STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

APPELLANT,

V.

MARVIN REGINALD BROWN

RESPONDENT.

APPELLATE CASE NO. 2014-002129

FINAL BRIEF OF RESPONDENT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge correctly find that a statement made by the deceased to the police was not admissible as a "dying declaration"?

II. As an alternate sustaining ground, is the statement made by the deceased to the police inadmissible as a violation of the Confrontation Clause of the United States Constitution and the South Carolina Constitution?

STATEMENT OF THE CASE

In 2012, Respondent was indicted for murder (2012-GS-10-6846), armed robbery (2012-GS-10-6845), and possession of a weapon during a violent crime (2012-GS-10-6844). R. 690 - 695. On March 13, 2013, Respondent filed a motion to suppress hearsay testimony of Goodwin, Davon Goodwin. R. 117. On March 25, 2013, Respondent filed a memo in support of his motion to suppress hearsay testimony. R. 118. Respondent argued the burden was on the state to demonstrate the proffered evidence fulfilled the requirements of the law to be introduced as a dying declaration. R. 128. Although Respondent conceded the subject of the proffered statement concerned the circumstances of the death, Respondent argued Goodwin was not in imminent danger of death and the statement was not given while Goodwin was so fully aware of his imminent death as to be without any hope. R. 128-129.

The state responded by way of a document titled "Source Citations in Response to Defense Motion to Suppress Statement." R. 131 - 134. The state argued that Respondent's "line of cases dating from 1914-1943 & 1962" stood for the "general proposition that a victim must literally be at death's door" for the dying declaration exception to apply. R. 131 - 134. The state continued by explaining that defense counsel "kindly taught" the prosecuting attorney the phrase "*in extremis*" to explain the first requirement of a dying declaration. R. 131- 134. Additionally, the state argued the cases cited by Respondent, which the state called "World War I era authority," had been implicitly overruled by State v. McHoney, 344 S.C. 85, 554 S.E.2d 30 (2001). R. 131 - 134. According to the state "the modern approach to the reasonable fear of 'imminent death' relaxe[d] somewhat the rigid requirements of a century ago." R. 131 - 134.

The matter proceeded to a hearing before the Honorable Stephanie P. McDonald on March 26, 2013. R. 1. Cody Groeber and Megan Ehrlich represented Respondent, and Chad Simpson represented the state. R. 1. Judge McDonald took the matter under advisement. R. 101, lines 3-4.

On December 10, 2013, the parties reconvened. R. 102 Judge McDonald found the statements made by Goodwin were not dying declarations falling within the hearsay exception found in Rule 804(b)(2) of the South Carolina Rules of Evidence. R. 104, lines 7-12. On August 18, 2014, Judge McDonald issued a written order granting Respondent's motion to suppress the statements made by Goodwin. R. 135.

The state filed a notice of appeal on August 26, 2014, which was perfected. Respondent now files this brief.

ARGUMENT

I. The trial judge correctly found that a statement made by Goodwin to the police was not admissible as a "dying declaration."

Relevant Facts

During the early morning hours of April 26, 2011, Davon Goodwin, Goodwin was shot in the abdomen in downtown Charleston. Court's Exhibit #3; R. 140; R. R. 208; R. 571. He was transported to the Medical University of South Carolina (MUSC) by EMS. 140; R. 208; R. 571. He informed the emergency medical personnel that he "heard one shot" and "felt pain in [his] stomach." R. 571.

When he arrived, he was "awake, alert, [and] oriented." R. 208; R. 568. Immediately, Goodwin "underwent an exploratory laparotomy and repair of duodenum, inferior vena cava, and superior mesenteric vein and artery." R. 140 - 141; R. 202; R. 208; R. R. 239. According to the physician, the injuries were repaired. R. 208. Additionally, he was intubated. R. 208; R. 239.

The following day, April 27, 2011, he underwent surgery again for "an abdominal washout and drain/tube placements." R. 140; R. 202; R. 208; R. 516 - 521. The decedent "tolerated this procedure well." R. 208. Discussions of extubation began on April 27, 2011 due to Goodwin's improving condition. R. 273. On April 28, 2011, at 10:15 a.m., the medical team arrived at the his bedside awaiting extubation. At approximately 11:00 a.m., he was extubated. R. 339; R. 555.

Thereafter, he "improved and had begun ambulation and physical therapy." R. 140; R. 208. On April 29, 2011, he was "adequate on the floor and transferred accordingly." R.

208; R. 210.[1] On that date, he was started on oxycodone and tube feeds, which he tolerated well. R. 210. Furthermore, he was "up and out of bed-to-chair." R. 210. At 8:00 a.m, he was calm and "stable." R. 351; R. 355. At 12:45 p.m., he was sitting "up in [a] chair." R. 356. At 2:15 p.m., he returned to his bed from his chair. R. 357. At 2:17 p.m, the doctor ordered a physical therapy evaluation and treatment. R. 617. At 8:00 p.m., he denied feeling any tingling or numbness in his upper or lower extremities. R. 367. Also at 8:00 p.m., the doctor ordered the patient could be out of bed at his liberty. R. 369. Although the nurses' notes indicated he was emotional on April 26 and April 27, the notes ceased to list "emotional" on April 28 or April 29. R. 543 - 544. However, the notes indicated Goodwin lacked motivation and was unreceptive to instruction. R. 544.

On April 29, 2011, Jerome Fleming, then a detective for the City of Charleston Police Department, went to MUSC to meet with Goodwin. R. 8, lines 9-18; R. 9, lines 15-17. Fleming went to the hospital at "[a]pproximately noontime." R. 9, lines 18-19.[2] Fleming first spoke with Goodwin's parents, who informed him that Goodwin "was lucid" and "able to communicate at the time." R. 10, lines 1-9; Court's Exhibit #3. During the audio recording, while Fleming was in Goodwin's presence, Fleming described him as "alert and conscious" and "recuperating from his injury." Court's Exhibit #3. At the time of the meeting, Goodwin did not have a breathing tube and was able to communicate with Fleming by speaking. R. 19, lines 16-19. Goodwin was lucid and alert. R. 19, lines 23-24.

---

[1] It appears he was transferred from the ICU to a regular room around 8:00 p.m. on April 29, 2011. R. 372; R. 471.

[2] In his report, he stated he saw Goodwin "around 12:10." R. 37, lines 4-7. On the recording, he said he interviewed Goodwin at 10:12 a.m. R. 37, lines 8-17; Court's Exhibit #3.

After entering Goodwin's hospital room, he first engaged in conversation "to convince the [deceased] to cooperate ... as far as the investigation [was] concerned." R. 10, lines 16-22. Goodwin expressed hesitancy in speaking to Fleming because individuals "living in a community [] don't want to be identified as being an individual [who] assisted the police." R. 10, line 23 – R. 11, line 5. Goodwin told Fleming "he didn't want to get involved." R. 11, lines 11-12. In fact, Goodwin said he did not know who shot him. R. 36, lines 1-11. Fleming encouraged Goodwin to cooperate because he was "very fortunate" to be alive" and "no matter ... the opinion of the people" there were no other witnesses to assist the police in determining the identity of the perpetrator. R. 11, lines 12-19. Thereafter, Goodwin provided Fleming with a statement, which was partially recorded. R. 11, lines 20-22; R. 12, lines 22-25; R. 26, lines 8-12; R. 39, lines 3-7.

