STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2011-191566

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

MICHAEL AVERY HUMPHREY,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was initially indicted in Lexington County in November 2005 for involuntary manslaughter in connection with the death of his girlfriend. Following a mistrial due to a hung jury in December 2010, Appellant was re-indicted in April 2011. On April 25-27, 2011, he proceeded to his second trial before the Honorable William P. Keesley. The jury found Appellant guilty, and Judge Keesley imposed a sentence of one year, suspended upon service of three days of time served and two years of probation. The sentence provided that probation could be terminated after just one year if Appellant complied with all terms and paid his fines and fees. A notice of appeal was timely served and filed.

ARGUMENT

III. The trial judge properly denied Appellant's directed verdict motion on the charge of involuntary manslaughter where evidence supported that Appellant's reckless disregard for the safety of others resulted in the death of his girlfriend.

In ruling on a motion for directed verdict, the trial judge must view the evidence, and all of its reasonable inferences, in the light most favorable to the State. See State v. Frazier, 375 S.C. 575, 581, 654 S.E.2d 280, 283 (2007). If the State presents direct or substantial circumstantial evidence reasonably tending to prove the guilt of the defendant, including evidence from which his guilt can be logically deduced, the defendant's directed verdict motion is properly denied. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001). The South Carolina Supreme Court has stated that the appropriate test to be applied when reviewing a directed verdict motion in a case relying solely on circumstantial evidence is as follows:

> When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis**.

State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004) (citations omitted) (emphasis in original). Accordingly, an analysis of the trial judge's ruling hinges on whether all of the circumstantial evidence taken together was sufficient for the jury to reasonably infer the defendant's guilt for the crimes beyond a reasonable doubt. Id. at 595, 606 S.E.2d at 478. On appeal from the denial of a motion for a directed verdict, the appellate court may only reverse the trial court only if there is no evidence to support the

trial court's ruling. See, e.g., State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

In this case, the trial judge did not err in denying Appellant's directed verdict motion because the State presented sufficient evidence to establish Appellant's guilt on the charge of involuntary manslaughter. Such evidence, viewed in the light most favorable to the State, is as follows. Around 5:30 or 5:45 am on October 17, 2004, Appellant returned home from a nightclub in Columbia. (R. p. 348). He was still drunk and wanted to sleep it off rather than take care of his two children. (See R. p. 348; p. 236, lines 3-4). Therefore, upon arriving home, he told his girlfriend (the victim), who was a nurse at Saluda Nursing Home, that she could not go to work that morning because she needed to stay and watch the kids. (R. p. 348). The victim and Appellant then argued for a while before Appellant went and got in bed. (R. p. 348).

After Appellant got in bed, the victim, wearing her work attire and having her work ID badge, got in her 1993 Ford Ranger pickup truck and headed in the direction of her job. (R. p. 348-49; p. 230-31; p. 259, lines 12-14; p. 277, lines 15-16; p. 295; see also R. p. 442, lines 12-18). As she was pulling off, Appellant ran outside - leaving the door unlocked and the two children alone - and jumped in the back of the truck, yelling at her to stop. (R. p. 348-49; p. 270, lines 8-17). When the victim refused to stop, Appellant, still in the truck bed, punched out the truck's back window and partially climbed through the back of the truck, grabbing at the victim. (R. p. 349; p. 377, lines 14-21; p. 403, lines

1-16). At some point during this struggle, the victim exited the truck head-first and hit the pavement. (R. p. 304-17; p. 366, lines 1-21; p. 398-403; p. 409-410).

No longer having a driver, the truck veered off the side of the road and crashed into a tree.[1] (See R. p. 300-33; p. 402). At the time of the collision, the truck was going approximately twenty-five to twenty-eight miles per hour. (R. p. 309, lines 2-7). The collision with the tree caused Appellant, still partway in the truck's back window, to fall forward and sustain injuries to his right shoulder from hitting the steering column and the dash. (See R. p. 325-29). A nearby neighbor who awoke to sounds from the collision came outside to investigate while his wife called 911. (R. p. 210-15). When he inquired of Appellant, who still smelled strongly of alcohol, how he came to be at the scene of the accident, Appellant told him that he had been "dropped off." (R. p. 218, lines 1-5; p. 236, lines 3-4). When Officer Thomas arrived on the scene, he heard Appellant apologizing to the victim, stating, "I'm sorry, baby." (R. p. 231, lines 16-22). Shortly thereafter, emergency responders arrived and the victim was air-lifted to Palmetto Richland Hospital via helicopter. (R. p. 292-93; p. 394, lines 2-4). Meanwhile, Appellant was taken to the hospital in Lexington to be treated for the injuries to his shoulder. (R. p. 292, lines 12-16).

