ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-002129

Indictment No. 2012-GS-10-6844-06845, 06846

RECEIVED
JAN 15 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA, Appellant,

v.

MARVIN REGINALD BROWN

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge abuse her discretion in granting defendant's motion to suppress a bedside photographic identification by the victim of the defendant where there is evidence that at the time the victim had an awareness of his impending death as a result of his wounds from a gunshot and had expressed those thoughts to his grandfather and sister and his demeanor supported that belief. The trial judge erred in finding that there was no evidence that at the time of the statement on April 29, 2011 that he did not have a belief in his impending death. The evidence was admissible under Rule 804(b)(2) SCRE.

II. Did the trial judge err and abuse her discretion in finding as a basis for concluding that the victim did not have an awareness or belief in his impending death that "evidence was presented at the pre-trial hearing suggested that the victim was planning on seeking revenge against the assailant" when no evidence supporting that conclusion was presented at the March 26, 2013 hearing nor in any medical record introduced as an exhibit. Since there is no evidence to support this "finding" or inference from the unsupported finding, it is an abuse of discretion where the record supports a conclusion the Davon Goodwin had a belief in his impending death on April 29, 2011 after his extensive surgeries for the effect of gunshot wounds reflected in his grave demeanor and morbid discussions with family members.

III. When the victim died on May 4 from the gunshot wounds he received on April 26 and the victim had been subjected to two surgeries and evidence was that at the time of the statement the victim had just been transferred to the Intensive Care Unit, was in great pain and weakened from the surgeries, and in the bed, did the trial court err in concluding that that the medical records showed no imminence of death at the time of the statement on April 29 because there was asserted improvement in the medical records and physical therapy and concluded this prevented his statement from qualifying under Rule 804(b)(2) because he did not die when his condition on May 4 caused his death from the same injuries and the Court has held the length of time the declarant lives after making the declaration is immaterial?

STATEMENT OF THE CASE

This is an appeal by the State of South Carolina to the granting of a motion to suppress hearsay testimony and exclude the victim's identification and rejecting its admissibility as a dying declaration in a written order dated August 18, 2014. The defendant, Marvin Reginald Brown, was indicted by the Court of General Sessions for murder, armed robbery and possession of a weapon during a violent crime. 2012-GS-10-6844, 6845, 6846. On March 25, 2013, the defendant, Marvin Brown, through appointed counsel Cody J. Groeber, Assistant Public Defender, made a motion to suppress hearsay testimony of Detective Jerome Fleming concerning the April 29, 2011 photographic identification of Brown by Davon Goodwin at the Medical University of South Carolina where he had surgery as a result of an April 26, 2011 gunshot wound. The victim died on May 4, 2011.

The victim, Davon Goodwin, was shot on April 26, 2011, around 2 a.m., on America Street in downtown Charleston, South Carolina. R.p. 135, Order, p. 1. He was transported to the Medical University of South Carolina, where he underwent surgery that same day. He was subjected to a second surgery on April 27, 2011. He made it through surgery and regained consciousness sometime on April 27, 2011. The following day, the victim's breathing tube was removed, and he was able to converse with his family and doctors. On April 29, 2011, Detective Fleming of the Charleston Police Department interviewed the victim. Detective Fleming read him a standard admonition form for photographic lineups. The victim identified the Defendant in a six-pack photo lineup. There is a partial audio recording of this identification procedure. On May 4, 2011, the victim died from complications of the gunshot wound.

In his motion to suppress, Brown claimed that the admission of the deceased's identification of Brown from a 6-person photographic line-up was a violation of the Sixth

Amendment Confrontation Clause and alternately inadmissible as hearsay and asserted the evidence failed to qualify as a dying declaration exception under Rule 804(b)(2), SCRE. R.p. 119-129, Memo in Support of Motion to Suppress Hearsay Testimony, p. 2-12.

The State made written opposition to the motion to suppress through Assistant Benjamin Chad Simpson. R,p, 131-34, "Source Citations in Response to Defense Motion to Suppress". p. 1-4.

On March 26, 2013, a suppression hearing was held before the Honorable Stephanie McDonald, then Circuit Court Judge. The defendant was present and represented by Mr. Groeber and Megan Ehrlich of the Ninth Circuit Public Defender's Office. The State was represented by Assistant Solicitor Simpson. At the hearing, testimony was received from former investigator Jerome Fleming (R. 8-44, Tr. 8-44), the victim's grandfather, David Allen Brunson, Jr. (R. 45-48, 67-70, Tr. 45-48, 67-70), the victims' father, David Allen Brunson, III (R.p. 49-57, Tr. 49-57), the victim's sister, Dendria Brunson, (R. 57-79, Tr. 57-59) and the victim's brother, Desmonte Brunson, (R. 59-62, Tr. 59-62).

After testimony, argument was heard from counsel. R.p. 63-67, Tr. 63-67. At that point, the victim's grandfather was recalled concerning the timing of his conversations with the victim. R. 67-70, Tr. 67-70.