Fleming described Goodwin as "very weak" while lying in a bed in the Intensive Care Unit (ICU). R. 12, lines 2-3. There were "tubes ... attached to his body" and he was "unable to really raise his hands or arms, *per se*, and speak loudly." R. 12, lines 3-6. When Fleming asked Goodwin to circle a photograph, Goodwin stated he "was too weak to accomplish that task." R. 12, lines 7-15. Nevertheless, Goodwin "attempted to write his initials - - or sign by the picture that he pointed to." R. 14, lines 7-10; R. 672; R. 688.

While the digital recording device was turned off, Fleming "read an admonition statement from the lineup to show" Goodwin and showed the simultaneous photographic lineup to Goodwin. R. 13, lines 7-22; R. 15, lines 17-23. Also, while the digital recording device was turned off, Goodwin signed the admonition form indicating he understood the admonition and circled a photograph among those in the lineup. R. 14, lines 7-10; R. 15, lines 1-4; R. 16, lines 1-22; R. 672; R. 688. According to Fleming, Goodwin indicated

"while he didn't know the person's name, he had known this person's face from the neighborhood for quite some time," despite Goodwin's earlier statements that he did not know the shooter at all. R. 17, lines 3-6; R. 36, lines 9-15. Fleming claimed Goodwin expressed no hesitation, reluctance, or doubt concerning the identification. R. 17, lines 7-12. During the recorded conversation, Goodwin indicated he got a good look at the person who shot him. R. 17, line 22 – R. 18, line 1; Court's Exhibit #3. Also, during the recorded and unrecorded conversation, Fleming referred to the suspect by the name of Marvin and told Goodwin "he had made a positive identification." R. 33, lines 2-8; R. 36, line 16 – R. 37, line 3; R. 40, lines 23 -25.

On April 30, 2011, a physical therapist consulted with Goodwin. R. 556. He was able to tolerate five to fifteen minutes of uninterrupted exercise. R. 557. He could roll, scoot, move from supine to sitting, and move from sitting to standing with moderate assistance. R. 557. Also, Goodwin's family was instructed on physical therapy exercises and the importance of getting out of bed. R. 557. The physical therapist determined Goodwin's prognosis was "good" and established short term goals for Goodwin to achieve by May 14, 2011 and long term goals to be achieved within two months. R. 557 - 558.[3]

Despite the decedent's improvement over the course of his hospital stay, he was found unresponsive on May 4, 2011. R. 141; R. 208. The hospital suspected he died from a pulmonary embolism. R. 199. He was pronounced dead at 8:45 a.m. R. 199; R. 141; R. 207; R. 658. The attending physician described his death as "[s]udden, unexpected, [and] unexplained." R. 200.

[3] On May 2, 2011, the physical therapist met with the deceased who indicated, "I'm ok." R. 563.

An autopsy was performed on May 5, 2011 at MUSC at 9 a.m. R. 140. The pathologist opined the "decedent died as the result of complications of a single penetrating gunshot wound to the abdomen." R. 146.

At the hearing, Goodwin's grandfather, David Brunson, Jr. recalled his close relationship with Goodwin. R. 45, lines 19-20. He mentioned that he would ride around in the car with all of his grandkids, including Goodwin. R. 46, lines 1-11. On an unknown date while Goodwin was in the hospital, Goodwin and his grandfather talked about the rides they used to take. R. 46, lines 12-22. In fact, the two discussed the rides more than once. R. 46, lines 23-25. While the grandfather was holding Goodwin's hands, the subject came up. R. 47, lines 16-18. Goodwin "would always sit on the front, near the door on the passenger side." R. 47, lines 18-19. Goodwin "said he wouldn't be able to ride" with the grandfather, and another grandson "would have his seat." R. 47, lines 20-22. The grandfather took "that to mean that he was fearful he may not ever have the opportunity to take [those] rides with [him] again." R. 47, line 24 – R. 48, line 2. Additionally, Goodwin apologized to the grandfather "for some of the decisions that he had made in his life." R. 48, lines 3-5.

After the judge indicated she found the grandfather's testimony persuasive, the state recalled the grandfather to the stand. R. 66, lines 7-11; R. 66, lines 24-25. The grandfather was unable to recall an exact date when "these types of conversations" happened. R. 68, lines 1-3. However, he stated those "types of conversations happened on more than one occasion while he was in the hospital." R. 68, lines 4-7.

Additionally, the grandfather noted that he believed Goodwin "was leaking inside because he started to swell." R. 68, lines 11-12. Goodwin "was rubbing and his belly" and

stated he was "burning inside." R. 68, lines 13-14. The grandfather asked the nurse "for something" to assist Goodwin with this complaint. R. 68, lines 14-15. The nurse went to the doctor. R. 68, line 15. The grandfather was told "to go to the drugstore and get some itch cream and put [it] on his belly." R. 68, lines 15-17. The grandfather and his grandson walked to a drug store, returned with "itch cream" and rubbed it on Goodwin. While doing so, Goodwin "point-blank asked" his grandfather, "he wasn't going to make it." R. 68, lines 17-20. Later, the grandfather said Goodwin "pretty much pointblank said he wasn't going to make it - - he didn't think he was going to make it." R. 70, lines 2-4. This incident occurred "a little bit after he was sewn back up." The grandfather recalled "his eyes were yellow like a banana." R. 69, lines 4-8.

The conversation between Goodwin and his grandfather about the car rides the two would take occurred *prior* to the conversation in which the grandfather rubbed cream on Goodwin's belly. R. 68, line 21 – R. 69, line 3; R. 69, line 12-15.

On the morning of the shooting, David Brunson, III, Goodwin's father, arrived at the hospital where Goodwin was in surgery. R. 49, lines 8-9; R. 49, lines 16-17. Immediately after the surgery, the doctor advised, "we did what we can do, but you know, I'm - - I'm just telling you, it don't look like he may make it, but you know - - and it's because the small intestines got damaged real bad." R. 50, lines 1-5. However, the doctor explained Goodwin "was stable" immediately after the surgery. R. 50, line 6. In fact, the doctor told the family that the surgery went as well as could be expected and they had done "the [b]est they [could] do." R. 50, lines 13-15. Nevertheless, the doctor warned, "any moment, it can be bad for him." R. 50, line 7.

Oddly, Goodwin's father claimed the doctor said "they couldn't do surgery again because that was it, because of the damage and stuff and he wouldn't be strong enough for them after this if anything happened, that was just it, they couldn't do anything else for him." R. 50, lines 15-19. However, the medical records clearly showed Goodwin underwent two surgeries.

After the surgery, Goodwin was "[a]lmost like a - - a child just happy to see his parents." R. 51, lines 2-3. Goodwin's father compared his son's demeanor to that of a "child [who] got in a fight at school or beat up with a gang" and was "happy to see [his] parents" because the child was "scared or whatever." R. 51, lines 4-7. Further, he described Goodwin as "pretty much scared" and "in a deep stare." R. 51, lines 8-9. While in the hospital, Goodwin wanted to hold hands with his family members, but prior to being in the hospital, the nineteen-year old was not inclined to hold hands with others. R. 51, lines 15-20. Nevertheless, Goodwin was "real playful" and enjoyed playing with "his little sisters and nephews and everybody." R. 51, lines 20-25. Goodwin's father interpreted Goodwin's desire to hold hands while in the hospital to mean he was afraid. R. 52, lines 7-9. Later, Goodwin's father explained Goodwin feared his assailant would finish the job police because the person who allegedly shot Goodwin was someone who "do[es] so much in the community, and always get[s] in a lot of trouble." Goodwin agreed to cooperate with the detective because "you don't have to worry about nobody coming back to do nothing to you when you do the right thing." R. 54, lines 10-22.