The victim ultimately died from the injuries she sustained in the incident, and Dr. Armstrong, who had been a forensic pathologist for thirty-three years, performed an autopsy on her on October 21, 2004. (See R. p. 391-404). The autopsy revealed that the victim's death was the result of a severe closed head injury accompanied by skull fractures. (R. p. 395). The skull fractures were caused by the victim sustaining blunt force trauma to the front of her head and was consistent with the victim's head having hit

[1] In his statements to police, Appellant claimed that the victim was still in the vehicle at the time of the collision. (See 10/17/04 and 10/19/04 Statements).

the concrete road surface. (R. p. 398-99). The skull fractures caused extensive intracranial hemorrhages and brain swelling, which ultimately resulted in brain death. (R. p. 395). Dr. Armstrong also found scrapes and abrasions on the victim's upper arms, elbows, and on the palms of both hands. (See R. p. 399). The victim also had linear scratches on her left shoulder and along her right abdomen. (R. p. 400). Although some of the abrasions were consistent with "road rash," the linear scratch marks were consistent with scratches from human fingernails. (R. p. 399-403; p. 403, lines 1-16). Dr. Armstrong listed the victim's death as a homicide. (R. p. 403, lines 17-24).

Appellant gave two voluntary statements to police, the first on the evening of the incident. In this statement, Appellant admitted to arguing with the victim prior to the incident and admitted he was trying to get the victim to stop the truck and go back home. (See 10/17/04 Statement). He also admitted that he was grabbing at the victim after he punched out the back window of the truck, although he claimed that he was grabbing at the victim because she was "trying to fall out" of the truck.[2] (See 10/17/04 Statement). However, he denied that he tried to "scare" the victim into pulling over or going back to the house. (See 10/17/04 Statement). In his second statement, Appellant professed that he had no knowledge of why the victim would be trying to get out of the moving vehicle. (See 10/19/04 Statement). Specifically, when asked whether the victim was trying to get away from him, Appellant's response was as follows: "For what? Why would she be trying to getting from me? No." (See 10/19/04 Statement).

[2] Appellant claimed that, rather than reaching to the side and simply holding the driver's door closed, he punched through the glass of the back window and hoisted himself inside so that he could grab the victim by the back of her pants so that she would not fall out of the truck. (See 10/17/04 Statement).

The above evidence, along with the reasonable inferences that could be drawn therefrom, supported that a drunk and angry Appellant, with reckless disregard for the safety of others, engaged in a physical altercation with the victim while she was driving her truck, and that this physical altercation - particularly Appellant's punching out of the glass in the truck's back window and grabbing at the victim through this window - led to the victim's attempted escape from the moving vehicle and ultimately to her death as a result of the fatal injuries she sustained when she fell out of the truck.

Despite the fact that Appellant denied any guilt in his statements to police and instead claimed to be trying to rescue the victim from "trying to fall out" of the vehicle, the jury was entitled to discredit Appellant's self-serving, totally implausible, and patently unbelievable story. See Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 428-29, 412 S.E.2d 425, 427 (Ct. App. 1991) ("Furthermore, evidence is not rendered undisputed simply because there is no direct evidence contradicting it; there still remains the question of its inherent probability, the credibility of the witness, and the inferences to be drawn.") (citations omitted); Smith v. Safeco Life Ins. Co., 303 S.C. 131, 136, 399 S.E.2d 427, 429 (Ct. App. 1990) ("In weighing conflicting testimony, however, a jury may believe that part of the testimony which convinces it more heavily toward one view of the facts as opposed to another view. The jury is also free to accept a portion of a witness's testimony and reject a portion."); see also U.S. v. Brown, 53 F.3d 312, 314 (11th Cir. 1995) (a statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt); compare U.S. v. Kenny, 645 F.2d 1323, 1347 (9th Cir. 1981) ("When the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth.").