At that point, further argument was heard on the Confrontation Clause and "dying declaration" issue. R. 70-90, Tr. 70-90. [Argument was also heard on a Neil v. Biggers issue concerning the identification procedures concerning a separate motion. R. 90-96, Tr. p. 90-96. Judge McDonald orally found the identification was not "unduly suggestive" and reliable. Judge McDonald concluded she "would not exclude the identification under Neil v. Biggers. R. 96, Tr. p. 96, ll. 2-25]. Judge McDonald took under advisement the issue of whether the statement

qualified as a "dying declaration" and whether it was a Confrontation Clause violation under Crawford v. Washington, 541 U.S. 36 (2004).

On December 10, 2013, a hearing was convened to address the dying declaration issue and bond. At the hearing Judge McDonald made an oral ruling concluding it did not qualify within Rule 804(b)(2), SCRE concerning a statement upon belief of impending death. R. 104, Dec. 10, 2013 Tr. p. 3, 14-15. The trial court did not address the Confrontation Clause issue. R. 104-09, Tr. 3-8.

On August 18, 2014, Judge McDonald filed a written Order styled "Order Granting Defendant's Motion to Exclude Hearsay Testimony of victim's Identification." In particular, Judge McDonald concluded that: "neither the medical records nor other evidence in the case demonstrates that the victim was aware of his imminent death when identifying the photograph of the defendant in a six-pack line-up." R. 138, Order, p. 4.

The State filed a notice of appeal on August 26, 2014 pursuant to State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) asserting the suppression of this evidence significantly impaired the prosecution.

This briefing follows.[1]

[1] An earlier notice of appeal was served on December 20, 2013 and filed from the December 10, 2013 oral order granting the suppression motion. On January 24, 2014, the South Carolina Court of Appeals entered an order dismissing the December 20, 2013 notice of appeal without prejudice as premature because the trial judge had not issued a written order.

ARGUMENT

II. **The trial judge abused her discretion in granting the motion to suppress the victim's statement where there is evidence that at the time of the photographic identification to Detective Fleming the victim believed his death was imminent reflected in his statements to his grandfather and sister concerning his future without them and his medical condition.**

a. **Contrary to the trial court's finding, there is no evidence in the record of the hearing that the victim was planning on seeking revenge against Brown which the trial court erroneously partially based its rejection.**

b. **Contrary to the conclusion of the trial, death did not have to actually be imminent at the time of the statement.**

c. **The statement was admissible under** Rule 804(b)(2), SCRE.

The trial court erred in finding the statement of Davon Goodwin on April 29, 2011 from his hospital bed after surgery from a gunshot wound of April 26, 2011 was not admissible as a "dying declaration" under Rule 804(b)(2), SCRE. The error arises from the court's conclusion that there was "no evidence" "that the victim was aware of his imminent death when identifying the photograph of the defendant from the six-pack line-up." R. 138, Order, p. 4. However, the record reflects there was evidence presented through his grandfather that Davon Goodwin was aware of his imminent death. R. 46-48, 68, 70, Tr. p. 46-48, p. 68, ll. 16-20, p. 70, ll. 2-4. In addition, there was evidence from his sister that he "seemed tired and ready to go home", which the family interpreted as ready to die. R. 58, 99, Tr. p. 58, ll. 19-22, p. 99, ll. 13-19. Further, the trial court's conclusion that death had to actually be imminent and was not imminent in this case was a misreading of Rule 804(b)(2), SCRE and State v. McHoney which concluded that the length of time the declarant lives after making a declaration under a belief of imminent death was immaterial, particular under the victim's circumstances in this case and his death on May 4,

2011.

Further, reflecting a strong error in the Order of Suppression, the trial court based its rejection of Davon Goodwin's belief of imminent death:

> Furthermore, 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.

R. 138, Order, p. 4, ¶ 2. However, there was no evidence at the hearing to support this finding of revenge. There is no evidence that Davon was planning his revenge presented by any witness at the hearing. R. 1-101, Tr. p. 1-101. The trial judge's citation to Ex. A p. 464 does not concern anything about a motive or plan to revenge or "seeking revenge", but is only a record reference to chaplain visits which did not include any contact with Davon Goodwin. Ex. A p. 464 (MUSC Records).[2]

Simply put, the trial judge mistakenly rejected the showing of belief in imminent death on unsupported facts and the unfounded inference from the facts. This was an abuse of discretion.

STANDARDS OF REVIEW

State's Right to Immediately Appeal Pre-Trial Suppression Ruling

An appeal ordinarily may be pursued only after a party has obtained a final judgment." Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). However, "[a] pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a)." McKnight, 287 S.C., 168. "Under McKnight, the State has the right to immediately appeal a trial court's

[2] The State notes that in the pre-trial "memo in Support of Motion to Suppress Hearsay Testimony", Brown's counsel stated: "Furthermore, there is evidence to be presented at the pre-trial hearing that the victim was planning on seeking revenge." R. 129, Memo., p. 12. However, at the hearing, such evidence was not presented.

suppression of evidence which significantly impairs the prosecution of the case." State v. Belviso, 360 S.C. 112, 115, 600 S.E.2d 68, 70 (Ct. App. 2004).

