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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5506 (S.C. Ct. App. August 2, 2017)

STATE OF SOUTH CAROLINA,

Appellant,

v.

MARVIN BROWN,

Respondent.

STATE'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner State of South Carolina hereby certifies that the petition for rehearing was made, and that the Court of Appeals ruled upon the petition for rehearing on December 5, 2017. (App. 112).

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in rejecting that the trial judge abused 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 Court of Appeals err finding harmless error in the trial judge's findings when the Court of Appeals found no record support for its basis in 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 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 a petition for writ of certiorari by the State of South Carolina to the affirmance by

the South Carolina Court of Appeals of the granting of a motion to suppress hearsay testimony and exclude the victim's identification by rejecting its admissibility as a dying declaration in a written order dated August 18, 2014.

Procedural History

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, 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."

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. Then, 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.

APPEAL

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. In the appeal before the Court of Appeals, the State made the following issues presented:

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 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?

Final Brief of Appellant, p. v. The Respondent Marvin Brown was represented by Susan B. Hackett of the South Carolina Office of Appellate Defense. On August 2, 2017, the South Carolina Court of Appeals issued its order denying the appeal. State v. Marvin Reginald Brown, Appellate Case No. 2014-002129, Op. No. 5506 (S.C.Ct. App. August 2, 2017). In the decision, the Court of Appeals made the following pertinent findings and conclusion:

Here, evidence supports the circuit court’s finding Goodwin’s statement was not made while he believed his death was imminent. The circuit court’s order noted specific facts in the medical record “that he was improving and was not in imminent danger of death at the time the statements were made.” The order referenced portions of the medical record that provide Goodwin underwent surgery, was extubated, was transferred out of intensive care on the day of the statement, was able to begin physical therapy, and that his death was not expected. The court indicated recognition of Goodwin’s “serious condition” at the time he identified Brown but relied on evidence in the medical record he was improving. The circuit court also found “neither the medical records nor the other evidence in the case demonstrates that the victim was aware of his imminent death” when he made the identifying statement.

The medical records support the circuit court’s finding Goodwin was improving on the date Goodwin gave the identifying statement to Detective Fleming. Physician notes from that evening state “[h]e is up and out of bed-to-chair and PT has been consulted to work with ambulation.” The medical records

establish Goodwin successfully underwent two surgeries and was extubated prior to the statement. The “Case History” set forth in the autopsy report indicates “[t]he patient improved and had begun ambulation and physical therapy,” after the second surgery, although an exact date is not given. . . .

. . . In the present case, however, Goodwin gave the statement identifying Brown after he had undergone two surgeries, been extubated, and was able to breathe on his own. On the same day Goodwin identified Brown, he was moved out of the intensive care unit and began to ambulate. Goodwin did not identify the assailant spontaneously but in response to questioning when Detective Fleming encouraged Goodwin to identify the person who shot him. Additionally, Goodwin was reluctant to name the perpetrator, which suggests a fear of reprisal, something inconsistent with a belief of impending death. . . .

. . . Recognizing the challenge of discerning the state of mind of the declarant, we find the record contains evidence to support the circuit court’s finding Goodwin’s statement to Detective Fleming was inadmissible hearsay as it did not meet the dying declaration exception. . . .

II. Findings as to Goodwin’s Revenge

The State also argues the circuit court erred in finding Goodwin was planning to seek revenge against his attacker, asserting no evidence was offered at the pretrial hearing to establish such intent. We agree.

The circuit court’s written order stated:

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.

“Ex. A at 464” appears to be a flowsheet of chaplain services indicating that a chaplain visited with the family of the victim on the day he was admitted to the hospital and again after Goodwin died. Brown’s argument that Goodwin’s lack of chaplain visits supports a finding of intended revenge is strained at best. Additionally, testimony Goodwin knew who shot him and feared his assailant does not support such a conclusion.

No evidence was presented at the suppression hearing that Goodwin planned to seek revenge against Brown, and the evidence Brown identified in his brief is not evidence Goodwin was planning to seek revenge. Therefore, we find the conclusion of the circuit court as to revenge was erroneous. However, this error did not prejudice the State.

“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.’ ” Bethea, 241 S.C. at 23, 126 S.E.2d at 849-50 (quoting Smalls, 87 S.C. at 551, 70 S.E. at 301). “To warrant reversal, an error must result in prejudice to the appealing party.” State v. Black, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012).

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it “could not reasonably have affected the result of the trial.”

State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)).

We find the circuit court did not rely solely on evidence of revenge to support a finding of hearsay but relied on other evidence, including the medical records. Notably, the finding of revenge appears in the written order, but the court did not rely on the finding of revenge in its verbal ruling. Moreover, the finding of revenge in the written order is an additional reason given by the circuit court for finding Goodwin was not aware of his imminent death when he made the statement. The circuit court found “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....” The court supported its ruling by first stating: “on April 29th, the victim’s medical condition was improving.” The court next stated: “Furthermore, evidence presented at the pre[]trial hearing suggested that the victim was planning on seeking revenge against his assailant.” Thus, the finding of revenge is in addition to a finding of an improved medical condition as set forth in the medical records. As such, we do not find this error prejudiced the State and affirm the admission of the identifying statement. . .