Goodwin's father recalled when the detective arrived to talk to Goodwin. Initially, the father told the detective that Goodwin was asleep. R. 53, lines 3-7. However, the doctors explained that if someone needed to talk to Goodwin, "they can pinch it where the

medicine would stop going in, and he can wake up." R. 53, lines 11-14. However, the doctors would not allow Goodwin to stay awake for longer than "an hour or so." R. 53, line 15. Thereafter, Goodwin's father permitted the doctors to wake up Goodwin and talk to the detective. R. 54, lines 1-2.[4]

Goodwin's sister, Dendria Brunson, explained she had never seen Goodwin cry until he was in the hospital following his surgeries. R. 58, lines 7-17. According to her, he did not cry frequently in the hospital, but she would see tears fall when she would wipe his face. Tr. 58, lines 18-20. Goodwin "seemed tired, and he was ready to go home." R. 58, line 22.

Goodwin's younger brother, Desmonte Goodwin, visited with Goodwin in the hospital. R. 59, lines 24-25; R. 60, lines 4-6. Goodwin repeatedly told him "everything will be all right." R. 60, lines 11-12. In conjunction with explaining everything would be "all right," Goodwin told his little brother that he *knew* who shot him. R. 60, lines 20-22. According to his little brother, Goodwin told him "Marvin" had shot him and the little brother conveyed this to the police. R. 62, lines 1-4.

During the argument on the motion, the state noted Goodwin had "majorly, invasive surgery, emergency surgery" and was "in critical condition" when he arrived on April 26, 2011. R. 73, lines 21-24. Goodwin underwent "further exploratory surgery" on April 27, 2011. R. 74, lines 5-6. Goodwin gave a statement to the police at 10:12 a.m. on April 29, 2011. R. 74, lines 15-17. The state noted Goodwin "had a breathing tube ... was intubated" and the "breathing tube was removed ... on the morning of the 29th - - or late the

[4] As noted by defense counsel, the medical records contained no indication the deceased's medications were altered in order to permit the deceased to communicate with the detective. R. 85, line 18 – R. 86, line 1.

28th." R. 74, lines 19-22. Nonetheless, Goodwin gave his statement after the tube was removed. R. 74, line 24 – R. 75, line 1.

The state's summary of the medical records was that "the doctors believed that surgery was successful, that they were hopeful of a favorable prognosis." R. 75, lines 2-7. Further, the state contended the "doctors conveyed to the family, hey you know, surgery went as well as can be expected and we're hopeful." R. 75, lines 8-10. Nevertheless, the state argued the "prognosis" was "in a context of a gunshot wound to the abdomen and majorly invasive surgery." R. 75, lines 11-14. Further, the state argued that Goodwin's dying days after the surgery and his statement to police was "immaterial" and that his "actual medical condition" was "not the end of the discussion." R. 76, lines 1-7. According to the state, the issue was whether the "person subjectively [was] in fear of death" and "was that fear of death, of imminent death, a reasonable fear to have at that time." R. 76, lines 9-12. Acknowledging "things [] cut both ways," the state argued Goodwin "was actually in fear of imminent death and that fear was reasonable." R. 76, lines 14-19.

The state argued the evidence "suggesting this fear of imminent death" was "the medical records themselves," the fact that the statement was made approximately forty-eight hours after "major invasive surgery," the surgery was to repair a gunshot wound, and that the medical records "echoe[d] the severity of the situation that he was under and how he was in fact still in the woods, so to speak, and in fact, possibly going to die." R. 77, lines 3-21. Next, the state pointed to the testimony of the officer that Goodwin could not use his hands and the statement showing "how weak and scrawled his initials" were. R. 77, lines 22-25. According to the state, Goodwin's "weakness and pain" could be heard in his voice on the recording of his statement. R. 78, lines 3-4. Finally, the state argued the substantial

evidence of Goodwin's subjective fear of imminent death was the testimony by the grandfather of his conversations with Goodwin. R. 78, lines 9-12. The state claimed Goodwin was "very upset that that could very well be his last ride with his granddad that he was going to have." R. 78, lines 22-24. The state argued that was "a direct statement ... suggesting he was fearful of death." R. 78, lines 24-25. Further, the state argued Goodwin's apologies to his grandfather "for some of the decisions and some of the mistakes he had made in his life" were "suggestive of a fear of imminent death." R. 79, lines 1-4.

The state claimed the father's testimony that Goodwin would "stare off into space" was attributable to medication, but was "some circumstantial evidence toward a fear." R. 79, lines 12-16. Further, the testimony that previously, Goodwin was not "the kind of touchy-feely guy [who] would walk around holding people's hand" but when he was "in the hospital, he almost constantly wanted someone's hand to hold" was "circumstantial evidence of the degree of fear that he was under." R. 79, lines 17-21. Further, the state pointed to the testimony of Goodwin's sister that Goodwin cried and attempted to hide his crying from his family. R. 79, lines 22-25. The state conceded there were "some signs of hope." R. 80, line 8. However, the state argued that "being hopeful of recovery and fearful of imminent death are not mutually exclusive propositions for someone in this kind of situation." R. 80, lines 10-13. The state argued it would be "very natural for someone in this kind of situation [to] have ebbs and flows and fear death - - you know, have a persistent fear of death while remaining somewhat hopeful of recovery." R. 80, lines 13-16. According to the state, the evidence was "mixed" on this issue, but what went "to the heart of it" was the conversation between Goodwin and his grandfather. R. 80, lines 17-25.

According to defense counsel, dying declarations are exceptions to the rule against hearsay "because a person who believes that they're about to meet their maker wouldn't lie" and would desire a clear conscience. R. 81, lines 11-18. Defense counsel explained the first condition that must be met in order to find a statement is a dying declaration is that the declarant "actually be in imminent danger of death." R. 82, lines 1-21. Second, the declarant must be aware of imminent death and be without any hope at life. R. 83, lines 8-10. Defense counsel noted the state's concession "there was a mixture of hope and fear," and argued that "if hope exists, then the statement does not come in." R. 83, lines 10-13.

Defense counsel noted the absence of repeated questioning by Goodwin of his health status. R. 84, lines 7-13. Importantly, defense counsel explained that while the condition of Goodwin was relevant, the most relevant aspect of this factor was his condition when he made the statement. R. 84, lines 14-22.

According to defense counsel, there was no "sacrosanct moment" when Goodwin gave his statement to the detective. R. 84, line 23 – R. 85, line 4. Instead, Goodwin was "lucid and alert," was "recuperating from his injury," had the ability to correct mistakes in his conversation with the detective. R. 85, lines 10-17.

Defense counsel noted the sister's testimony Goodwin was tired and wanted to go home, and argued this "clearly" indicated "he had hope that he was going to go home." R. 86, lines 2-5. Similarly, the younger brother testified Goodwin told him everything would be all right, which evidenced his hope that he would get better and go home. R. 86, lines 5-7.

Defense counsel countered the state's argument that the doctors telling the family that "things could go bad" by explaining that such a prognosis was not a suggestion

Goodwin as in imminent danger of death at the time he gave the statement – it was a mere possibility. R. 86, lines 9-17.

Regarding the grandfather's testimony, defense counsel noted the record was unclear *when* those statements were made and that an apology for past conduct showed "hope to change in the future." R. 86, lines 18-24.

In response to defense counsel's argument, the prosecutor explained he had "received a note from the family" and "their interpretation of his statement, I'm ready to go home was, I'm ready to pass. I'm ready to pass on to Heaven." R. 99, lines 13-18.