Admissibility of Evidence

"In criminal cases, appellate courts sit to review errors of law only, and are therefore bound by the trial court's factual findings unless clearly erroneous." State v. Robinson, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). "The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." (alteration in original) (internal quotation marks omitted). State v. Williams, 409 S.C. 455, 463, 761 S.E.2d 770, 775 (Ct. App. 2014). "Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion." Id. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015)(internal quotation marks omitted). The determination by the trial court of the preliminary facts, on which the competency of a dying declaration depends, will not be disturbed on appeal "unless clearly incorrect and prejudicial." State v. Bethea, 241 S.C. 16, 23, 126 S.E.2d 846, 849 - 850 (1962) citing State v. Franklin, 80 S.C. 332, 60 S.E. 953 (1908); State v. Smalls, 87 S.C. 550, 70 S.E. 300 (1911); State v. Marshall, 111 S.C. 356, 98 S.E. 130 (1919).

"On appeals from a motion to suppress based on Fourth Amendment grounds, [an appellate court] applies a deferential standard of review and will reverse if there is clear error." State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)(internal quotation marks omitted). "However, [an appellate court] reviews questions of law de novo." Id.

Dying Declaration as an Exception to Hearsay

Hearsay is not admissible unless it fits within an exception to the hearsay rule. Rule 802, SCRE. The State sought to introduce the victim's identification of Marvin Brown as her killer under the dying declaration exception. Rule 804(b)(2), SCRE. The Rule states in pertinent part:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> 2) Statement Under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, **a statement 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.

A statement made under the belief of impending death is not excluded by the hearsay rule if the declarant is unavailable as a witness in a prosecution for homicide, the statement is made by a declarant while believing the declarant's death is imminent, and the statement concerned the causes or circumstances of what the declarant believed to be impending death. Rule 804(b)(2), SCRE; *see also* 29A Am.Jur.2d, Evidence § 829 (2000)("In a homicide prosecution, the dying declaration must bear on the fact of the homicide and the person by whom it was committed. Such statements must be made voluntarily and in good faith. In addition, such statement must be made under a sense of impending death."). [3] Accord, State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001).

The commentators have generally addressed this condition:

> **It is essential that a dying declaration be made when the declarant has abandoned all hope of recovery from the injury inflicted by the accused and**

---

[3] Under the long established common law rule of evidence, which we quote from State v. Johnson, 26 S.C. 152, 1 S.E. 510 (1887), dying declarations are competent evidence, for or against the accused, upon preliminary proof of certain conditions.:

> 'The rules in regard to such testimony are well settled: 1st. That death must be imminent at the time the declarations in question are made. 2nd. That the declarant must be so fully aware of this as to be without any hope of life. * * * And 3rd. That the 'subject of the charge' must be the death of the declarant, and the circumstances of the death must be the subject of the declarations.'

Bethea, 241 S.C., 21-22, citing Johnson, 26 S.C. 152.

is firmly convinced that death is inevitable and near at hand.

It is not enough that the statement be made when the declarant is in extremis as the statement must be made when the declarant is conscious of impending death.[FN1] The fact that the declarant believes that there is great danger and entertains a fear of dying is not sufficient.[FN2] The declarant must possess the requisite state of mind simultaneously with the statement.[FN3] For a deceased's statement to be admissible as a dying declaration, it need only appear to the court from the circumstances of the case that there was a probability that the deceased was conscious of his condition at the time he made the statement.[FN4] The testimony need not contain any statement by the deceased to the effect that he or she was conscious of impending death at the time the declarations were made since this may be inferred from the nature of the wounds and other circumstances.[FN5]

It is immaterial how or by what means the deceased became conscious of dying.[FN6] For instance, it is no objection to the admissibility of the declarations that the declarant's belief of impending death was induced by the statements of attendants.[FN7] Conversely, the statement is not rendered inadmissible by the fact that no physician or other person had told the declarant that death was impending[FN8] or that witnesses had told the declarant that death was not impending.[FN9]

It has been held that the declarant must believe that there is no hope of recovery.[FN10] Under this view, the declarations are inadmissible if the deceased had the slightest hope of recovery when they were made.[FN11] On the other hand, it has also been held that it is not necessary that all hope of recovery be abandoned.[FN12] In any event, a statement should not be rejected as a dying declaration when only nebulous rays of hope exist.[FN13] For a dying declaration to be admissible, the declarant's belief in impending death must be strong enough that the ordinary worldly motives for misstatement are not operative.[FN14]

There is authority for the view that the person making the declaration must entertain a settled and hopeless expectation of immediate or, in other words, of impending death[FN15] and that the declarant's mere belief that there will be no recovery from the injuries is not sufficient to admit the declarations into evidence.[FN16] However, there is contrary authority.[FN17]

C.JS Homicide, § 389. (footnotes omitted).

A mere belief that death was possible, or even probable, is not sufficient; the declarant must be virtually certain that death is imminent. In other words, the declarant must have abandoned all hope of recovery.[FN94] If the declarant believed in his impending death at the time he made the declaration, it does not matter that he later believed that he would recover.[FN95]

A request to a doctor, "Try to get me well," does not render a dying declaration made at that time inadmissible.[FN96] The dying person need not state expressly that he knows he is going to die. The use of any words equivalent to such a statement will suffice.[FN97] However, a statement that indicates the declarant retains some hope of recovery which, in turn, precludes a firm conviction of the imminence of death, will render a dying declaration inadmissible.[FN98]

Wharton's Criminal Evidence, § 6:30. Dying Declarations (Dec. 2014).