Indeed, it was obvious Appellant had lied about the victim being inside the vehicle at the time of the collision. (See 10/17/04 and 10/19/04 Statements; R. p. 304-17; p. 402). Therefore, the jury could reasonably infer that Appellant was also lying when he claimed that the victim was not scared of him and was not trying to get away from him, especially considering that he was admittedly drunk and clearly out-of-control in that he had just broken the back window right behind the victim - while she was driving a vehicle on a public roadway - when she refused to comply with his demands to stop and go back home.

Accordingly, since there was evidence in the record supporting that Appellant was guilty of involuntary manslaughter, Appellant's directed verdict motion was properly denied. (See R. p. 411-29; p. 512, lines 7-23). See State v. Vanderhorst, 257 S.C. 114, 117, 184 S.E.2d 540, 541 (1971) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury. Among other considerations is the credibility of the witnesses, including that of the appellant himself."); State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) ("Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury."); See Coleman v. Palmetto State Life Ins. Co., 241 S.C. 384, 387, 128 S.E.2d 699, 700 (1962) ("Where evidence is conflicting or different inferences can reasonably be drawn therefrom, issue should be submitted to jury").

IV. Appellant's right to a speedy trial was not violated where Appellant did not assert his speedy trial right until the pre-trial motions of his second trial, where the delay was not the result of willfulness or neglect on the part of the State, and where the delay did not result in actual prejudice to Appellant.

Relevant Facts

The incident in question occurred on October 17, 2004, and Appellant was arrested five days later, on October 22, 2004, after the victim died the day before. (R. p. 58). Appellant remained in jail less than three full days before bonding out on October 24, 2004. (R. p. 107, lines 17-20). Appellant was first indicted by the grand jury on November 14, 2005. (R. p. 58). Notably, in this particular county, due to the docket backload, it was normal for cases not to go to trial before two-and-a-half or three years. (R. p. 103). Appellant's first attorney "intimated" that the case would be resolved through a guilty plea; therefore, the assistant solicitor and defense counsel approached the case as if it would be a plea. (R. p. 103). After the assistant solicitor realized that the case was apparently not going to be resolved by a plea, he began sending out trial notices, and there were several requests for continuances (presumably by Appellant). (See R. p. 103). Therefore, although the assistant solicitor wanted to have the case tried before he was deployed overseas in August of 2009, he was unable to do so. (R. p. 103).

Thereafter, Appellant's first attorney was "dismissed" by Appellant, and this attorney's request to be relieved as counsel was officially granted in late November 2009. (R. p. 103-104; p. 106). Then "there became a whole series of issues about [Appellant] needing to find additional time to get new counsel." (R. p. 104, lines 2-4). Importantly, Appellant was "working and ha[d] a good job" during this time. (See R. p. 186, lines 21-22). After the assistant solicitor was deployed overseas, another assistant solicitor was assigned to the case and made some further attempts to work out the case through a plea.

(R. p. 104). However, these attempts failed, and when the originally-assigned solicitor returned from his deployment in April 2010, he immediately tried to get Appellant "brought in" because Appellant had no defense counsel at the time. (R. p. 104). Appellant then appeared before Judge Newman and was warned regarding the dangers of self-representation. (R. p. 104). Appellant was thereafter served with a trial notice. (R. p. 104). At that time, Appellant wanted to hire his own counsel, and he did in fact hire his own private investigator. (R. p. 104). However, later, Appellant had still not retained counsel, and finally Judge Russo appointed trial counsel to represent Appellant. (R. p. 104). Trial counsel initially accepted the case, but then made a motion to be relieved based upon Appellant making too much income to qualify for a public defender. (R. p. 104-105). Judge Keesley (who ended up being Appellant's trial judge) denied the motion. (R. p. 105). Importantly, no speedy trial motions had been made by Appellant up to this point; indeed, Appellant **never** raised the issue of a speedy trial until just before his second trial. (R. p. 100, lines 9-12).

After the issues with Appellant's defense counsel were resolved, the State called the case for trial at the December 2010 term of court. (See R. p. 105, lines 3-10). However, this trial resulted in a hung jury. (R. p. 105, lines 9-10). Thereafter, the State "tried on several occasions" to get the case to trial, but was unable to do so because of two other "date certain" trials that had been set; because Judge McMahon, the initial trial judge, declined to hear the second trial; and because, at the previous court term, the assistant solicitor was off for two weeks for required military service. (See R. p. 105, lines 22-23). Accordingly, Appellant's second trial was scheduled at the "first opportunity" after the first trial. (See R. p. 105, line 23 – p. 106, line 2).