When the parties re-convened on December 10, 2013, the judge found "after reviewing the medical records, the information about the extubation of the victim and his health status at the time of him looking at the six-pack," the statement was not a dying declaration within Rule 804(b)(2), SCRE. R. 104, lines 7-12. The judge noted Goodwin expressed to his sister that he was tired and ready to go home. R. 104, lines 14-15. He was ambulatory later that day or the next day. Ruling Tr. 3, lines 17-18. He was "screened for a physical therapy session and everyone thought he was getting better." R. 104, lines 18-19.

The judge distinguished the instant facts from State v. McHoney, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001), where the "victim ... never regained consciousness after she made her declaration. Her throat was cut. ... [She] shook her head and thought she was going to die at the time." R. 104, line 20 – Ruling Tr. 4, line 3. Thus, the judge held the hearsay exception of 804(b)(2), SCRE did not apply. R. 105, lines 4-5; R. 106, lines 15-16.

According to the judge, it was not the intent of the exception to deal with someone in the health condition that Goodwin was in. Along those lines, she noted it was a not a

"spontaneous declaration," but occurred when an officer went into his hospital room with a simultaneous photographic line-up. R. 106, lines 17-22.

On August 18, 2014, Judge McDonald issued her formal written order resolving the issue in the case. R. 135. Judge McDonald concluded there was "no doubt" Goodwin "was in serious condition" at the time of his statements, the medical records showed he was improving and not in imminent danger of death at the time the statements were made. R. 137 - 138. Per the medical records, on the day of the statements, Goodwin was "'adequate on the floor, transferred out of STICU, was making strides with physical therapy, and ambulating in the hall.'" R. 138. Goodwin received a physical therapy consult on April 29 and began therapy on April 30 tolerating between five and fifteen minutes of uninterrupted exercise. R. 138. Further, Goodwin's death on May 4 "was listed as sudden and unexpected." R. 138.

Additionally, Judge McDonald found neither the medical records nor the other evidence in the case demonstrated Goodwin was aware of imminent death when he gave the statements to the police. R. 138. In fact, the evidence showed Goodwin's condition was improving. R. 138. The judge found evidence Goodwin "was planning on seeking revenge against his assailant" and such evidence was "inconsistent with both an awareness of imminent death as well as one who has given up all hope of survival." R. 138.

Discussion

Standard of Review

"The circuit court primarily decides whether these conditions exist and its ruling will not be disturbed unless clearly incorrect and prejudicial." State v. Smalls, 87 S.C. 550, 70 S.E. 300 (1911); see also State v. Bethea, 241 S.C. 16, 23, 126 S.E.2d 846, 849 (1962).

"Primarily the circuit judge decides whether these conditions [for a dying declaration] have been met, and [the appellate court] will not interfere with his ruling except when clearly convinced that he reached an incorrect conclusion prejudicial to the accused." State v. Franklin, 80 S.C. 332, 332, 60 S.E. 953, 954 (1908). "Affirmance is required when ... the conclusion of the trial judge is a reasonable inference from the evidence." Bethea, 241 S.C. at 24, 126 S.E.2d at 850.

Dying Declarations – Common Law through the Rules of Evidence

Under the common law, the conditions authorizing the admission of dying declarations were (1) the imminence of death of the deceased; (2) that deceased was without hope of recovery; (3) that the circumstances of the death were the subject of the declaration. State v. Smalls, 87 S.C. 550, 550, 70 S.E. 300, 301 (1911); see also State v. Johnson, 26 S.C. 152, 152, 1 S.E. 510, 510 (1887)(explaining the rules for dying declarations are "well settled" requiring (1) the death be imminent at the time the declarations are made, (2) that the declarant "be so fully aware of imminent death as to be without any hope of life," and (3) the subject of the declaration must be the imminent death and circumstances of the death); State v. Long, 93 S.C. 502, 77 S.E. 61 (1912); State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926)(explaining that the death of the deceased must be imminent at the time of the declarations).

The common law permitted the introduction of dying declarations due to their inherent reliability in light of the declarant being so fully aware of his imminent death as to be without any hope of life. State v. Quick, 49 S.C.L. (15 Rich.) 342 (Ct. App. 1868). "This condition of the person is considered as constituting as strong a guarantee for the truth of the declaration, as an oath is of ordinary testimony. There must be few that would be

willing to pass immediately into the presence of that Almighty Judge, whose eye penetrates all disguise, with a lie upon his lips." Id. A dying declaration is admissible because it occurs "when a party is at the point of death, and is conscious of it – when every hope of this world is gone, and every motive to falsehood is silenced by the most powerful considerations to speak the truth." State v. Belcher, 13 S.C. 459, 463 (1880).

"The principle on which death bed declarations are admitted is that of necessity." State v. Ferguson, 20 S.C.L. (2 Hill) 619, 624 (1835). "No one who has a proper sense of religion or who believes in a future state of rewards and punishments, would willingly incur the guilt of falsehood, who had before him the immediate prospect of a final account for the deeds done in the body, when every word, thought and deed of evil, must rise up for his condemnation." Id. In order to introduce statements by the deceased as dying declarations, the proponent must present evidence "that the deceased was in *extremis*, and that he himself was conscious of his approaching death." Id. This evidence may be produced from the conversation of the deceased "or from other circumstances indicating such a state of mind." Id.

In Belcher, 13 S.C. at 463, the Court held statements of a wife to her doctor that her husband, the defendant, caused her injuries did "not come within the definition of dying declarations." The Court explained the wife "was afflicted with a lingering disease" and did not die until nearly three months after her statement to the doctor. Id. According to the Court, the wife's statement was not made knowing her death was imminent where wife stated "she thought at the time the violence was inflicted that 'she would then die,' but she did not say that, at the time she made the statement, she considered herself in the very presence of death – soon to occur." Id.

In Johnson, 26 S.C. at 152, 1 S.E. at 510, the deceased was shot on September 20, 1886. The following day, the deceased gave a statement concerning the circumstances of his injury to a witness, who later testified the deceased was "'lying on a bed in his house in a weak condition,'" was "'in a very low condition,'" and "did not sign the declaration because he was unable to do so." Id. at 152, 1 S.E. at 510-511. The witness asked the deceased if he thought he would get well or die and the witness responded that he did not know, but he did not think he would ever get well. Id. at 152, 1 S.E. at 511. Thereafter, the deceased gave the witness an account of how he received the fatal wound. Id. The Court held "this question and answer were quite sufficient to show that the deceased had no hope of recovery at the time." Id. Additionally, the Court noted the circumstances surrounding the declaration demonstrated the deceased was full conscious of his impending death:

> Here was a man lying on his bed "in a very low condition," suffering from a wound inflicted with a deadly weapon, in close conflict, which very speedily proved to be mortal, with the film of death then probably spreading over his eyes, as shown by his inability to see ... and with the numbness of death then probably creeping up his extremities. ... When it is remembered that not a word was said, either by the deceased or by the doctor, or any one else, indicating that there was any hope for the recovery of deceased, and considering the very low condition in which the deceased was, of which he was manifestly conscious.

Id.

The Court explained that to show a dying declaration is made under a belief of a speedily impending death, it is not necessary to show "any set form of words." Id. at 152, 1 S.E. at 511-512. Rather, "the court must draw a rational conclusion from all that was said, taken in connection with such surrounding circumstances as must have been known to the declarant, as to whether or not the declarant was in such a condition of mind as would render his declarations competent." Id. at 152, 1 S.E. at 512.