The central issue in determining whether a statement is a dying declaration is whether the declarant believed he or she was dying.[FN1] To render a dying declaration admissible, the declarant must have uttered it with a consciousness of impending death.[FN2] Where a death is sudden and unexpected the declaration will be inadmissible under the exception for dying declarations.[FN3] A mere belief that death was possible, or even probable, is not sufficient; the declarant must be virtually certain that death is imminent.[FN4] There must be a settled, hopeless expectation that death is near at hand and no statements indicating a hope for recovery,[FN5] although a declarant's urgent request for an ambulance would not necessarily show that he or she entertained some hope of recovery.[FN6] Similarly, the fact that the declarant requested a doctor does not, in itself, render the declaration inadmissible.[FN7] In addition, if the declarant believed in his or her impending death at the time of the declaration, it does not matter that, after the declaration, hope was revived and the declarant believed that he or she would recover.[FN8]

A declarant's statements are admissible to show a belief in impending death.[FN9] However, although there is some authority to the contrary,[FN10] some courts state that the dying person does not have to state expressly that he or she knows that he or she is going to die; rather, the use of any words which are equivalent to such a statement will suffice.[FN11] Apart from the statements of the declarant, his or her consciousness of impending death can be proved by surrounding circumstances, such as the nature of the injury,[FN12] or by conduct, such as sending for a priest.[FN13] Furthermore, although there is some authority to the contrary,[FN14] there is authority that a statement by a physician or other attendant that the declarant was aware,[FN15] or was not aware,[FN16] of impending death is admissible in evidence. It is not necessary to show a statement by the declarant indicating a belief that death was impending, if it is otherwise clear that the declarant did not expect to survive the injury.[FN17] In any event, the attendant circumstances should be carefully considered, not only to determine whether the declarant believed death was imminent, but also to confirm whether the declarant was sincere in entertaining such a belief.[FN18]

Although it is immaterial that the declarant did not die until a significant period of time had elapsed after making the declaration, provided at the making of the declaration, the declarant believed death was impending,[FN19] the existence

> of delay may be a factor in determining whether the declarant did in fact believe that death was impending when he or she made the declaration.[FN20]

Am Jur. Evidence § 844. *Dying declarations; statements made under belief of impending death - Expectation of impending death.*

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. See Louisiana v. Bell, 721 So.2d 38 (La.Ct.App. 5th Cir.1998); Louisiana v. Nicholson, 703 So.2d 173 (La.Ct.App. 4th Cir.1997); Louisiana v. Matthews, 679 So.2d 977 (La.Ct.App. 4th Cir.1996). Repeated 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 are circumstances that indicate the declarant's awareness of approaching death. Charles v. State, 955 S.W.2d 400 (Tex. App. 1997).[4] In fact, a declarant can be aware of imminent death even when he is assured he will not die and will be fine. See Id. at 404(holding evidence was sufficient for trial court to infer victim believed her death was imminent where victim had severe burns all over her body, she asked if she was going to die, and the officer replied negatively to reassure her and to prevent shock). See Wilks v. State, 983 S.W.2d 863 (Tex. App. 1998)(statement victim made to a witness at the hospital, that she always figured defendant, her husband, would kill her, but she figured he would use a gun, was admissible as a dying declaration in murder and arson case, where victim was severely injured and death was imminent); State v. Brown, 263 N.C. 327, 139 S.E.2d 609 (1965)(although attending physician was hopeful and encouraging, declarant's belief in inevitability of death was

[4] *See, e.g.,* People v. Georgakapoulos, 303 Ill.App.3d 1001, 237 Ill.Dec. 156, 708 N.E.2d 1196 (1999) (holding the belief in the imminence of death may be demonstrated by the declarant's own statement or from circumstantial evidence, such as the nature of the wounds or statements made in his presence); Louisiana v. Lucas, 762 So.2d 717 (La.Ct.App. 1st Cir.2000) (finding the magnitude of the victim's gunshot wound, the victim's knowledge he was going into surgery, his obvious pain, and his "serious" tone of voice provided enough evidence to infer victim was aware of his imminent death).

sufficient for admission); State v. Richardson, 308 N.C. 470, 302 S.E.2d 799 (1983)(declaration admissible where the victim repeatedly stated to police officers "Oh God, I am dying; somebody please help me"; it is not necessary that declarant personally express his belief that he has no chance of recovery).

Additional examples include; People v. Newell, 135 Ill. App. 3d 417, 481 N.E.2d 1238 (1985)(victim's identification of murderer and additional "I love my mother, tell my mother I love her, better yet, I'll tell her" does not prevent admission of declaration); Bargery v. State, 37 Ark. App. 118, 825 S.W.2d 831 (1992)(declarant's repeated statements that he didn't know why he had been stabbed and that he was scared, coupled with the obvious severity of his wound combined to make statement admissible); .