Standard of Review/Applicable Law

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. The fundamental right to a speedy and public trial is guaranteed to all criminal defendants appearing in South Carolina courts by the Sixth and Fourteenth Amendments of the United States Constitution and by Article 1, Section 14 of the South Carolina Constitution. State v. Kennedy, 339 S.C. 243, 249, 528 S.E.2d 700, 703 (Ct. App. 2000).

Several factors must be considered when determining whether a criminal defendant's right to a speedy trial has been violated. Id. at 249, 528 S.E.2d at 703-704. In Barker v. Wingo, 407 U.S. 514, 530 (1972), the United States Supreme Court adopted a balancing test employing the evaluation of the conduct of both the defendant and the prosecution. Under the balancing test, four factors must be considered when evaluating the circumstances of a delay in the prosecution of a criminal defendant's case: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. Id. None of the four factors is alone necessary or sufficient for a finding of a speedy trial violation. Id. at 533. Instead, "they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." Id. "Whether or not a person accused of a crime has been denied his constitutional right to a speedy trial is a question to be answered in the light of the circumstances of each case." State v. Dukes, 256 S.C. 218, 222, 182 S.E.2d 286, 288 (1971). However, "barring extraordinary circumstances," a court should be reluctant to rule that a defendant was denied his speedy trial right where

the record indicates that the defendant did not want a speedy trial. Barker, 407 U.S. at 536.

Importantly, the dismissal of a defendant's charges due to denial of his right to a speedy trial is a very significant consequence to the State and to the community at large because it means that a defendant who may be guilty of a serious crime will simply go free without ever being tried. See Barker v. Wingo, 407 U.S. 514, 522 (1972). Accordingly, the burden rests with the defendant to establish that he was denied his right to a speedy trial and to show that the delay was due to the neglect and willfulness of the State. See Dukes, 256 S.C. at 222, 182 S.E.2d at 288 ("The burden was on the appellants, who assert that they were denied their constitutional right to a speedy trial, to show that the delay was due to the neglect and willfulness of the State's prosecution."). A trial court's decision regarding whether to dismiss a case based upon a violation of the defendant's right to a speedy trial is reviewed for an abuse of discretion. State v. Langford, Op. No. 27195 (S.C. Sup. Ct. filed Nov. 21, 2012) (Davis Adv. Sh. No. 42 at 99-100) (citations omitted).

Discussion

As discussed above, the delay between Appellant's arrest and his first trial was approximately six years and two months. The delay between Appellant's first and second trials was approximately four months. Thus, the total delay was about six-and-a-half years. Although this delay was obviously lengthy, this delay did not result in a violation of Appellant's constitutional right to a speedy trial when considered in relation to the other relevant factors. See State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997) ("Although delay alone is not dispositive, this delay is sufficient to trigger review of the other three factors.") (emphasis added).

As the trial judge concluded, although the length of the delay was "troubling," the reasons for the delay, as set forth above and which included Appellant's own issues with defense counsel, were "acceptable" and there was "certainly no intentional misconduct" by the State. (R. p. 185, line 4; p. 191, lines 1-4). See State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993) ("Appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law."); State v. Smith, 307 S.C. 376, 380, 415 S.E.2d 409, 411 (Ct. App. 1992) (finding the defendant bears the burden of showing a speedy trial delay was due to the neglect and willfulness of the State's prosecution); Barker v. Wingo, 407 U.S. 514, 531 (1972) ("[a] more neutral reason such as negligence or *overcrowded courts* should be weighted less heavily") (emphasis added); State v. Chapman, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) ("A portion of the delay was caused by the *normal condition of the docket.* . . . The constitutional guarantee of a speedy trial affords protection only against unnecessary or unreasonable delay.") (emphasis added); State v. Pittman, 373 S.C. 527, 551, 647 S.E.2d 144, 156 (2007) ("the defense's contributions to the delay cannot be ignored"); State v. Waites, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (considering defense counsel's actions delaying the trial when assessing whether a speedy trial violation occurred).