In State v. Banister, 35 S.C. 290, 290, 14 S.E. 678, 680 (1892), the deceased was shot on a Thursday afternoon and died the following Monday morning. Id. On the evening he was shot, the deceased told a witness that his brother, the defendant, had shot him. Id. at 290, 14 S.E. at 681. Additionally, the witness claimed the deceased said "'he would be obliged to die; that he was going to die, and was obliged to die'" and "'he could not get well.'" Id. However, the defendant called a witness who testified that on the third day after he was shot, the deceased said he was better and thought he would get well. Id. Other witnesses also testified to not hearing the deceased "express any apprehensions of dying." Id.

The doctor who examined deceased told him that "the ball ha[d] entered [his] brain" and could not be located. Id. The doctor advised him that some people recovered from head wounds, but there were none on record "where a foreign body was imbedded in the brain." Id. The deceased never shared with the doctor whether he thought he was going to die or recover. Id. However, the doctor stated the deceased understood his death "would probably result from the wound." Id.

The Supreme Court affirmed the trial judge's finding that the statements were admissible as dying declarations. Id. The Court was persuaded "the expression of the deceased, that he was 'obliged to die,' made after the examination of the physician, which informed him of the fact that the bullet was lodged in his brain, was abundantly sufficient to show that deceased had lost all hope of recovery." Id.

However, the Supreme Court also affirmed the trial judge's ruling that other statements by the deceased were not admissible as dying declarations. A witness claimed that on the Sunday before the deceased died, he told her someone other than the defendant

had shot him. Id. However, the deceased thought he was getting better on the day of this statement. Id. The Court held the deceased's statements were not a dying declaration because "the deceased was not then in the condition of mind required by the rule as he then thought he was getting better." Id.

In State v. Jaggers, 58 S.C. 41, 41, 36 S.E. 434, 435 (1900), the deceased was shot on the morning of October 3, 1899 between 9:00 a.m. and 10:00 a.m. A witness found the deceased between ten and fifteen minutes after the shooting. Id. The deceased said he was "shot bad" and "did not expect to live." Id. Around 3:00 p.m. and 4:00 p.m., the sheriff and the magistrate met with the deceased, who was "sleeping under the influence of opiates." Id. The magistrate shook the deceased awake and took a statement regarding the circumstances of the shooting. Id. Although the magistrate told the deceased he might die, the deceased made no indication of his belief regarding his death. Id. According to the magistrate, the deceased was under the influence of morphine at the time, did not manifest any concern about himself, and "seemed to be perfectly easy." Id. Another witness claimed that between 9:00 p.m. and 10:00 p.m. on the day of the shooting, the deceased expressed "no hope of himself." Id. The deceased died the following day at noon. Id.

The Court found no evidence "to show that the deceased, at the time he made the declarations in question, was so fully aware that his death was imminent as to have lost all hope of recovery." Id. In fact, the Court held "the testimony rather tends to show the contrary." Id. The Court pointed to the fact that the deceased was sleeping quietly, and when awakened, sat up in bed and drank a glass of milk. Id. According to the Court, the deceased "certainly said nothing and did nothing tending to show that he was conscious of impending death." Id. Even when the magistrate told the deceased that he might die, "the

deceased expressed no apprehension, and in no way indicated that he was uneasy about his condition." Id. The Court explained that "while it may be true that, under the excitement of the moment" of being shot, the deceased may have thought he was going to die, it did "not at all follow that he still entertained those same apprehensions" several hours later when he was resting "perfectly easy." Id.

In Franklin, 80 S.C. at 332, 60 S.E. at 955, the Court found the deceased's dying declarations admissible where two witnesses testified the deceased indicated "he was fatally shot," "was in a bad fix," and "was in a dying condition." Not only did the deceased refer to his wound as a "death shot," but he removed his watch and handed it to someone nothing he would "have no further use for it." Id.

In State v. Hall, 127 S.C. 256, 256, 120 S.E. 849, 850 (1924), the Court held "[t]he evidence that the deceased had given up all hope of life was not clear enough to allow the introduction" of a statement as a dying declaration. The deceased lived about a month after sustaining a fatal injury. Id. He made a statement to a witness "about three days before he died." Id. The witness testified the deceased said he "had to die" and "he could not live." Id. "The deceased had been very ill and thought that he would die nearly a month before." Id. However, he recovered, but had a relapse. Id. The Court found "no intimation that The deceased expected immediate death. The death he expected was death from disease, and not the immediate death from a mortal wound." Id. The Court held the deceased's statement to the witness did "not indicate that the deceased had abandoned all hope of recovery, but simply that at the time he thought that he would die." Id. "There [was] no evidence that at the time the dying declaration was written down the deceased had abandoned hope." Id.

In State v. Hall, 134 S.C. 361, 361, 133 S.E. 24, 25 (1926), the defendant and the deceased fought between 8 and 9 o'clock at night. The deceased was found early the next morning "helpless, badly beaten up, and bleeding from a wound in his head." Id. He was carried to his home and put to bed. Id. That morning, he told his wife and daughter that the defendant had beaten and robbed him. Id. Although he developed pneumonia, he "recovered sufficiently to sit up around the house." Id. However, he suffered a relapse, and died thirty-three days after the fight with the defendant. Id.

At the defendant's trial, the prosecution sought to admit The deceased's statement to his wife and daughter as a "dying declaration." Id. The wife and daughter claimed The deceased told them he was dying and had no hope at the time of the declaration. Id. Further, the two claimed the deceased was in agony every day until he died. Id. A doctor examined The deceased five or six days after the fight. Id. He claimed the deceased was in "very critical condition" and was "suffering from pneumonia." Id. According to the doctor, the deceased was "in imminent peril of death at that time." Id. Additionally, the doctor testified the deceased's "condition was extremely critical from the moment, from the time of the trauma, the time of the assault, up until the time of his actual death; he was at all times in extreme danger." Id.

The Supreme Court held the testimony by mother, daughter, and doctor established the necessary foundation for finding the deceased's statements to be dying declarations. Id. at 361, 133 S.E. at 26. The Court was not persuaded that the "length of time intervening between the assault and the death render[ed] the declaration inadmissible." Id. The Court explained that it is "not the rapid succession of death ... that renders the testimony

admissible"; instead, "[i]t is the impression of almost immediate dissolution" that must be present. Id.

In State v. Davis, 138 S.C. 532, 532, 137 S.E. 139, 140 (1927), the Court emphasized the importance of a declarant making the statement, subsequently offered as a dying declaration, in *extremis*, and fully conscious of his impending dissolution. According to the Court, "it is not alone sufficient that the declarant believe that he is about to die; to be admissible under the dying declarations rule, his dying declarations must have been made while he was in *extremis*. And even though the declarant was in *extremis*, his declarations are not admissible unless they were made by him while he was under a sense of impending death." Id. (internal quotation omitted). In other words, "[t]o render his declarations admissible, the declarant must not only believe that he is about to die, but must be without hope or expectation of recovery." Id. (internal quotation omitted). "[I]f the deceased had the slightest hope of recovery, when the declarations were made, they were inadmissible." Id. (internal quotation omitted).

The Court held that statements by the deceased to a doctor while being taken from his home to a hospital in Columbia after the shooting were not dying declarations because there was no evidence the declarant had abandoned all hope of recovery. Id. The deceased told the doctor he did not believe he was going to make it. Id. The Court noted that what the deceased meant by those words was unknown, but the doctor interpreted them to mean the deceased did not believe he would get well. Id. As a result, the doctor encouraged him to think he would recover, but the success of the encouragement was unknown. Id. Nevertheless, the Court held it did "not appear from the language used that he had abandoned all hope of recovery." Id. "While he was uneasy and anxious about his

condition, he had not given up all hope of life." Id. Therefore, the declarant's statements to the doctor should not have been admitted. Id.