At common law, the condition was described as "that the declarant must be so fully aware of this as to be without any hope of life." "While it is true that, to make a dying declaration admissible, the deceased must have lost all hope of life, it does not follow necessarily that, because he sends for a physician, or asks that one be sent for, he has any hope of life from the timely aid of a physician. One may be so severely wounded that he may know that death is imminent and certain, and yet he may want a physician to relieve his suffering." Marshall, 98 S.E., 131. Evidence that on the morning after a defendant had fatally stabbed deceased, and while deceased was in a hospital and about two hours before his death, declarant he stated that he wanted to get well so he could apologize to defendant, was not admissible as a "dying declaration." State v. Dawson, 203 S.C. 167, 26 S.E.2d 506 (1943). However, the commentator to the Rule stated that the requirement that the declarant actually died was relaxed and only required the death of the declarant in a homicide death prosecution and only requires unavailability. In State v. Wideman, 110 S.C. 394, 96 S.E. 688 (1918), it was held that, where

declarant made statement that he was shot to death and was not going to get well, this sufficiently showed that he was *in extremis*.

HOW THE ISSUE WAS RAISED BELOW

On March 26, 2013, a hearing on the motion to suppress was held before Judge McDonald. In addressing the admission of the April 29, 2011 bedside identification of Marvin Brown as the assailant by Davon Goodwin to Detective Jerome Fleming, the state presented a series of witnesses to support its admissibility under Rule 804(b)(2), SCRE.

Former Detective Jerome Fleming stated he arrived at the Medical University of South Carolina Hospital around noon (corrected to around 10 am[5]) to attempt to interview Davon Goodwin for any information about the gunshot wound he received on April 26. R. 8-10, Tr.p. 8-10. He went to the Intensive Care Unit and met with the victim's family members and learned that the father had spoken with the son that night and that his son was lucid and able to communicate. At that point, Detective Fleming went into the room and sought to interview Goodwin and convince him to cooperate and told him that he was fortunate to be alive and that no one had come forward and he was the only person who could establish who the perpetrator was and to bring him to justice. R. 11, Tr.p. 11, ll. 11-20. Detective Fleming described the victim as very weak, lying in bed with tubes attached to his body, and unable to raise his arms or legs or speak loudly. R. 12, Tr.p. 12. When asked to circle the photograph that the victim pointed to as being the perpetrator, the victim advised Fleming that he was too weak to do so. R. 12-13, Tr.p. 12-13. He attempted to initial or sign the photograph he pointed to. The tape of the interview, Court Exhibit 3, was played for the judge (and is supportive of the weakened state and demeanor of the victim at the time. R. 14, Tr.p. 14 (10:24-10:30 am). Detective Fleming had to stop the recording when he was holding the recorder close to the victim's mouth because Fleming lacked

[5] R. 37, Tr.p. 37, ll. 8-17.

a free hand to hold the photographic lineup and admonition statement. R. 13-14, Tr.p. 13-14.

Detective Fleming stated that he showed the victim the 6-pack which included Marvin Brown based upon an anonymous call that they had received. R. 15, Tr.p. 15. Without hesitancy, he pointed out Number 6 which was Brown to Detective Fleming. R. 15-17, Tr.p. 15-17. The victim attempted to write what appeared to be "D I G" on the photograph. R. 16, Tr.p. 16. Fleming confirmed that the victim stated to him that while he did not know the person's name, that he had known the person's face from the neighborhood for quite some time. R. 17, Tr.p. 17. The remainder of the tape of the interview was played for the next four minutes. R. 18, Tr.p. 18. (10:34-10:37). Detective Fleming conformed again that the victim's weakened state is reflected in the recording. R. 18, Tr.p. 18.

On cross-examination, Detective Fleming confirmed that there was no breathing tube in the victim's throat at the time and the victim was able to speak and appeared lucid. He confirmed that the shooting happened on the morning of the 26th and he interviewed him on the 29th. R. 19-20, Tr.p. 19-20. He stated that he had attempted to interview the victim earlier when he was intubated but was not allowed to see him. R. 21-22, Tr.p. 21-22. He allowed that the actual line-up that was shown Goodwin was a colored line-up identified as Court Exhibit 5. R. 30-31, Tr.p. 30-31. Although Fleming was aware of the anonymous tip, he never revealed that information to the victim. R. 22, 34, Tr.p. 22, 34.

Detective Fleming clarified that when he first interviewed the victim, he stated that he did not know the name, but that he knew the person who shot him by sight. R. 36-38, Tr.p. 36-38. He stated that the interview began around 10:12 am. R. 37-38, Tr.p. 37-38. It was pointed out that the victim stated that the perpetrator "he's always doing that when he's drunk" and that the person took money from him. R. 37-39, Tr.p. 37-39. Detective Fleming stated that the victim said

he had $120 in his pants and his pants were taken in and he did not know where they were and clarified that he was not sure if money was taken. R. 38-39, Tr.p. 38-39. Detective Fleming confirmed that he did not record when the victim made the identification. He stated described how weak the victim's voice was and why he had difficulty holding the recorder and showing the victim the documents. R. 39-40, Tr.p. 39-40. Detective Fleming stated that he though he made his written report on April 29, but was corrected that the report was dated May 4, 2011, the date the victim died. R. 34, Tr.p. 34.