Furthermore, critically, as defense counsel conceded below, there were **no** speedy trial motions filed at any time. (R. p. 100, lines 9-12; p. 186, lines 24-25). Therefore, Appellant made no assertion of his right to a speedy trial until the oral pre-trial motions at his **second** trial. Thus, presumably, for about six-and-a-half years, Appellant had no objection to putting off the case and probably believed the delay would work towards his advantage. See Barker v. Wingo, 407 U.S. 514, 521 (1972) (deprivation of the right to a

speedy trial "may work to the accused's advantage;" inasmuch as "[d]elay is not an uncommon defense tactic"); State v. Langford, Op. No. 27195 (S.C. Sup. Ct. filed Nov. 21, 2012) (Davis Adv. Sh. No. 42 at 101) (pointing out the reality that delay may be a defense tactic); State v. Pittman, 373 S.C. 527, 553, 647 S.E.2d 144, 157 (2007) (noting that "Appellant received some benefits as a result of the delay."). Moreover, Appellant was tried *immediately* following his first assertion of his right to a speedy trial. See State v. Robinson, 335 S.C. 620, 626, 518 S.E.2d 269, 272 (Ct. App. 1999) (finding the defendant was not denied his constitutional right to a speedy trial where the case was "tried within one year of [the defendant's] first formal motion to dismiss"). Since Appellant failed to assert his right to a speedy trial until just before his second trial - after six-and-a-half years had passed since his arrest - he should not now be heard to complain that he was denied a speedy trial. See Barker, 407 U.S. at 531-532 ("The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. *We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.*") (emphasis added); State v. Waites, 270 S.C. at 108-109, 240 S.E.2d at 653 (the manner in which the defendant asserts his right to a speedy trial is an important factor to be considered; "[w]e think it significant that [the defendant], represented by counsel, waited approximately twenty-eight months before claiming he had been denied his constitutional right to a speedy trial.").

Finally, Appellant failed to demonstrate that he suffered any actual prejudice from the delay. In his pre-trial motion, Appellant made several assertions of prejudice due to the delay. First, he asserted that witnesses' memories were "not as clear" as they once were. (See R. p. 63, lines 1-9). This assertion was insufficient because Appellant failed

to point to anything in particular that the witnesses had forgotten that would hurt the defense or be material to the outcome. (See R. p. 63; p. 70-73; p. 101-102). See Barker, 407 U.S. at 534 ("The trial transcript indicates only two very minor lapses of memory-one on the part of a prosecution witness - which were *in no way significant to the outcome*.") (emphasis added). Furthermore, the State suffered the same prejudice from lapses in the witnesses' memories. See State v. Chapman, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) (pointing out that the State is also hampered by witnesses' loss of memory); State v. Robinson, 335 S.C. 620, 626, 518 S.E.2d 269, 272 (Ct. App. 1999) ("Furthermore, lost witnesses and documents are also disadvantages that hamper the State.") (citations omitted).

Second, Appellant asserted that two SLED agents were no longer around to testify. (See R. p. 63; p. 73-76). However, Appellant failed to establish that either of these SLED agents would have had anything of any significance to offer in the case. (See R. p. 73-91). Third, Appellant asserted that photographs taken of the truck in question on the day after the incident were lost. (See R. p. 63; p. 79-88). Initially, Appellant failed to establish that the loss of these photographs was actually caused by the delay. See State v. Kennedy, 339 S.C. at 251, 528 S.E.2d at 704 ("[T]here is nothing to suggest the delay caused the witnesses to become unavailable."). Further, the State suffered the same prejudice from loss of the photographs. (See R. p. 87, lines 23-25). See, e.g., State v. Chapman, 289 S.C. at 45, 344 S.E.2d at 613. In any event, Appellant failed to demonstrate he suffered any prejudice from the loss of these photographs since

the Batesburg-Leesville Police Department took similar photographs on the same day.[3] (See R. p. 79-88).

