STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Court of General Sessions

The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001786

THE STATE,

Respondent,

v.

CARMINE JAMES MIRANDA, III,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

The trial judge properly instructed the jury that they could infer Appellant was under the influence if his blood alcohol concentration was .08 or higher where the instruction was a correct statement of law and applies in any case where the defendant is charged with a violation of S.C. Code Ann. §§ 56-5-2930, 56-5-2933, or 56-5-2945, regardless of whether the blood is taken pursuant to South Carolina's implied consent law or through other lawful procedures. Furthermore, any error in the trial judge's instruction is harmless.

STATEMENT OF THE CASE.

Appellant was indicted during the January 2016 term of the Grand Jury for Greenwood County for felony driving under the influence (2016-GS-24-108). Appellant proceeded to a jury trial before the Honorable Donald B. Hocker from August 1-3, 2016, in Greenwood, South Carolina. At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Hocker to imprisonment for a term of sixteen years, as well as paying a fine in the amount of $10,100. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Background Facts

During the early morning hours of October 16, 2014, Trooper Todd Stevenson responded to a collision on Highway 34 in Greenwood, South Carolina. R. p. 54. Upon his arrival at the scene, Trooper Stevenson noticed a white Honda in the middle of the road with extensive front-end damage and a red Mercedes on the shoulder of the roadway. R. pp. 54-55. The driver of the Honda, Petey Miller, was trapped inside his vehicle and had obvious injuries. R. pp. 55-56. Appellant, the driver of the Mercedes, was lying on the ground next to the passenger side of his vehicle receiving medical treatment. R. p. 55, 68. As medical personnel loaded Appellant into an ambulance, Trooper Stevenson smelled an odor of alcohol emanating from him. R. p. 55.

After securing the scene, Trooper Stevenson proceeded to the emergency room at Self Regional Healthcare. R. p. 60. Upon arriving at the hospital, Trooper Stevenson spoke with Appellant and could still smell a strong odor of alcohol about his person. R. p. 61. Trooper Stevenson testified that by the time he spoke with Appellant, he had determined Appellant was a contributor to the collision based on evidence at the scene establishing he crossed into the wrong lane. R. p. 61. Trooper Stevenson then placed Appellant under arrest for felony driving under the influence. R. p. 61. After placing Appellant under arrest, Trooper Stevenson read him his Miranda rights and advised him of his implied consent rights. R. pp. 61-62. Trooper Stevenson testified he was seeking Appellant's consent to perform a blood draw because Appellant's injuries from the crash precluded him from being taken to jail to perform a breath test. R. p. 62. Appellant indicated he understood his implied consent rights and that he was refusing to submit to a blood draw. R. p. 62. Appellant then stated he was not driving. R. p. 63, 69.

On the evening of the incident, Anthony Abbott was driving to assist a friend with a broken-down vehicle. R. p. 89. Abbott then heard a noise and noticed "a very faint mushroom

cloud coming up," and realized that he was coming upon a car wreck. R. p. 89. Abbott pulled over his vehicle and proceeded to check on the drivers of the vehicles involved in the crash. R. pp. 89-90. Abbott testified he approached the white Honda first to see if the driver was conscious. R. p. 89. After not getting a response, he checked the red Mercedes and noticed the driver leaning towards the passenger side and barely moving. R. pp. 89-90. When asked about Appellant's position in the car, Abbott testified, "his feet were still under the steering wheel. He was leaning from the driver's side towards the passenger side trying to crawl through." R. p. 92, Abbott also noted it seemed Appellant was the only individual in the car. R. p. 92. Abbott noted he was the first person on the scene of the collision and did not see anyone fleeing the scene or standing near the vehicles when he arrived. R. p. 90.

After checking the Mercedes, Abbott returned to the Honda to try to get the occupant to respond. R. p. 90. Abbott realized the driver of the Honda was Petey Miller. R. p. 91. Miller and Abbott were old friends. R. p. 93. Abbott was eventually able to rouse Miller, who kept repeating "let me out of here. I have to be. I have to be." R. p. 91. Miller later succumbed to his injuries and passed away. R. pp. 180-84. Other individuals subsequently arrived at the scene and they pulled Appellant through the passenger side window of the vehicle so he would not be trapped inside the vehicle if it caught fire. R. p. 91. Roderick Stoll, a paramedic with Greenwood County EMS, arrived and helped treat Appellant at the scene. R. pp. 167-70. Stoll smelled a strong odor of alcohol coming from Appellant's person and noted his pupils were dilated. R. p. 169. Jessica Bell, another EMT with Greenwood County EMS, also noted Appellant smelled like alcohol. R. p. 173.