App. 101-104.

State’s Petition for Rehearing

The State of South Carolina petitioned for rehearing on August 17, 2017. App. 105-111.

The State asserted rehearing was appropriate because it found unsupported by any evidence in the record a factual conclusion by the hearing judge:

No evidence was presented at the suppression hearing that Goodwin planned to seek revenge against Brown, and the evidence Brown identified in his brief is not evidence Goodwin was planning to seek revenge. **Therefore, we find the conclusion of the circuit court as to revenge was erroneous.**

State v. Brown, No. 2014-002129, 2017 WL 3272134, at *5 (S.C. Ct. App. Aug. 2, 2017). The State urged that the Court of Appeals panel erred in its conclusion that “this error did not prejudice the State.” The State asserted that this finding and conclusion by the Court of Appeals overlooked the significance of the unsupported finding and its impact of the hearing judge’s conclusion. *Petition for Rehearing*, p. 106-110. Simply put, planning to participate in a future revenge against the defendant and having a belief in his imminent death cannot co-exist and overwhelms any conclusion otherwise. The State further argued that the Court of Appeals overlooked the impact of the other evidence in the record which would have led to the conclusion in support of the fact that it was an admissible dying declaration where evidence supported a conclusion that the victim had an actual belief in his imminent death rather than a future plan to survive and personally act in revenge upon the defendant.

On December 5, 2017, the Court of Appeals summarily denied the Petition for Rehearing. App. 112. This Petition follows.

ARGUMENT WHY CERTIORARI SHOULD BE GRANTED

The trial judge made a mistaken finding in rejecting the dying declaration with an unsupported factual conclusion that the victim was planning revenge – a fact entirely inconsistent with a belief in his imminent death when he made his declaration identifying Marvin Brown as his assailant. Yet despite this powerful and dispositive mistake, the Court of Appeals found the conceded mistake by the hearing judge was harmless error. A conclusion of planning a revenge and imminent belief in death cannot co-exist. To suggest that it had no impact on the conclusion in contrary to this Court’s precedent addressing harmless error matters. See State v. Pagan, 357 S.C. 132, 144, 591 S.E.2d 646, 653 (Ct. App. 2004) (“Error is harmless where it could not reasonably have affected the result of the trial.”), *aff’d as modified*, 369 S.C.

201, 631 S.E.2d 262 (2006). Relying upon a dispositive factual conclusion that has no support in the record, plainly affected the result where conflicting evidence existed. This was a substantial error affecting the result, not an insubstantial error. Simply put, had there been evidence of the victim intent to commit revenge upon Brown in the future – that fact standing alone – would have precluded the victim’s identification of Brown being admitted. To suggest it had no impact is unsupportable by a reasoned fact-finder.

Whether an error is harmless depends on the circumstances of the particular case. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct.App.2003). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). By analogy, “[t]o say that an error did not contribute to the verdict is ... to find that error *unimportant in relation to everything else* the jury considered on the issue in question, as revealed in the record.” *Id.* at 166, 420 S.E.2d at 839 (citation omitted) (emphasis added). State v. Collins, 409 S.C. 524, 537–38, 763 S.E.2d 22, 29 (2014). Can any appellate court reliably say that an unsupported factual conclusion that alone would be dispositive is unimportant in relation to everything else in the record where the other evidence is conflicted on whether the victim had a belief in his imminent death? We would urge this Court to conclude that the mistake cannot be considered “unimportant” or “insubstantial.” This mistake contributed to the hearing judge’s conclusion. To suggest that it was inconsequential dicta in the order, defies a reasonable reading of the order. See State v. Shuler, 344 S.C. 604, 621, 545 S.E.2d 805, 813 (2001). See also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) (“[E]rror at law’ exists: (1) when the circuit judge, in issuing [the order], was

controlled by some error of law ... or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support.”

The Court of Appeals conclusion ignores the mutually exclusive nature of the two mental states. Certiorari is appropriate because the Court of Appeals overlooked or misapprehended the following factual and legal points in its opinion in State v. Marvin Reginald Brown, Appellate Case No. 2014-002129, Op. No. 5506 (S.C.Ct. App. August 2, 2017).

1. The standard of review portion set forth the following in its opinion:

Thus, an appellate court “is bound by the [circuit] court's factual findings unless they are clearly erroneous.” *Id.* “**The determination by the [circuit] 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, 849-50 (1962) (quoting *State v. Smalls*, 87 S.C. 550, 551, 70 S.E. 300, 301 (1911)).

State v. Brown, No. 2014-002129, 2017 WL 3272134, at *3 (S.C. Ct. App. Aug. 2, 2017).