The defendant's grandfather, David Brunson, Jr. testified about his visit with the victim at the hospital. He noted that he had a close relationship with the victim. He described his discussion with the victim about the car rides they took together:

> A. I was sitting there holding his hand, and we were talking about the times we had, and the subject came up bout riding around, and – he would always sit on the front, near the door on the passenger side. **And he said he wouldn't be able to ride with me, and that my other grandson Kaleem would have his seat.** Because he and Kaleen would always fight.
>
> Q. And did you take that to mean that he was fearful he may not ever have the opportunity to take these rides with you again?
>
> A. Yes.
>
> Q. Did he also apologize to you for some of the decisions that he made in his life?
>
> A. Yes, he did

R. 47-48, Tr.p. 47, l. 12- p. 48, l. 5.

The grandfather was recalled concerning the timing of these conversations. R. 68-70, Tr.p. 68-70. He stated that conversations occurred on more than one occasion, although he could not state the exact dates. R. 68, Tr.p. 68, l. 3. He stated that conversation about no longer being able to ride in the car with him occurred "a little bit after he was sewn back up after that." [According to hospital records, the victim had two separate surgeries. R. 208-211, Court Exhibit

p. 56-59. (MUSC Records). He stated the car conversation preceded when he was putting cream on the victim's stomach. R. 69, Tr.p. 69.

On cross-examination, the grandfather unequivocally stated: "**he just pretty much point blank said he wasn't going to make it –he didn't think he was going to make it.**" R. 70, Tr.p. 70, ll. 2-4. He said that they talked about the incident with the car a couple of times. R. 70, Tr.p. 70, ll. 2-12. The victim's father, David Brunson, III, testified that about the victim's demeanor at the hospital. R. 48-56, Tr.p. 48-56. The father stated he got there while his son was still in surgery. When they brought his son out he noted the overall swollenness of his son and the large cut in his stomach. R. 48-49, Tr.p. 48-49. The father learned from the doctor that "we did what we can do...I'm just telling you it don't look like he may make it . . . because the small intestines have been damaged real bad." R. 50, Tr.p. 50. The father said that his son was scared and afraid. R. 51, Tr.p. 51. He described his son as wanting to hold his hand which he had never done before. R. 51-52, Tr.p. 51-52. He also described the victim's demeanor as reflected in his having a "deep stare while holding his hand." R. 52, Tr.p. 52, ll. 13-22. He stated that they had to wake his son up to talk with the detective because he was in such pain. The father stated the swollen condition of his son lasted awhile and did not go down in one day. R. 55, Tr.p. 55, ll. 17-21.

The victim's sister, Dendria Brunson testified that she spent time with the victim at the hospital. Before the incident, she stated that he was not an emotional person and never saw him cry. R. 58, Tr.p. 58, ll. 2-13. However, she stated she saw him cry at the hospital when she would wipe his face. She testified: "I don't think he wanted us to see him crying. But he used to always –seemed tired**, and he was ready to go home**." R. 58, Tr.p. 58, ll. 19-22. [According to a note passed from the family to the prosecutor, the comment "ready to go home" meant ready to

pass on in death. R. 99, Tr.p. 99, ll. 8-18.

The brother, Desmonte Goodwin testified that the victim was his big brother. He stated that his brother kept telling him that everything will be all right.[6]

WHAT THE TRIAL JUDGE RULED

In the initial oral ruling on December 10, 2013, Judge McDonald orally rule that the statement identifying Brown was not admissible within Rule 804(b)(2), SCRE after reviewing the medical records, the information about the extubation of the victim and his health status at the time of his viewing the six-pack. R. 104, December 10, 2013 Tr.p. 3, ll. 7-13. She opined that the victim had been extubated and had told his sister he just seemed tired and ready to go home and that he was ambulatory the next day and screened for physical therapy and that everyone thought he was getting better. R. 104, December 10, 2013 Tr.p. 3, ll. 13-19.

She distinguished McHoney, 344 S.C., 93("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."), by noting that there the victim never regained consciousness after the declaration although she lived for two more weeks. R. 104-05, December 10, 2013, Tr.p. 3-4.

In the written order dated August 18, 2014, Judge McDonald set forth her reasons for suppressing the statement:

> 1. Imminent Death at the Time the Declaration is Made
>
> The Court concludes that while there is no doubt that the victim in this case was in serious condition at the time of his identification of Defendant Brown, his medical records demonstrate that he was improving and was not in imminent danger of death at the time the statements were made. The victim was admitted into the hospital on April 26, 2011, and underwent surgery the same day. See Exhibit A, page 56 of 519. He was

[6] Desmonte also said that his brother told him who the person who shot him was, but did not use a name and that he knew who he was. R. 60, Tr.p. 60, ll. 11-22. However, there is a dispute on whether Desmonte told law enforcement about that statement by his brother. R. 61, Tr.p. 61.

intubated on April 26th and extubated on the 28th. Ex. A at 186. Furthermore, on the day that the challenged statements were made, the Defendant, the victim was "adequate on the floor, transferred out of STICU, was making strides with physical therapy, and ambulating in the hall." Ex. A at 56. He received a physical therapy consult on April 29th, and began physical therapy on April 30th. Ex. A at 404,406 and 465. On that day, he tolerated 5-15 minutes of uninterrupted exercise. Ex. A at 429. Moreover, the victim's May 4th death was listed as sudden and unexpected. Ex. A at 48.