Lesley Ashley was also traveling down Highway 34 during the early morning hours of October 16, 2014, when she came upon the scene of the collision. R. p. 114. Ashley noted at the

time of her arrival, it appeared the collision had just occurred. R. p. 117. Ashley testified each vehicle involved in the crash had one occupant, and Appellant was the occupant of the red Mercedes. R. p. 115. Ashley recalled Appellant was positioned to where his legs were on the driver's side and his head and torso were on the passenger's side of the vehicle. R. p. 115. Ashley stated she and Abbott pulled Appellant out of the vehicle. R. p. 116. Ashley noticed the smell of alcohol coming from Appellant. R. p. 117. Ashley later went to the hospital and spoke with Appellant. R. pp. 117-18. Appellant indicated to Ashley he had been driving and simply stated, "when he seen the lights it was too late." R. p. 119. Ashley asked Appellant whether he had been drinking and he winked at her and stated, "well, you know, yeah." R. p. 119. Ashley noted Appellant's speech was slurred. R. p. 119. Appellant also indicated to Ashley that, at the time of the crash, he was traveling to a bar. R. p. 119.

Lieutenant Bruce Brock is assigned to the South Carolina Highway Patrol's MAIT team. R. p. 128. MAIT stands for multidisciplinary accident investigation team and involves various aspects of collision investigation. R. p. 128. Lieutenant Brock was called in to investigate the scene of the collision involving Appellant and Miller. R. pp. 133-34. After examining the scene, Lieutenant Brock concluded the red Mercedes driven by Appellant went left of center and struck Miller's white Honda. R. p. 140. At trial, the defense stipulated that the wreck in this case was the proximate cause of the death of Miller. R. p. 180-84.

Testing of Appellant's Blood by Self Regional Healthcare Staff

Shannon Rogers is employed as a registered nurse in the emergency room at Self Regional. R. p. 186. Rogers recalled that when Appellant arrived at the emergency room, he was screaming and reeked of alcohol. R. p. 187. During her treatment of Appellant, Rogers took a blood sample for purposes of medical diagnosis. R. p. 187-88. Rogers testified she, "drew the

blood, labeled it with [Appellant's] information. That's his name, date of birth and his bar code. We labeled the blood, put it in a red biohazard bag and put it into out Translogic system which shoots the blood straight into the lab." R. p. 188.

Christian Lomax was working in the lab at Self Regional on October 16, 2014. R. p. 175. Lomax received Appellant's blood sample when it was sent from the emergency room. R. p. 176. Lomax described the method of transportation of the blood sample, stating, "It comes up from the ER in a cylinder. It's kind of like what they have at the banks. You just pop it open and it kind of folds open. And the blood is in a bag." R. p. 176. After receiving Appellant's sample, Lomax placed the sample into a centrifuge and spun the blood for the technician. R. p. 177. Lomax testified that once the blood was spun in the centrifuge, the technician would take over to actually run the test. R. p. 177.

Chris Allsep, a technician in the chemistry division of the laboratory, was working on October 16, 2014, alongside Christy Lazzo, another lab technician. R. pp. 193-94. Allsep testified he and Lazzo were responsible for all blood alcohol testing that evening, as there were no other lab technicians on shift. R. p. 194. Significantly, the solicitor asked Allsep, "And do **you**, as part of **your** job as a lab tech, retrieve all the samples from the centrifuge and put them in the machine?" Allsep replied, "Yes, I do." Allsep testified it is readily apparent if a sample has been tampered with and he would not have tested a sample that had been tampered with. R. p. 194. Allsep noted he had performed "thousands" of lab tests of blood samples since October 16, 2014. R. p. 195. Allsep explained that a machine called the Vista 1500, a chemistry instrument, actually performed the analysis. R. p. 196. The machine generated a printout of results showing Appellant's blood alcohol level was .208. R. p. 196, 207. Allsep explained that if the result is normal and doesn't require any human intervention, the result will be generated automatically. R.

p. 196. Allsep clarified that the machine performed all of the analysis; neither he nor Lazzo would have performed any additional analysis. R. p. 196.