Although many of the concepts contained within the Rules had been adopted by the Supreme Court through case law, South Carolina formally adopted the South Carolina Rules of Evidence effective September 3, 1995. Just as the common law did, the Rules of Evidence prohibited the introduction of hearsay: "Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE.

Additionally, the Rules of Evidence "codified" the common law exception to hearsay for dying declarations. When the declarant is unavailable as a witness, hearsay may be admissible "[i]n a prosecution for homicide" when the proffered statement was "made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Rule 804(b)(2), SCRE. As explained by the drafter's note, the Rule altered the common law regarding "dying declarations" by "broaden[ing] the admissibility of dying declarations by making them admissible in civil cases" and "relax[ing]" the "rigid requirement that the declarant must actually have died" except in homicide prosecutions. Rule 804 note, SCRE.[5]

The only published case in South Carolina examining "dying declarations" since the adoption of the Rules of Evidence is State v. McHoney, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001). Contrary to the state's assertion at trial, which was not argued on appeal, the Court

[5] In Sligh v. Newberry Elec. Co-Op., 216 S.C. 401, 419, 58 S.E.2d 675, 683 (1950), the Supreme Court explained that under the common law a dying declaration was only admitted in cases of criminal homicide.

did *not* alter the requirements for a dying declaration. Rather, the Court affirmed its reliance on the common law to interpret the Rule. This is not surprising in light of the note to the Rule explaining the Rule had not changed the common law except in two very narrow respects. In fact, the Court cited to State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926) to support its conclusion that the focus of the analysis is on the declarant's state of mind when the statement is made, not on the eventual outcome of the declarant's injuries. McHoney, 344 S.C. at 93, 544 S.E.2d at 34. Thus, it is clear, the adoption of the Rules of Evidence as it concerned dying declarations, did not alter the landscape created by centuries of common law.

In McHoney, 344 S.C. at 93, 544 S.E.2d at 33, the Court explained that "[a] declarant does not have to express, in direct terms, his awareness of his condition for his statement to be admissible as a dying declaration." "The necessary state of mind can be inferred from the facts and circumstances surrounding the declaration." Id. Circumstances considered by a court include "[r]epeated questioning by the declarant concerning whether he is going to live, a less than reassuring answer, the nature of the wound, and the declarant's critical condition." Id. "The focus is on the declarant's state of mind when the statement is made, not on the eventual outcome of the declarant's injuries." Id. at 93, 544 S.E.2d at 34. Ultimately, the Court held a victim's statement regarding her attacker were a dying declaration despite the victim dying two weeks after her injury because she shook her head when told she would be fine and never regained consciousness after she made the declaration. Id. at 94, 544 S.E.2d at 34.

Imminent Death at the Time the Declaration is Made

The state argues that "actual imminence of death is not the determining factor" under the Rule "where the length of time to death is immaterial." IBOA at 21. This proposition runs directly counter to centuries of case law concerning dying declarations. In fact, our Courts maintain the length of time between the statement and death remains a "factor to be considered." McHoney, 344 S.C. at 94, 544 S.E.2d at 34. Although the victim died two weeks after her injury, the victim, whose throat was slashed, expressed her concern that she would die by shaking her head when told she would die and never regained consciousness after making the declaration. Id. The evidence was clear that death was imminent. Id.

In the instant matter, death was not imminent at the time of the police interview. The shooting occurred during the early morning hours of April 26, 2011. The police interview occurred on April 29, 2011, after Goodwin underwent two successful surgeries on April 26, 2011 and April 27, and one day after, the breathing tube was removed. R. 339; R. 555. Goodwin's medical condition significantly improved during April 28 and on April 29 as shown by the medical records explaining he was ambulatory, starting physical therapy, able to get out of bed and sit in a chair, and allowed to get out of bed whenever he wanted.

Fully Aware of Imminent Death & Without Hope of Life

On appeal, the state argued Goodwin expressed his belief in his in impending death through his contact with his grandfather and expressions to him of regret that he would no longer be taking rides with him. IBOA at 18. The grandfather interpreted the statements of regret to mean Goodwin was not going to make it. IBOA at 18-19. The state also argued the multiple facts in the medical records supported the grandfather's interpretation, including Goodwin dying five days after the statement, being intubated, undergoing two

surgeries, having a generalized weakened condition, and using pain medicine. IBOA at 19. Although the state admitted Goodwin was "placed in a chair bed" on the date of his statement and engaged in physical therapy, the state discounted this evidence as indicative of Goodwin's improving condition. IBOA at 19. A careful examination of the record reveals the judge's ruling on this point is not clearly incorrect or prejudicial.

The grandfather could provide no date for his conversation with Goodwin regarding his regret concerning no longer being able to take rides with him. In fact, the grandfather's best guess was the conversation took place close in time to the surgery, which would have been two or three days prior to the police interview. The meaning of the conversation was open to multiple interpretations. First, Goodwin may have worried that his grandfather would not have wanted to ride with him if the shooting incident revealed negative character traits, as suggested by Goodwin's apologies for his past decisions and conduct. Second, Goodwin may have feared retribution from his assailant and would have to leave the area in fear. Goodwin's fear of his assailant was expressed clearly and unequivocally by his father, who testified Goodwin was afraid of the assailant. Third, Goodwin may have feared that his physical condition would not allow him to ride in a regular car or he would require assistance to ride in a car. The lack of evidence in the record regarding when the conversation between the grandfather and Goodwin occurred coupled with the equivocal nature of the conversation failed to carry the state's burden.

According to Goodwin's sister, Goodwin "seemed tired, and he was ready to go home." R. 58, line 22. Goodwin repeatedly told his younger brother that "everything will be all right." R. 60, lines 11-12. These two indicate Goodwin expected to recover from his injuries. During the arguments on the state argued, pursuant to a note from the family, that

"ready to go home" meant ready to die. However, this was not evidence before the court as it was received solely during arguments. Further, the statement was open to interpretation, and the most obvious interpretation was that Goodwin was ready to go to his physical home, not his heavenly home.

Additionally, the medical records support the trial judge's finding that Goodwin was not so fully aware of his impending death to be without hope of life. When Goodwin was transported by EMS, he was alert and oriented. R. 208; R. 568. He underwent a successful surgery on April 26, 2011, followed by a second successful surgery on April 27, 2011. By all accounts, he was tolerating all treatment well and his condition was improving significantly. R. 140 - 141; R. 202; R. 208; R. 239; R. 516 - 521. Two days before the police interview, the medical team discussed extubation due to the decedent's improving condition. R. 273. A full twenty-four hours before the police interview, the medical team arrived at Goodwin's bedside for his extubation that day, a clear sign that his medical condition had improved significantly. R. 339; R. 555.

Thereafter, he "improved and had begun ambulation and physical therapy." R. 141; R. 208. On the very day of the police interview, he was transferred from the ICU to a room. R. 208; R. 210. He was clearly in a much improved condition on the date of the police interview because he was "up and out of bed-to-chair." R. 210. According to the records, he was calm and stable just two hours before the police interview. R. 351; R. 355. A short time after the officer left, Goodwin was sitting "up in [a] chair" and did not return to bed for several hours. R. 356 - 357. Goodwin reported no numbness or tingling that day and the doctor ordered for him to receive physical therapy. In fact, his condition had improved so much, the doctor allowed him to get out of bed at his liberty. R. 617; R. 367; R. 369.

