STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Pickens County

Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

APPELLANT

APPELLATE CASE NO. 2017-002563

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in admitting a statement made by Appellant to law enforcement where the evidence demonstrated Appellant was so intoxicated by her prescription medications that she was incapable of knowingly and voluntarily waiving her rights and of voluntarily giving a statement?

II. Did the trial judge err in permitting an expert witness – a pathologist – testify regarding lab test results where the analyst who conducted the actual testing did not testify violating Appellant's Sixth Amendment right to confront the witnesses against her?

III. Did the trial judge err in denying Appellant's request for a brief continuance or recess where "good cause" existed, in light of her serious medical condition and the jail's failure to provide her with her prescribed medication, which rendered her unable to make an intelligent and voluntary decision regarding whether she would testify in her defense, in violation of Appellant's right to due process of law?

STATEMENT OF THE CASE

On October 11, 2016, a Pickens County grand jury indicted Appellant for homicide by child abuse (2016-GS-39-2265). R. 512. The state, represented by Brandi B. Hinton and Caroline H. Newton, called the case for trial on December 11-14, 2017, before the Honorable Perry H. Gravely and a jury. R. 1. John W. DeJong and Daniel M.H. King represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 504, ll. 7-14. Judge Gravely sentenced Appellant to twenty years imprisonment. R. 506, ll. 3-4; R. 514.

On December 15, 2017, Appellant served her notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in admitting a statement made by Appellant to law enforcement where the evidence demonstrated Appellant was so intoxicated by her prescription medication that she was incapable of knowing and voluntarily waiving her rights and of voluntarily giving a statement.

Standard of review

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse a trial judge's ruling on the voluntariness of the confession when the ruling is "so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

Relevant facts

On December 18, 2014, at 11:46 a.m., Pickens County Sheriff's Deputy Rita Burgess and SLED agent Christine Cauthen began interrogating Appellant regarding the death of her grandson, Minor. R. 34, ll. 3-25; R. 48, ll. 18-23; R. 49, ll. 20-22. Burgess advised Appellant of her rights using a form. R. 35, l. 4 – R. 36, l. 13; R. 41, ll. 5-17; R. 50, ll. 1-12 R. 507; State's Exhibit #18. During the course of the interrogation, Appellant explained that she had taken her prescribed oxycodone at 6 a.m. that morning. R. 36, ll. 18-23; R. 40, ll. 17-19; R.50, ll. 16-24;

State's Exhibit #18. Nevertheless, the officers forged ahead with the interrogation. State's Exhibit #18. Deputy Burgess claimed Appellant "seemed very coherent." R. 36, ll. 21-24; R. 39, ll. 15-21. However, she later tempered her opinion to limit Appellant's "coherent responses" to the "beginning" of the interrogation. R. 36, l. 25 – R. 37, l. 2; R. 39, ll. 15-21. Cauthen likewise stated that Appellant appeared coherent at the beginning of the interrogation. R. 51, ll. 5-7.

"At some point" it became clear to Burgess and Cauthen that Appellant was "under the influence of something." R. 37, ll. 3-5; R. 51, ll. 13-14. According to Burgess, Appellant "made a few statements that were - - that were incoherent." R. 37, ll. 8-9; see also State's Exhibit #18 (showing Appellant's slurred speech and non-sensical responses from the beginning of the video). Cauthen described Appellant as no longer coherent when she "seemed to be falling asleep." R. 51, ll. 13-15; R. 53, ll. 16-20; see also State's Exhibit #18 (showing Cauthen repeatedly question Appellant regarding her drowsiness and Appellant showing signs of fatigue, slurring her speech, being thick-tongued, not remembering what she said just moments prior, and saying that she did not understand and could not remember).