Prior to the admission of the blood test results, Appellant objected to its admission, asserting the state provided an insufficient chain of custody. R. p. 199. Defense Counsel likened Appellant's case to State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990). The trial judge meticulously recounted the State's chain of custody and denied Appellant's motion, stating:

> We've got Shannon Rogers, the ER nurse, who is the one who actually drew the blood. Now, the fact that none of these people can specifically remember [Appellant's] blood test, that in and of itself I don't think makes the chain of custody fatally defective. But we've got Shannon Rogers who said yes, based upon the records she was the one to draw the blood. And she puts it in the chute like a bank. She and Lomax both referred to it as a bank chute at a drive-in window. And next to Christina (sic) Lomax who then codes it into the computer and does whatever, and then puts it in the centrifuge. And then this witness here picks it up from the centrifuge. So I think the chain of custody is pretty - - pretty tight, notwithstanding the fact that none of the three witnesses can say, oh yes, I remember [Appellant], even though the nurse did say I remember treating him. So there was some recognition there. In the Williams case it says no one present in the emergency room could identify the person who sealed and labeled the blood with Williams' patient number, which is not the case here. Additionally, although the blood sample received in the laboratory, neither ER not laboratory personnel could recall by whom it was transported. Again, that's not the case here. It says moreover Williams' ER was initially mislabeled, and that's not the case here. So - - and I'm not trying to argue for the State, and certainly, solicitor Maxey, if you want to add anything on the record. But I believe I'm going to deny your motion to suppress and allow it in.

R. pp. 201-02.

Acquisition of Appellant's Blood Testing Results by the State

Trooper Jeremy Heaton of the South Carolina Highway Patrol became involved in Appellant's case on October 16, 2014. R. pp. 70-71. Trooper Heaton attempted to obtain a search warrant for Appellant's blood while he was at the hospital. R. pp. 74-75. Trooper Heaton called the on-call magistrate several times, however he was unable to reach him because of the late

hour. R. p. 75. Trooper Heaton later secured a search warrant for Appellant's medical records from Self Regional. R. pp. 75-76.

Prior to trial, Appellant sought to suppress the evidence of Appellant's medical records, asserting that there was not probable cause to support the issuance of the warrant. R. p. 15. The trial judge noted the search warrant for the medical records was not even needed, as the State could simply subpoena the hospital records and hospital personal and the evidence would come in as a business record. R. p. 19. The trial judge found the affidavit that served as the basis for the search warrant provided the requisite probable cause. R. p. 29. The trial judge further noted, "Now, with all that said, again, I'm not so certain that we really need to be arguing too much about the search warrant in light of the fact that the State intends to offer this evidence at trial pursuant to a subpoena of hospital personnel. So anyways, motion denied." R. pp. 29-30.

ARGUMENT

I.

The trial judge properly admitted the results of Appellant's blood draw test where the chain of custody was as complete as was practicable because the State presented evidence during its case-in-chief positively establishing the identity of each person who was in custody of Appellant's blood sample and the progression of the sample between the time Appellant's blood was drawn through the time the blood test was conducted by a laboratory technician; further, any error in the admission of the blood test result was harmless.

Appellant contends the trial judge erred in admitting the test results of Appellant's blood draw because the chain of custody was fatally defective. Specifically, Appellant avers the fact that the State was unable to specifically identify which of the two laboratory technicians actually performed the testing renders the chain of custody incomplete. To the contrary, the chain of custody was complete as far as practicable, as the State carefully tracked the movement of Appellant's blood sample between the time the sample was taken and the testing was performed, and each party who handled the evidence was identified.

"The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982). "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see Howard-Arias, 679 F.2d at 366 ("The purpose of this threshold requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the 'Don Frank.'"). Notably, "[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." Hatcher, 392 S.C. at 94, 708 S.E.2d at 754.

A complete chain of custody must be established as far as practicable when a party seeks the admission of fungible evidence like drugs or a blood sample during trial. State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005); see Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 ("The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable."). However, the proof of the chain of custody need **not** exclude every possibility of tampering. State v. Smith, 326 S.C. 39, 41, 482 S.E.2d 777, 778 (1997); see State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) ("South Carolina law does not require testimony as to the exclusion of any possibility of tampering."). Instead, in order to satisfy the requirements for establishing the chain of custody, the evidence and testimony presented during trial must simply not leave to conjecture who was in possession of the fungible item and what was done with it between its seizure and analysis. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995). "[I]f the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007).

In South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005), the South Carolina Supreme Court found the chain of custody was sufficient even though the courier who transported blood evidence to the testing site was never identified, stating:

> The testimony presented by DSS indicates the blood samples were secure when Kejales took the samples at the collection site. The testimony also indicates the samples arrived at the testing facility sealed an intact. Additionally, each person involved in the actual testing procedure once the samples arrived at the facility,

> testified as to their handling of each respective sample and the chain of custody. Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified.