Concerning Appellant's emotional state, the nurses' notes demonstrate a change in his demeanor. The notes indicated Goodwin was emotional on April 26 and April 27. However, the notes did not list "emotional" on April 28 or April 29, the date of the police interview. R. 543 - 544. Even the detective who conducted the interview described Goodwin as "recuperating from his injury" at the time of the statement. Court's Exhibit #3. He described Goodwin as lucid and alert, and did not describe him as emotional or without hope. R. 19, lines 23-24.

Very telling of Goodwin's mental state was his initial unwillingness to cooperate with the police. As explained by the detective, Goodwin expressed his hesitancy in cooperating because individuals who lived in the community did not want to be identified as individuals who cooperated with the police – snitches. R. 10, line 16 – R. 11, line 5. A fear of retribution or concern about one's reputation in the community as a snitch or rat would hardly be the concerns of a man lying on what he perceived to be his deathbed. The very purpose supporting the introduction of dying declarations is that a person believing death to be imminent would not die with a lie upon his lips. It was not Goodwin's fear of death that convinced him to cooperate with the police; rather, it was the detective's statements that he was lucky to be alive and the police needed his assistance in apprehending the culprit.

After the hearing, the state admitted Goodwin had a "favorable prognosis" and the doctors were "hopeful." R. 2-10. Further, the state admitted the evidence "cut both ways." The state conceded the evidence showed there were "some signs of hope." R. 80, line 8. However, the state's argument was that "being hopeful of recovery and fearful of imminent death are not mutually exclusive propositions for someone in this kind of situation." R. 80, lines 10-13. The state argued it would be "very natural for someone in this kind of situation

[to] have ebbs and flows and fear death - - you know, have a persistent fear of death while remaining somewhat hopeful of recovery." R. 80, lines 13-16. According to the state, the evidence was "mixed" on this issue. R. 80, lines 17-25.

The state faults the trial judge for explaining that "evidence presented at the pre-trial hearing suggested that the victim was planning on seeking revenge against his assailant. This is inconsistent with both an awareness of imminent death as well as one who has given up all hope of survival. Ex. A, 464." IBOA at 5. According to the state, there was no evidence at the hearing to support this finding of revenge, and that the judge's citation did not concern a revenge plan. IBOA at 5. While the state is correct that the judge cited to the chaplain records, the state is incorrect that the record contained no evidence to support a finding of revenge.

Goodwin's brother testified Goodwin told him everything would be "all right" and that he *knew* who shot him. R. 60, lines 11-22. Further, Goodwin's father testified Goodwin feared his assailant because he had a bad reputation in the community. R. 54, lines 10-22. Finally, Goodwin was not inclined to cooperate with the police initially. R. 10, line 16 – R. 11, line 12. Although the chaplain's records do not directly support the judge's inference that Goodwin sought revenge, the chaplain's records do show Goodwin never sought the services of the chaplain. R. 616. Although Goodwin's family met with the chaplain on the day of his arrival to the hospital and expressed they were "hopeful," Goodwin never sought the services of the chaplain. R. 616. Someone in fear of imminent death, particularly someone who was religious as Goodwin appeared to be in light of his family's initial contact with the chaplain, would likely seek out the chaplain to seek

absolution and comfort before passing. These facts would permit the judge to infer that Goodwin planned to seek revenge against his assailant.

II. As an alternate sustaining ground, the statement made by the deceased to the police inadmissible as a violation of the Confrontation Clause of the United States Constitution and the South Carolina Constitution.

Relevant facts

Respondent incorporates by reference the discussion of relevant facts presented in Issue I, supra. In addition to moving to exclude the deceased's statement to police as not falling within the hearsay exception of a dying declaration, Respondent moved to exclude the statements as violating his right to confront his accusers under the Sixth Amendment's Confrontation Clause. R. 119. Further, Respondent moved to exclude the statements as violating the South Carolina Constitution. R. 119(citing State v. Green, 269 S.C. 657, 239 S.E.2d 485 (1977); S.C. Const. art. I, § 14).

During the pre-trial hearing, Fleming testified that his documentation in a case, which was part of the investigation, would be used by the prosecutor to prosecute the case. R. 23, lines 22-25. Fleming testified that the purpose of conducting a photographic line-up is to get information to make an arrest with the ultimate goal of prosecuting the case. R. 24, line 23 – R. 25, line 3; R. 25, line 17 – R. 26, line 2. Fleming also explained, on re-direct examination, that he wanted a statement from Goodwin because he wanted to take a dangerous person off the street and catch the person who committed the crime. R. 43, lines 2-8. Fleming was motivated by a public safety component inherent in investigating crimes and apprehending criminals. R. 43, lines 13-16.

Respondent argued Goodwin's statements to police were testimonial and Respondent had not had a prior opportunity to cross-examine Goodwin. R. 120. Further, Respondent argued the primary purpose for the police eliciting the statements from

Goodwin, including the photographic line-up, was not to enable police assistance to meet an ongoing emergency. R. 124. Finally, Respondent argued that if the trial court determined Goodwin's statements were dying declarations, the statements should still be excluded because dying declarations were not an exception to the Confrontation Clause. R. 126.

According to the state, he had an "uphill battle" to show Goodwin's statements did not violate the Confrontation Clause. R. 71, lines 18-19. The state conceded this was "a fairly formal statement," but stated, "there is an argument to be made that this is nontestimonial" pursuant to Michigan v. Bryant, despite the fact that some factors worked against his position. R. 72, lines 1-3. The state argued the Supreme Court's standard regarding what is testimonial and what is not was "wishy-washy" and left "open the possibility that a gunman on the loose" was not an emergency. R. 71, lines 7-12. The state noted that Fleming "acknowledged" he was gathering evidence "to later prosecute and get a conviction," but he also had a public safety motivation. R. 71, lines 12-15. Additionally, the state argued that if Goodwin's statements were dying declarations, then the statements were admissible because "Crawford v. Washington does not impact on dying declarations." R. 71, lines 2-5; R. 72, lines 5-20.

The trial judge explained that she did not "need to reach the Confrontation Clause issue" in light of her decision that the statements were not dying declarations. R. 105, lines 5-6. However, she noted that the statements were "certainly testimonial." R. 105, lines 10-11. Further, the judge explained the statements did not occur under circumstances in which the police were in "emergent situation where you have the first person dying in a back alley." R. 105, lines 12-15. At this point, the state interjected: "And I believe we conceded that at the hearing, Your Honor." R. 105, lines 16-17. Finally, the judge noted the split in

authority regarding whether dying declarations were excepted from the Confrontation Clause. However, the judge made no ruling in this regard. R. 105, line 23 – R. 106, line 16. Additionally, the judge's written order did not address the Confrontation Clause. R. 135 - 139

Discussion

The Confrontation Clause of the Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to confront and cross-examine witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987); Pointer v. Texas, 380 U.S. 400 (1967). The South Carolina Constitution also provides that "[a]ny person charged with an offense shall enjoy the right … to be confronted with the witnesses against him." S.C. Const. art. I, § 14.

In Crawford v. Washington, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Important to this case, the Court has held that statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006); see also State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009). "[I]nterrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay the Confrontation Clause forbade. Crawford, 541 U.S. at 53. "[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." Michigan v. Bryant, 562 U.S. 344, 358 (2011).