2. Declarant must be Fully Aware of Imminent Death to be without any Hope of Life

The Court further finds that neither the medical records nor the other evidence in the case demonstrates that the victim was aware of his imminent death when identifying the photograph of the defendant from the six-pack lineup. In fact, the evidence suggests the contrary; on April 29th, the victim's medical condition was improving. Furthermore, 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 at 464.

3. The Circumstances of the Death Must be the Subject of the Statement

The Court concludes, and all parties agree, that the circumstances of the shooting – which resulted in the victim's subsequent death - were the subject of the hearsay statement. However, this alone does not satisfy the requirements of either Rule 804(b)(2), SCRE or the common law rule.

R. 137-38, Order, p. 3-4.

ANALYSIS

The State submits that the trial court erred in its conclusions that the April 29, 2011 declaration by Davon Goodwin was inadmissible under Rule 804(b)(2), SCRE. First, contrary to the mistaken conclusion of Judge McDonald, Davon Goodwin did express a belief the his death was impending due through his contact with his grandfather in his expression to him of regret that he would no longer be taking rides with him. R. 47-48, Tr.p. 47-48. Any question about the intent of such an expression was resolved by the recipient of that statement who unequivocally stated "he just pretty much point blank said he wasn't going to make it –he didn't think he was going to make it." R. 70, Tr.p. 70, ll. 2-4. Judge McDonald did not address this strong statement in her order, although during the hearing, she considered the testimony as "pretty persuasive"

evidence of his belief of impending death. Similarly, these statements cannot be taken in a vacuum. The medical records before the trial judge revealed that on April 29 at 10 am, the victim had been subjected to a gunshot wound which would cause his death on May 4, just 5 days later. Exhibit 1 (A), p. 56. He had been intubated and subject to two surgeries to seek to close the damage. R. 208, 516-24, Id. p. 56, 364-372. He spoke with a weakened voice and was weak and unable to write. He was confined to his bed at the time of the interview in the Intensive Care Unit where he had been within that day. Id. He was on oxycodone for pain. R. 210, Id., 58. At some point (apparently subsequent to the interview) during that day, he was placed in a chair bed. The day after the interview on April 30, he was given some physical therapy. R. 581, Id. at 429. However, it also revealed that he did not want to do PT and they required encouragement for his participation. R. 581, Id., 429.

On April 29 at 8 PM, the social work report indicated that the victim "lacked motivation and was unreceptive" to discussions about discharge planning, pain management, patient safety and plan of care." R. 544, Id. at 392. He was found that same day to have a "flat affect. Id. .

Here, the circumstances support only a conclusion that on April 29 at around 10 am. Davon Goodwin had a belief that his death was imminent. Under Rule 804(b)(2), SCRE, this is the crux of a showing for admissibility, not whether the hospital was continuing to treat the wound or whether the social workers were taking a course of conduct to prepare for the possibility of survival. The fact that death resulted on May 4, 2011 speaks volumes about whether death was imminent on April 29 and whether the victim after two days of surgeries had a belief that death was imminent.

The trial court also based its decision on a factor that did not exist in the record as suggesting that he did not believe that death was imminent. There is no evidence in the record to

show that Davon Goodwin was planning revenge against Brown. To the contrary, Detective Fleming had to encourage Goodwin to assist law enforcement at the time of the meeting. For this unsound basis in the decision it must be reversed.

The trial court, although death occurred on May 4, questioned whether there was evidence on April 29 to suggest that death was imminent. The trial judge surveyed the medical records and asserted that they reflected that his condition was reported improving until his death. However, in McHoney, under Rule 804(b)(2), SCRE, the court determined that even though the declarant survived for another two weeks after her statement, the statement was admissible as a dying declaration. As was clear under McHoney and its interpretation of Rule 804(b)(2), SCRE, the focus is one the declarant's state of mind, not on the eventual outcome of the declarant's injuries. Here, his state of mind was morbid and represented a belief that he would not return to the life he knew as represented to his grandfather.

The Court in McHoney recognized that the declarant's state of mind can be inferred from the facts and circumstances surrounding the declaration where it found repeated questioning by the declarant about whether he was going to live, a less than reassuring answer, the nature of the wound and the declarant's critical condition[7] are circumstances that indicate the awareness of his approaching death. Here, those factors on April 29, 2011 point conclusively that awareness of his impending death. The trial court's conclusion to the contrary is not supported and was an abuse of discretion.

[7] A declarant's serious injuries can support an inference that he believed death was imminent, see United States v. Peppers, 302 F.3d 120, 137 (3d Cir. 2002), but the nature and extent of the injuries must be so severe that "obviously ... [the declarant] must have felt or known that he could not survive." Mattox v. U. S., 146 U.S. 140, 151, 13 S. Ct. 50, 36 L. Ed. 917 (1892)

THE ACTUAL IMMINENCE OF DEATH IS NOT THE DETERMINING FACTOR UNDER Rule 804(b)(2), SCRE WHERE THE LENGTH OF TIME TO DEATH IS IMMATERIAL.