In State v. Hatcher, 384 S.C. 372, 681 S.E.2d 925 (2009), in determining the chain of custody was insufficient, this Court noted: (1) a party who received the evidence at SLED was not identified, (2) no testimony of how the evidence was handled while in one officer's possession was presented, (3) one officer did not testify regarding how the evidence came to be in her custody, (4) the date the evidence was left at SLED was not revealed, and (5) no evidence was presented as to where the evidence was stored pending the analysis. However, our Supreme Court later reversed, finding that after considering the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it, the trial judge did not abuse his discretion in admitting the evidence. See Hatcher, 392 S.C. at 94-95, 708 S.E.2d at 754-55. The Supreme Court concluded the State adequately traced the movement of the evidence and reaffirmed that, "the State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable." Id at 95.

In Appellant's case, the State established the chain of custody as far as practicable, as the progression of the evidence was fully accounted for, as were the identities of all parties who handled the evidence. The State presented the testimony of Shannon Rogers, who testified she took a blood sample from Appellant for purposes of medical diagnosis. Rogers then labeled the blood sample, placed it in a biohazard bag, and put it into the Translogic system, which transported the blood sample straight to the laboratory. Christian Lomax received Appellant's blood sample, removed it from the Translogic transportation system, and placed the sample into

a centrifuge and spun the blood for the technician to later retrieve for analysis. Chris Allsep and Christy Lazzo were the only two technicians working on the night Appellant was at Self Regional. Allsep testified that as part of his job as a lab technician, he removes all the samples from the centrifuge and puts them in the machine. Allsep's testimony established that he was responsible for placing the samples into the machine for testing. Allsep testified the Vista 1500 then performed the analysis, and the results showed Appellant had a blood alcohol level of .208. While Appellant argues, "Allsep testified that he did not remember whether he or Lazzo tested Appellant's blood sample," this is a mischaracterization of the record, as Allsep never testified to any such thing. To the contrary, Allsep testified that as part of his duties as a lab technician, he retrieved **all** samples from the centrifuge and placed them in the Vista 1500, which performed the analysis without any technician intervention. R. pp. 195-96. This testimony was cited by the trial judge in his ruling, where he noted, "And then this witness here (Allsep) picks it up from the centrifuge. So I think the chain of custody is pretty - - pretty tight, notwithstanding the fact that none of the three witnesses can say, oh yes, I remember [Appellant]. . . ." R. p. 201. The State, thus presented an adequate chain of custody, fully accounting for the sample's whereabouts and the identity of the persons handling it. It was never left to conjecture as to who was in possession of the blood sample or what was done with it between seizure and analysis.

Regardless of whether the State established a sufficient chain of custody, any error in the admission of Appellant's blood test results was harmless, as there was overwhelming evidence of Appellant's guilt. In addition to the testimony of Trooper Stevenson and multiple witnesses unaffiliated with law enforcement regarding the odor of alcohol emanating from Appellant's person, Lesley Ashley testified Appellant was slurring his speech and, when asked whether he had been drinking, Appellant winked at her and said "well, you know, yeah." R. p. 119. Further,

evidence was presented during trial establishing Appellant was unable to operate his motor vehicle in his lane of travel, as he crossed the center line and struck and killed Petey Miller. There was no evidence of any factor, mechanical or otherwise, being the cause of the crash other than Appellant's intoxication. In light of the overwhelming evidence collectively and conclusively establishing Appellant was under the influence of alcohol at the time he fatally struck Miller, any error in the admission of Appellant's blood test results was harmless. See City of Columbia v. Ervin, 330 S.C. 516, 522, 500 S.E.2d 483, 486 (1998) (finding no prejudice resulted from the admission of Ervin's refusal to submit to a breathalyzer test where testimony was presented establishing Ervin was unsteady on his feet, smelled of alcohol, exhibited slurred speech, cursed and threatened police officers, and tried to kick the window of a police vehicle); see also State v. Degnan, 305 S.C. 369, 372, 409 S.E.2d 346, 348 (1991) (finding no prejudice resulted from the admission of Degnan's refusal to submit to a breathalyzer test where the other evidence presented during trial established Degnan had a strong odor of alcohol on her breath, had difficulty walking, slurred her speech, and admitted she drank five or six beers); State v. Wilson, 296 S.C. 73, 76, 370 S.E.2d 715, 716 (1988) (finding any error in the admission of blood test results was harmless because it was cumulative to other evidence of Wilson's intoxication, which included properly-admitted breathalyzer test results and testimony that Wilson admitted to drinking a half pint of Vodka).

