appellant claims it to be, does not mean that Appellant automatically circumvents the requirement that a witness have knowledge of evidence to competently testify about it.

Furthermore, even though Rule 803(8) presumes admissibility, the opponent of such evidence has the ability to prove that sufficient negative factors are present to bring into doubt the report's trustworthiness. Such factors that may be used are (1) timeliness of the investigation; (2) the special skill or experience of the official; and (3) possible motivation problems. Jones v. Ford Motor Co., 204 Fed. Appx. 280, 284 (4th Cir. 2006). The opponent of the evidence also has the ability to review whether or not the document is an original, or a true copy of the original, or if the document contains secondary hearsay. Appellant's failure to provide a copy of the document to Respondent; to preserve it for review; and, to lay a sufficient

foundation through Sgt. Fortenberry precludes Respondent an opportunity to effectively examine the document. Appellant fails to demonstrate prejudice by the trial court's exclusion of the NHTSA document from evidence.

Harmless Error Analysis

Even if the exclusion of the evidence was error, any error was harmless. "Error is harmless where it could not have reasonably affected the result of the trial." Way v. State, 410 S.C. 377, 384, 764 S.E.2d 701, 705 (2014), citing Judy v. Judy, 384 S.C. 634, 646 S.E.2d 836, 842 (Ct. App. 2009). "Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result." Way at 384, 764 S.E.2d at 705, citing State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

The Circuit Court correctly found that any error's analysis was harmless. During the proffer, Appellant sought to introduce evidence in the document providing that texting was among the worst of all driving distractions, and that "sending or receiving a text takes a driver's eyes from the road for an average of 4.6 seconds, the equivalent at 55 miles per hour of driving the length of a football field blind" (R. p. 62, lns. 12-14).

Sgt. Fortenberry admitted that texting and driving was dangerous on multiple occasions. He further admitted that he observed drivers drive into opposite lanes of travel when they are distracted with their mobile phones. Judge Lee's order accurately reflects the brevity of the information sought by Appellant, but moreover, in large part, it was information Sgt. Fortenberry admitted to be true. As a result, the NHTSA document did not contain additional substantive information that would have reasonably affected the result of the trial.

II. THE TRIAL COURT DID NOT ERR BY ALLOWING THE JURY TO VIEW THE RESPONDENT'S VISUAL AIDS DURING DELIBERATIONS

An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." State v. Nichols, 325 S.C. 111, 120–21, 481 S.E.2d 118, 123 (1997) (citation omitted). A party cannot complain of an error which his own conduct has induced. State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). "Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct.App.1991). A contemporaneous objection is required to preserve issues for direct appellate review. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Thomason, 355 S.C. 278, 584 S.E.2d 143 (Ct.App.2003).

Respondent used the easel to show the jury the number of times Sgt. Fortenberry observed the Appellant's vehicle travel over the fog line (13); travel into the opposite lane of travel (3); travel halfway over the double yellow line (14); weave in and out of his lane of travel (47); 3/4 (number of clues on the one leg stand); and, 5/8 (number of clues on the nine step walk and turn test). The easel and numbers remained on display throughout the trial and were used by Respondent in its closing argument. During deliberations, the jury requested that it be allowed to review the numbers and information on the easel. Off the record, the Court inquired of counsel for the City and co-counsel for the Appellant, and both parties indicated they had no objection to the request. The jury entered the courtroom and viewed the numbers on the easel for approximately five (5) minutes before returning to their deliberations. The Court allowed no questions, comments, or discussion during the viewing.

Before the jury reached a verdict, Appellant's lead counsel discovered that the jury reviewed the demonstrative evidence during deliberations while he was outside the courtroom (R. p. 74-75). The court informed Appellant that his associate did not object. Appellant never objected at this point either. As a result, Appellant fails to properly preserve this issue for appeal. Appellant never objected at any point in the proceedings as to the Respondent's use of the easel.

Nevertheless, even if this Court determined that allowing the jury to review the visual aid during deliberations was error, any error was harmless. The easel, and the information it contained, stayed in front of the jury for the entire trial. It never moved. Moreover, the in-car video and Sgt. Fortenberry's testimony clearly established the accuracy of the numbers. Any error was insubstantial and could not have affected the result.

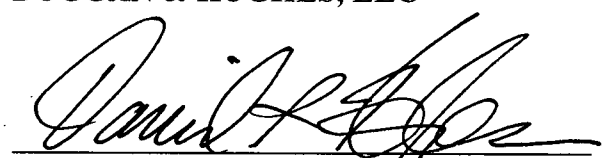
CONCLUSION

Neither the trial court nor the circuit court committed any reversible error. As to the first issue, the Court should affirm for several reasons. First, the NHTSA document itself is not preserved for appeal because it was never made part of the record. Respondent submitted a Motion to Strike the document from Appellant's Designation of Matter. Second, denial of the admission of the NHTSA document was proper under the South Carolina Rules of Evidence because Appellant failed to lay a proper foundation through the arresting officer. Third, if omission of the report was error, any error was harmless because the NHTSA document did not provide substantive additional information for the jury to consider that would have affected the outcome of the trial.

Appellant's second issue is also not preserved for appeal because Appellant never interposed an objection to the trial court. Regardless, any error was harmless because the jury heard and viewed competent evidence throughout the trial to support the information contained on the visual aid.

Respectfully submitted,

DUGGAN & HUGHES, LLC



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Date: Jan. 25, 2016
Greenville, South Carolina

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CERTIFICATE PURSUANT TO RULE 211, SCACR

I certify that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Brief on Michael Edward Schulz by depositing a copy of same in the United States Mail, postage prepaid, addressed to his attorney of record, Daniel J. Farnsworth, Jr., Esquire, P.O. Box 8719, Greenville, South Carolina 29604.

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