2. However, the Court of Appeals recognized that the hearing judge made a significant and unsupported finding of fact that there was evidence that the victim was seeking revenge against Brown in support of its conclusion of conflicting with “both an awareness of imminent death as well as one who has given up all hope of survival.” As stated by this Court, it found:

No evidence was presented at the suppression hearing that Goodwin planned to seek revenge against Brown, and the evidence Brown identified in his brief is not evidence Goodwin was planning to seek revenge. **Therefore, we find the conclusion of the circuit court as to revenge was erroneous.** State v. Brown, No. 2014-002129, 2017 WL 3272134, at *5 (S.C. Ct. App. Aug. 2, 2017).

3. The Court of Appeals panel however, concluded that “this error did not prejudice the State.” This finding and conclusion overlooked the significance of the finding and its impact.

A. First, it cannot be questioned that if there was evidence that the victim after being shot by Brown was in fact planning on seeking revenge on Brown at the time he made the statement that it would have defeated any claim that he had a belief in his imminent death. This mistaken factual conclusion of intended revenge by him in the future would override any medical evidence or other comments that he may have had with family members about his life prospects. The prejudicial impact of this unsupported conclusion by the hearing judge cannot be understated.

B. Second, the reliance by the Court of Appeals on the fact that the hearing judge did not solely rely in its written order on the unsupported fact or at all in its her earlier verbal order is confusing at best and simply does not support the emphasis given on it by the Court of Appeals. The State submits that the Court in appellate review would be leading the standard of review down a slippery slope if it forgives mistaken and critical findings of fact in later *written* orders merely because in an earlier *oral* order the Court did not make reference to it. It is difficult to see how this mistake does not only enhance the prejudice to the mistake, but secures it in this case. The hearing judge found it important enough to support her decision to add it to the analysis.

This issue is not one-sided since there exists significant evidence that this declaration qualifies as a dying declaration. Davon Goodwin did express a belief the his death was impending 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

written order, although during the hearing, she considered the testimony as “pretty persuasive” evidence of his belief of impending death. The Court of Appeals overlooked this fact in its conclusions.

C. Similarly, the Court of Appeals concluded that : “[T]he circuit court found “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....” State v. Brown, No. 2014-002129, 2017 WL 3272134, at *5 (S.C. Ct. App. Aug. 2, 2017) (emphasis added) . Yet, the so-called “other evidence” was the non-existent evidence of revenge planning and misinterpreted of other evidence set forth herein. The probative power the hearing judge placed on the non-existence revenge finding impacted the clear prejudice in the findings and conclusion by the judge.

D. The Court of Appeals overlooked **the impact of the other evidence**, *in light of the absence of revenge*, that supports the showing that the victim did have a belief in his imminent death at the time of the statement. The issue was not whether medical records revealed the doctor’s opinion that he was improving at the time of the statement and after, but whether at the time of the statement the victim had a belief in his imminent death.

These included:

1. On the April 29, 2011 bedside statement, the victim had just become lucid and able to communicate in the Intensive Care Unit when Detective Jerome Fleming stated he arrived at the Medical University of South Carolina. R. 8-10, Tr.p. 8-10.
 - a. 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.

2. 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.
3. 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.
4. 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.

5. 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.

a. 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.

E. The effect of this evidence may have been misinterpreted because of the fact that the victim eventually survived until May 4. However, the fact that he lived until May 4, should not eliminate that fact that under the circumstances Goodwin had a belief in his imminent death on April 27 to support the admission as a dying declaration.

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.”).¹ Accord, State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001).

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 am²) 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

¹ 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.

² R. 37, Tr.p. 37, ll. 8-17.

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 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 lineup 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 his son’s swollen condition 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.³

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.

Judge McDonald 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.

³ 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.

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 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 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 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.

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.

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).

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.

CONCLUSION

The State of South Carolina, for the reasons set forth in the Petition respectfully requests that certiorari be granted and 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, or in the alternative a remand for a trial judge to assess the admissibility of the statement untainted by the unsupported yet powerful and overwhelming "revenge" finding that undermined any reasonable assessment of the record of whether the victim had an imminent belief in his impending death.

Respectfully submitted,

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January 11, 2018
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 11 2018

Appeal from Charleston County
Honorable Stephanie P. McDonald, Circuit Court Judge **S.C. SUPREME COURT**

Appellate Case No. 2018-00016
Opinion No. 5506 (S.C. Ct. App. August 2, 2017)

STATE OF SOUTH CAROLINA,

Petitioner,

v.

MARVIN BROWN,

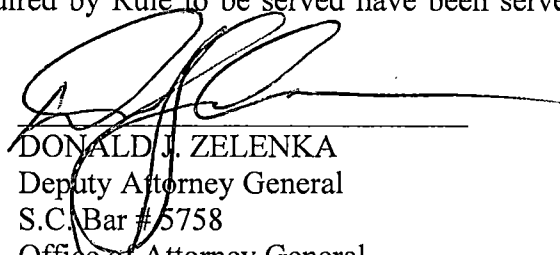
Respondent.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, certify that I have today served the within State's Petition for Writ of Certiorari and Appendix upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 11th day of January, 2018.


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