Further, Appellant was not prejudiced by the admission of the blood test evidence where his defense throughout trial was that he was not driving the vehicle at the time of the collision. At no time during trial did Appellant offer any sort of protestation to the State's assertions and evidence that he was intoxicated at the time of the crash. Instead, during his opening statement, cross-examination of State's witnesses, and closing argument, Appellant vehemently denied that

he was driving at the time of the collision. Since Appellant's defense focused on the identity of the driver rather than intoxication, Appellant was not prejudiced by the admission of the blood test results whatsoever. Appellant's conviction and sentence should be affirmed.

II.

The trial judge properly instructed the jury that they could infer Appellant was under the influence if his blood alcohol concentration was .08 or higher where the instruction was a correct statement of law and applies in any case where the defendant is charged with a violation of S.C. Code Ann. §§ 56-5-2930, 56-5-2933, or 56-5-2945, regardless of whether the blood is taken pursuant to South Carolina's implied consent law or through other lawful procedures. Furthermore, any error in the trial judge's instruction was harmless.

Relevant Facts

Prior to the trial judge's charge to the jury, Defense Counsel objected to the inclusion of the instruction that the jury could infer Appellant was under the influence if his blood alcohol concentration was .08 or higher. R. p. 226. Defense Counsel asserted:

> [T]he inference levels are part of the implied consent statute which is 56-5-2950. The blood in this case was not taken pursuant to implied consent. It was taken pursuant to a medical diagnosis. It was not - - it was not taken either voluntarily by Mr. Miranda or by search warrant, and it's our position that since it wasn't taken pursuant to implied consent, the entire implied consent statute should not be applicable in this situation.

R. p. 226. In response, the solicitor noted the .08 requirement was part of the laws of the State of South Carolina and that to limit the application of the inference of intoxication to instances where the State obtained the defendant's blood through implied consent would frustrate the intent of the legislature. R. p. 227. The trial judge denied Appellant's request to exclude the jury instruction. R. p. 227. The trial judge subsequently instructed the jury:

> Inferences of the amount of alcohol in the Defendant's blood at the time of the alleged violation as shown by chemical analysis of the Defendant's breadth (sic) or other bodily fluids may be considered by you in deciding whether the Defendant was under the influence. If the alcohol concentration was 8/100ths of

> one percent, commonly known as .08, or more, it may be inferred that the Defendant was under the influence. This inference is simply an evidentiary fact to be considered by you along with the other evidence in this case and you may give it the weight you decide it should receive.

R. p. 258.

Discussion

Appellant contends the trial judge erred in instructing the jury that Appellant was intoxicated if he had a blood alcohol level of .08 or greater because the State did not obtain the blood sample pursuant to South's Carolina's implied consent statute. Specifically, Appellant argues that because S.C. Code Ann. § 56-5-2950(A) was not applicable in his case, the inference of intoxication instruction found in S.C. Code Ann. § 56-5-2950(G) was improper. On the contrary, the inference of intoxication is not tied to the implied consent procedures whatsoever, and to hold that an inference of intoxication only applies when police obtained a sample under the implied consent provision would generate an absurd result.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd. 313 S.C. 1. 437 S.E.2d 6 (1993). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). "When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning." Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000).

S.C. Code Ann. § 56-5-2950, entitled "Implied consent to testing for alcohol or drugs; procedures; **inference of DUI,**" provides:

(A) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing. A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest. The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. Before the breath test is administered, an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent. Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

. . . .

(G) In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:

> (1) if the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol;
> (2) if the alcohol concentration was at that time in excess of five one-hundredths of one percent but less than eight one-hundredths of one percent, this fact does not give rise to any inference that the person was or was not under the influence of alcohol, but this fact may be considered with other evidence in determining the guilt or innocence of the person; or

> (3) if the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.
>
> The provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of alcohol and drugs.