The trial court also erred in assessing whether death was actually imminent on April 29 as an issue on admissibility under Rule 804(b)(2), SCRE. First, death did occur on May 4, 2011. Second, the victim was just placed in the Intensive Care Unit on that date after two surgeries had been completed to seek to repair the effects of the gunshot wound. The trial court misread Rule 804(b)(2), SCRE and the precedent of McHoney. It is the declarant's belief that death is impending under Rule 804(b)(2) and McHoney that makes the statement admissible, not that death is actually imminent. In fact, the commentators to our rule recognized the difference between the common law and Rule 804(b)(2) in noting that "subsection (2)" and stated the "rigid requirement that the declarant must actually have died, Dawson, 203 S.C. 167, is relaxed under the Rule which only requires the death of the declarant in a homicide prosecution." Since the declarant need not die from the wounds or injuries, the length of time between a statement and death could not be dispositive of the statement's admissibility under the modern exception. McCormick on Evidence, § 310.

As in McHoney, the swiftness of the death was not the issue underlying admissibility, but the declarant's state of mind. Under the trial court's mistaken theory, any indication of improvement in medical status could make a statement made under a belief of impending death inadmissible. As the Rule notes, even if the declarant survives the particular wounds, but later dies, the statement would be admissible as long as the declarant is unavailable by death at the time it was proffered. While his medical condition may be a circumstance supporting or rejecting a belief in his impending death, it is his actual state of mind that controls the admissibility.

Here, it is evident that the declarant was in danger of death, even if death was not actually

imminent on April 29. Like the Court held in McHoney, the length of time the declarant lives after making the dying declaration is immaterial. McHoney, supra. (victim died two weeks after statement). 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. See State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926).[8] In Hall, 134 S.C. 361, the Supreme Court held a dying declaration was properly admitted when the declaration was made shortly after the injury, and the declarant died 33 days later. The Supreme Court held it was the jury's duty to pass upon the credibility of the dying declaration, and the length of time between the declaration and death is just one factor to be considered. Id. at 361, 133 S.E. at 26. In McHoney, supra, the victim died two weeks after the injury. The medical personnel who attended the victim assured her she would be "fine." However, the victim shook her head no in response to the assurances, indicating she was aware of her impending death. The Court found the two week time frame after her injury did not indicate the victim did not believe her death was imminent, where she shook her head when told she would be fine, and where she never regained consciousness after she made the declaration and the court admitted the statement.

The trial court abused its discretion and erred in concluding otherwise. The order to suppress the statement must be reversed.

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[8] *See also* State v. Hamlette, 302 N.C. 490, 276 S.E.2d 338 (1981)(holding the fact victim lingered for several days after his communication to police officer that defendant was the man who shot him did not render statement inadmissible as a dying declaration); State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978)(the fact victim survived one week longer than doctors told him he might live did not render victim's dying declaration inadmissible); Thomas v. State, 62 Ark. App. 168, 973 S.W.2d 1 (1998)(holding under the dying declaration exception, it is declarant's belief in nearness of death when he makes the statement, not the swiftness with which death actually ensues, that is most important); Charles, 955 S.W.2d 400(holding length of time declarant lives after making dying declaration is immaterial in determining if statement is dying declaration for purposes of hearsay exception); Herrera v. State, 682 S.W.2d 313 (Tex. Crim. App. 1984)(length of time declarant lives after making dying declaration is immaterial to dying declaration exception).

CONCLUSION

It respectfully requests that the trial judge's ruling granting the suppression of the April 29 statement of Davon Goodwin be reversed and vacated and the trial court be directed to allow its admission under Rule 804(b)(2), SCRE.

Respectfully submitted,

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BY: _____
DONALD J. ZELENKA

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
January 15, 2016

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-002129

Indictment No. 2012-GS-10-6844-06845, 06846

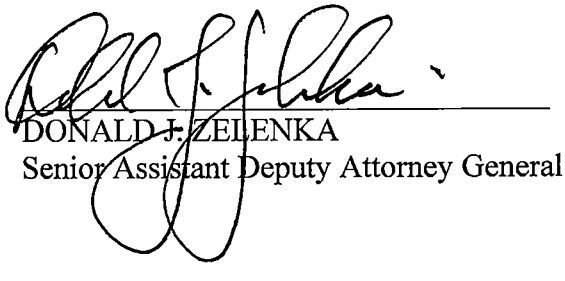
STATE OF SOUTH CAROLINA, Appellant,

v.

MARVIN BROWN, Respondent.

CERTIFICATE OF COMPLIANCE

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



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

January 15, 2016

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Final Brief of Appellant in the foregoing action by depositing copy in the InterAgency Mail to Susan B. Hackett, Esquire, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 15th of January 2016.

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SC Court of Appeals

January 15, 2016

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Marvin Brown
Appellate Case No. 2014-002129

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the Final Brief of Appellant in the above-referenced matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosure

cc: Susan Hackett, Esquire
Scarlett A. Wilson, Solicitor
Trisha Allen, Victims Assistance