Fourth, Appellant contended that Lieutenant Day, the executive officer for the Multi-Disciplinary Accident Investigation Team, had no notes or reports and no independent recollection of going to see the truck in questions on the day after the incident. (See R. p. 63, lines 18-23). However, the contention that Lieutenant Day had no independent recollection turned out to be incorrect since Lieutenant Day subsequently testified at trial and apparently did recall going to see the truck that day. (See R. p. 300-301). Fifth, Appellant asserted that the former coroner Wanda McNair was now deceased and that there was no way to determine where she received information (which was potentially detrimental to Appellant) that was contained in her coroner's report. (See R. p. 63, line 24 – p. 64, line 2; p. 96-98). Appellant failed to establish when the coroner died; indeed, the coroner might have died shortly after the incident and her testimony would have been unavailable regardless of when the case was tried. See Kennedy, 339 S.C. at 251, 528 S.E.2d at 704 ("[T]here is nothing to suggest the delay caused the witnesses to become unavailable."). More importantly, the information contained in her report was "rank hearsay" and was not admissible or offered against Appellant at trial. (R. p. 98, lines 7-9; p. 188, lines 24-25). As the judge concluded, the issue with the coroner's report was not "a sufficient ground to dismiss the charges." (R. p. 189, lines 10-12).

Finally, Appellant contended that one of his defense witnesses, the victim's former doctor, was now in North Carolina, and that two of the doctor's nurses "have no

[3] Notably, it appears that the truck was still preserved in the same condition and was available at the time of trial. (See R. p. 95, lines 9-18).

recollection of [the victim] or the events surrounding that time." (R. p. 64, lines 3-7; p. 98-99). However, Appellant admitted he had copies of the victim's medical records and made no showing that any information he wanted to introduce could not have been introduced through alternative means. (R. p. 99; see also p. 190, lines 13-22). Appellant also admitted that no efforts had been made to actually secure the doctor's presence at trial. (R. p. 435, lines 20-23; see also p. 190, line 23 – p. 191, line 1). Further, as the trial judge noted, Appellant failed to establish that the nurses "had much of a recollection before." (R. p. 190, lines 1-3). See Kennedy, 339 S.C. at 250, 528 S.E.2d at 104 ("[T]here is nothing to suggest the delay caused the witnesses to become unavailable.").

More importantly, Appellant made no proffer of the doctor's or nurses' potential testimony to show that such testimony would have actually been helpful to the defense. See Waites, 270 S.C. at 109, 240 S.E.2d at 654 & Chapman, 289 S.C. at 45, 344 S.E.2d at 613 (both holding that defendant's bare assertion of prejudice because his principal witness moved to another state is insufficient to warrant the lower court's conclusion that the defendant suffered actual prejudice thereby); State v. Dukes, 256 S.C. 218, 223, 182 S.E.2d 286, 288 (1971) (defendants failed to show prejudice where they made no showing of what facts their purported "material witness" would testify to if present); State v. Smith, 307 S.C. 376, 381, 415 S.E.2d 409, 412 (Ct. App. 1992) ("we are unable to determine whether Smith was actually prejudiced by the witness' unavailability because Smith made no proffer as to what this witness would have testified"); State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct. App. 2007) ("nothing in the record suggested what the out-of-state witness's testimony would be; therefore, it could have benefited either side;" consequently, "prejudice to Defendant had not been

demonstrated"), *reversed on other grounds by* State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009).

Here, the trial judge considered **at length** each aspect of alleged prejudice set forth by defense counsel in the pre-trial motion. (See R. p. 60-102; p. 167-74; p. 186-91). The judge concluded that "there just has not been a sufficient demonstration in the Court's view that there was a failure to record what was being investigated early on." (R. p. 187, lines 7-10). The judge also found that the evidence being challenged as prejudicial to Appellant "is not going to be able to be offered against the defendant or that it's stuff that benefits him or that it doesn't really prejudice him substantially.[4] (R. p. 187, lines 10-14). Furthermore, the trial judge found that "what's before me does not indicate the defense has been deprived of the opportunity to have a meaningful investigation of the critical issues." (R. p. 188, lines 20-23). Therefore, as the judge properly concluded, Appellant did not show sufficient actual prejudice entitling him to dismissal of the case. (R. p. 191, lines 10-14; see also p. 185-91). See State v. Evans, 386 S.C. 418, 425-26, 688 S.E.2d 583, 587 (Ct. App. 2009) (trial judge's denial of defendant's motion to dismiss based upon an alleged speedy trial violation was "supported by the evidence" where the judge stated he made his decision to deny the defendant's motion after consideration of the entire record, the totality of all the circumstances, and consideration of the specific prejudice asserted by the defendant); State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct. App. 2007) ("The trial court conducted a lengthy review of the constitutional considerations at stake in the

[4] Notably, the judge excluded certain testimony that would have been prejudicial to the defense due, in part, to purported lapses in memory. (See R. p. 167-75; p. 231-35; p. 260-69).

speedy trial issue. We discern no abuse of discretion in its ruling."), *reversed on other grounds by* State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009).