As evinced by the clear language of the statute, there is no requirement that the police obtained a sample pursuant to § 56-5-2950(A) in order for the presumption of intoxication enumerated in § 56-5-2950(G) to apply. Subsection (G) is a stand-alone provision and is not connected in any way to the implied consent language in subsection (A). The presumptions outlined in § 56-5-2950(G) apply in any prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945, regardless of whether a blood sample was taken under the implied consent statute or through other lawful means. In Appellant's case, he violated Section 56-5-2945 and had a blood alcohol level of .208. To find that the presumption of intoxication instruction is proper in prosecutions where a blood sample was obtained through the implied consent procedures, but that the same instruction is improper in cases where the test results were obtained through a valid search warrant would be absurd. See Florence County v. Moore, 344 S.C. 596, 601, 545 S.E.2d 507, 509 (2001) (citing rule that the court's goal in construing statutes is to prevent an interpretation that would lead to a result that is plainly absurd). There is absolutely no policy reason to find that a presumption of intoxication instruction is warranted only in those cases where the police obtained a sample through implied consent procedures. The trial judge thus properly instructed the jury that they could infer the Defendant was under the influence.

Appellant's comparison of the current case to State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992) is inapposite. In Cribb, the South Carolina Supreme Court found Section 56-5-2950(A) was inapplicable to the defendant's case because he was not arrested until some time

after the blood alcohol test was conducted. 318 S.C. at 521. 426 S.E.2d at 308. While Appellant contends Cribb stands for the proposition that police must comply with the implied consent provision in order to properly instruct the jurors on the inference of intoxication, this constitutes an overly broad view of Cribb. Cribb simply clarified that Section 56-5-2950(A) was not applicable in that case. The State certainly concedes that § 56-5-2950(A) is not applicable in Appellant's case; however, that does nothing to preclude the application of § 56-5-2950(G). Cribb did not address the applicability of the presumption of intoxication in any way.

Similarly. Appellant's reliance on State v. Carrigan, 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985) is misplaced. In Carrigan, the defendant contended the trial judge erred in reading the jury subsections (A) and (B) of the then-current version of Section 56-5-2950. At the time, the language of subsection A included the requirement that:

> The test shall be administered at the direction of a law enforcement officer who has apprehended a person while driving a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor. The test shall be administered by a person trained and certified by the South Carolina Law Enforcement Division, using methods approved by the South Carolina Law Enforcement Division.

Id. at 615. At the time, subsection (B) provided, in pertinent part, "in any criminal prosecution for the violation of § 56–5–2930 relating to driving a vehicle under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time of the alleged violation, **as shown by chemical analysis of the defendant's breath**, shall give rise to the following presumptions. . . ." Id. (emphasis added). Subsection B then listed the presumptions based on the alcohol levels found in the defendant's blood. The Court of Appeals concluded the trial judge erred in reading subsection (A) because the test administered to the defendant was not at the direction of the law enforcement officer who arrested, nor was the test administered by a person trained and administered by the South Carolina Law Enforcement Division, both of which were

required by subsection (A). Id. at 615-16. Similarly, and more importantly, the Court of Appeals found the trial judge erred in charging subsection (B) because the amount of alcohol was shown by a blood test, rather than a test of the defendant's breath, as required by subsection (B). Id. at 616. The Court of Appeals' judgment, thus, was not that the trial judge erred in instructing the jury on the presumptions contained in subsection (B) simply because subsection (A) was not followed. Rather, the Court concluded the trial judge erred in reading subsection (B) to the jury because the State failed to comply with the requirements of subsection (B) that were applicable at the time. This situation is easily distinguishable from Appellant's case, where the State met all requirements of subsection (G). Since the State met all requirements of subsection (G), and there is no requirement in the statute that the blood sample be obtained pursuant to subsection (A) in order for the presumptions to apply, Appellant's argument lacks merit.[1]

Moreover, as discussed in Respondent's Issue I, any error by the trial judge in giving the instruction is harmless in Appellant's case, as the jury was presented with overwhelming evidence of Appellant's guilt. Furthermore, the fact that Appellant was intoxicated was never in controversy at trial. Appellant's defense from opening statement through closing argument was that he was not driving the vehicle at the time of the collision. Appellant's conviction and sentence should be affirmed.

[1] The State would also note that S.C. Code Ann. § 56-5-2950 has been amended seven times since Cribb was decided and eleven times since Carrigan was decided. This further rebuts Appellant's argument that a statutory interpretation supplied by those courts is controlling in Appellant's case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 5, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Court of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001786

THE STATE,

Respondent,

v.

CARMINE JAMES MIRANDA, III,

Appellant.

CERTIFICATE OF COUNSEL

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

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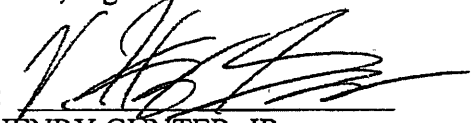
BY: 
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PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: John H. Strom, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211

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

This 5th day of October, 2017.

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