In Davis, the United States Supreme Court sought to "determine more precisely which police interrogations produce testimony" that is barred by the Confrontation Clause. 547 U.S. at 813. During the call, the victim identified the defendant as her attacker. Id. The victim did not testify at trial. Id. at 819. The Davis Court ruled the 911 call was admissible. Id. at 826-30. The Court stated, "A 911 call . . . and at least the initial connection with a 911 call is ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance." Id. The Court noted an important distinction between calls for emergency assistance and interrogations by the operator about the facts of the incident. Id. at 828-29. The Court stated, "This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot... evolve into testimonial statements once that purpose has been achieved." Id. at 828 (internal quotations and citations omitted). The Court noted that after the operator told the victim to be quiet and "proceeded to pose a battery of questions," those statements could be construed as testimonial. Id. at 828-29. The Court noted that trial courts "should redact or exclude the portions of any statement that have become testimonial." Id. at 829.

As explained by the Court, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822. Conversely, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. However, in Bryant, 562 U.S. at 358, the

Supreme Court explained "there may be *other circumstances*, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." (emphasis in original). When a court makes "the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." Id. at 358-359. According to the Court, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." Id. at 359.

In Bryant, the Court provided "additional clarification with regard to what Davis meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" Id. (quoting Davis, 547 U.S. at 822). To make the determination about the primary purpose, the reviewing court must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." Id. Two factors to consider are the location of the police encounter (at or near the scene of the crime versus at a police station) and the time of the police encounter (during an ongoing emergency or afterwards). Id. at 360. Another relevant inquiry is what purpose would reasonable participants have had as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred. Id.

"The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution." Id. at 361 (internal citations omitted). This is because "the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished," and "the Confrontation Clause does not require such statements to be

subject to the crucible of cross-examination." Id. Like an excited utterance, "[a]n ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency." Id.

Examining whether an on-going emergency existed, the Court explained the inquiry is "highly context-dependent." Id. at 363. According to the Court, the examination must include whether the threat is to police and the public. Id. "[T]he duration and scope of an emergency may depend in part on the type of weapon employed." Id. at 364. Even the "medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." Id. at 365. Additionally, the "victim's medical state ... provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public." Id.

However, the Court was quick to note that the presence of these factors does not suggest "that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose." Id. The evolution from statements to determine the need for emergency assistance to testimonial statements may occur if "a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or ... flees with little prospect of posing a threat to the public." Id.

Nevertheless, the existence of an "ongoing emergency" is but one factor of determining the primary purpose of the police encounter, which in turn, relates to the testimonial inquiry. Id. at 366. Formality must be considered as well as it "suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions." Id. at 366 (internal quotation omitted).

"[T]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." Id. at 367. The Court explained that if the police tell a victim to tell who committed the crime so that person could be arrested and prosecuted, the victim's identification of the culprit "appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers." Id. at 368.

Conducting the analysis required by the Supreme Court's jurisprudence leads to but one conclusion – Goodwin's statements to Fleming were testimonial. The primary purpose of the interrogation was to develop evidence to be used in the prosecution of the suspect. Although the interrogation did not occur in the police station, it occurred in the hospital only because of Goodwin's injuries. Further, it occurred three days after the assault, not immediately following the assault at the scene. Fleming's encounter with Goodwin was very formal, as conceded by the state at the hearing, because Fleming went to the hospital with a photographic line-up and posed the specific question of who committed the offense. In fact, Fleming spent a considerable amount of time with Goodwin to convince him to cooperate with the investigation so that the police could arrest, prosecute, convict, and imprison the culprit. The primary purpose of the encounter

was to obtain testimonial evidence regarding past events to be used later for trial, not to enable police assistance to meet an ongoing emergency. See Davis, 547 U.S. at 829 (holding a witness's statements to law enforcement regarding who assaulted her were testimonial where there was no ongoing emergency, the officer questioned the witness in a separate room from her husband, the alleged culprit, about past events, and the witness's statements were memorialized in an affidavit).

Respondent acknowledges the lingering question of whether a dying declaration is an exception to the Confrontation Clause. See Bryant, 562, U.S. 351, n. 1 (declinging to address whether the statements should have been admitted pursuant to the hearsay rules where the issue was not before the Court); Giles v. California, 554 U.S. 353, 358 (2008)(holding that "forfeiture by wrongdoing" was not an exception to the Confrontation Clause because it was not established at the time of founding of the Bill of Rights or in American jurisprudence since that time, but noting "declarations made by a speaker who was both on the brink of death and aware that he was dying" were admitted at common law even though they were unconfronted) Crawford, 541 U.S. at 56, n. 6 (explaining the Court need not decide whether the Sixth Amendment incorporates an exception for testimonial dying declarations where the issue was unpreserved).

Further, Respondent acknowledges the courts that have addressed the question have found an exception for dying declarations implicit within the Sixth Amendment. See People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004)(finding the Sixth Amendment incorporates an exception for testimonial dying declarations); Wallace v. State, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005)(holding that "Crawford neither explicitly, nor impliedly, signaled that the dying declaration exception to hearsay ran afoul of an

accused right of confrontation under the Sixth Amendment"); State v. Martin, 695 N.W.2d 578, 585-586 (Minn. 2005)(declaring "the admission into evidence of a dying declaration does not violate a defendant's Sixth Amendment right to confrontation within the meaning of Crawford because an exception for dying declarations existed at common law and was not repudiated by the Sixth Amendment"); People v. Gilmore, 828 N.E.2d 293, 303 (Ill. Ct. App. 2005)(holding dying declarations did not violate the Sixth Amendment).

One argument that the exception exists is historical – that at the time of the adoption of the Sixth Amendment, the Framers intended to include any exceptions at common law existing at the time. Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 Mo. L. Rev. 285 at 289 (2006).[6] Another argument for the exception is one of necessity. Id. at 305-306. Despite the number of courts finding the exception and permitting dying declarations, all admit the incongruence with the admission of a dying declaration and the core of Crawford and the Sixth Amendment. Admitting a dying declaration into evidence violates the basic concepts of the Sixth Amendment's right of confrontation and Crawford's interpretation of that right. Therefore, if this Court were to find Goodwin's statements to be dying declarations, which Respondent submits they were *not*, then this Court should hold admission of the statements violate the Sixth Amendment in light of their testimonial nature and the

[6] If the basis for admitting a dying declaration is the existence of the exception at the time of the writing of the Sixth Amendment, then the state's argument that the Rules of Evidence have altered the common law requirements for a dying declaration must be analyzed. If the state's argument on this point is true, then dying declarations that satisfy the Rules of Evidence, but do not satisfy the common law, should not be admitted as an exception incorporated into the Sixth Amendment at the time of its drafting.

incongruity of permitting the dying declaration exception with the Confrontation Clause jurisprudence.

Finally, if this Court were to determine the statements were dying declarations and that the Sixth Amendment permitted the exception, then this Court should analyze the South Carolina Constitution's bestowment of the right to confrontation. While Respondent is unaware of any case interpreting the state constitutional right differently than the federal constitution, there is no barrier to the state constitution affording greater rights. See State v. Counts, 413 S.C. 153, 167, 776 S.E.2d 59, 67 (2015)(finding greater privacy protections within the state constitution); State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001)(explaining the state constitution affords greater protections than the federal constitution).

CONCLUSION

Respondent respectfully requests this Court affirm the trial judge's order excluding the deceased's statements.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 26th day of January, 2016.

RECEIVED
JAN 26 2016
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 26, 2016

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED
JAN 26 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

APPELLANT,

V.

MARVIN BROWN,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Donald J. Zelenka, Esquire, at P.O. Box 11549, Columbia, S.C. 29211, this 26th day of January, 2016.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 26th day of January, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.