Finally, prejudice to the defendant must also be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. Barker v. Wingo, 407 U.S. at 532. One such interest is to prevent oppressive pretrial incarceration. Id. "[O]bviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." Id. at 532-33. "Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." Id. at 533. Here, it is notable that Appellant was only incarcerated for three days and he apparently kept a "good job" during the time he was out on bond. (See R. p. 107, lines 17-20; p. 186, line 22; p. 516, line 15). This factor also weighs against a finding of prejudice to Appellant. See Waites, 270 S.C. at 109, 240 S.E.2d at 654 (defendant failed to establish prejudice from the delay in bringing his case to trial where he "was neither incarcerated nor apparently unduly concerned about the accusation against him"); State v. Evans, 386 S.C. at 425-26, 688 S.E.2d at 587 (defendant failed to show sufficient prejudice despite twelve-year delay considering, among other things, that she was not incarcerated during this time).

In conclusion, considering the circumstances of Appellant's case in relation to the relevant Barker factors, Appellant failed to meet his burden of establishing he was denied his right to a speedy trial. See Dukes, 256 S.C. at 222, 182 S.E.2d at 288 ("The burden was on the appellants, who assert that they were denied their constitutional right to a speedy trial, to show that the delay was due to the neglect and willfulness of the State's

prosecution."). Appellant failed to establish that the delays in bringing his case to trial were attributable to any neglect or willfulness on the part of the State, failed to assert his right to a speedy trial until the pre-trial motions of his second trial, and failed to establish any actual prejudice suffered as a result of the delays. Accordingly, in spite of the six-and-a-half-year delay between the time Appellant was arrested and ultimately brought to trial and convicted, the trial judge properly denied Appellant's motion to dismiss the case based upon a purported speedy trial violation. See Brazell, 325 S.C. at 75-76, 480 S.E.2d at 70-71 (although the delay was lengthy and disturbing, and the justification unsatisfactory, the defendant's right to a speedy trial was not violated upon balance of the Barker factors, where there was no evidence the delay was willful or intentional and where the long delay was negated by the lack of prejudice to the defendant); Barker, 407 U.S. at 533-36 (even though delay of more than five years between the defendant's arrest and trial was "extraordinary" and only seven months of the delay was justified by a strong excuse, the defendant was not denied his right to a speedy trial considering that (1) "the prejudice was minimal" where the defendant was only incarcerated for ten months and was out on bond for the rest of the time period, and where there were only two minor lapses in witnesses' memories, neither of which was significant to the outcome, and (2) where the defendant, by his actions, indicated that he did not want a speedy trial and instead hoped to take advantage of the delay in which he had acquiesced); Robinson, 335 S.C. at 626-267, 518 S.E.2d at 273 ("Although the five-year delay in this case was substantial, upon our review and balancing of the Barker factors, we find Robinson was not denied his constitutional right to a speedy trial. The case was tried within one year of Robinson's first formal motion to dismiss. The State also presented adequate justification for the delay. Finally, Robinson presented no evidence of actual

prejudice."); State v. Evans, 386 S.C. at 425-426, 688 S.E.2d at 587 (although the twelve-year delay in bringing the defendant's case to trial was "troubling," it was justifiable under the circumstances of the case).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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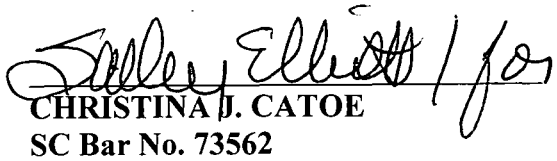

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January 28, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

THE STATE, Respondent,

vs.

MICHAEL AVERY HUMPHREY, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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January 25, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

vs.

MICHAEL AVERY HUMPHREY,

Appellant.

PROOF OF SERVICE

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

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I further certify that all parties required by Rule to be served have been served.

This 25th day of January, 2013

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