Burgess admitted that Appellant's conduct did not suddenly change; instead, "there was a steady and gradual decline in her ability to speak and her speech being slurred." R. 39, l. 25 – R. 40, l. 4; see also State's Exhibit #18 (showing Appellant's ability to comprehend deteriorate under the influence of her prescription medication). Cauthen even admitted that Appellant "just started sliding downhill" during the interrogation. R. 54, ll. 11-15; R. 56, ll. 10-15. Upon questioning, Appellant told the officers that she had taken a valium around 10 a.m. R. 40, ll. 20-24; R. 52, ll. 7-15; R. 52, ll. 16-20. Burgess was adamant that Appellant did not take any medications while Appellant was in her custody, which included from the moment Burgess and

Cauthen picked Appellant up from her home through the interrogation. R. 38, l. 25 – R. 39, l. 14. Thus, it was undisputed that Appellant had ingested prescription oxycontin and valium prior to her interrogation by law enforcement.

In response to what Cauthen described as Appellant's sleepiness, Burgess and Cauthen stopped the interrogation. R. 37, l. 9; R. 51, ll. 19-20; R. 57, ll. 3-6; see also State's Exhibit #18. Burgess then stepped out of the interrogation room and contacted a judge regarding an arrest warrant. R. 37, ll. 10-11. Burgess ultimately obtained an arrest warrant for Appellant and arrested her later that day. R. 38, ll. 2-9; R. 53, ll. 8-10. Cauthen walked Appellant outside to see if she could wake up. R. 51, ll. 22-23; see also State's Exhibit #18. Cauthen and Burgess then resumed the interrogation with Appellant's condition steadily deteriorating. R. 52, ll. 7-9; R. 57, ll. 7-11; see also State's Exhibit #18.

The state argued the statement was admissible because Appellant "was coherent at [the] point" that she was advised of her rights. R. 59, ll. 16-19; R. 169, ll. 8-11. According to the state, when she waived her rights, Appellant "was competent to do so." R. 169, ll. 10-11. The state conceded that "[a]t some point," Appellant became "clearly under the influence of something." R. 59, ll. 20-21; R. 169, ll. 11-14. In the state's view, the interrogation up to when the officers exited the room with Appellant to walk around and get a snack was admissible in light of what the state perceived as a competent waiver. R. 169, ll. 15-18.

Nevertheless, the state asked the judge to admit the entirety of the statement pursuant to Rule 404(b), SCRE. R. 59, ll. 20-23. The state wanted to use Appellant's admittedly incoherent statement to law enforcement to show that she "was not honest and forthcoming about how she uses her oxycodone" in order to "prove motive, intent, and lack of mistake or accident." R. 60, ll. 7-12; R. 169, ll. 19-23. The state claimed it was "essential" to show the video to the jury "not

for the point of showing, you know this is how she acts, but to show that she does not seriously take this medication and its effect seriously." R. 60, ll. 13-16.

Defense counsel noted that when Appellant first got on camera, her speech was already slurred. R. 170, ll. 17-21. Defense counsel emphasized the progression – or regression – of Appellant's cognitive abilities in the video to demonstrate that her lack of comprehension did not change suddenly. R. 170, ll. 17-21. As counsel explained, the evidence was undisputed that Appellant took her prescription for valium "not too long" prior to the officers picking her up from her home and starting the interrogation. R. 170, ll. 21-25. Defense counsel argued for the exclusion of the entire statement because she was intoxicated the entire time. R. 171, ll. 1-21.

Judge Gravely found there was "no question" that "at the first of" the interrogation there was "some little slurring." R. 171, ll. 22-24. However, he thought "her responses to the question and her general conversation" showed "it was voluntary, that she [knew] what [was] going on." R. 171, l. 24 – R. 172, l. 2. He concluded there was "definitely a point where ... the influence of the valium seem[ed] to kick in more based on what she said." R. 172, ll. 3-5. He found that Appellant "definitely, at some point, [became] almost incoherent and mention[ed] something about a 300-degree fever." R. 172, ll. 6-8. He also found that "after the break," she was "much worse." R. 172, ll. 8-9. Thus, the judge found the statement admissible from the point in time that the rights were given until the police took a break, but required some redactions, such as Cauthen's descriptions of how children are accidently killed by adults, due to the Rules of Evidence. R. 176, ll. 18-23.

Discussion

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. Based on the Fifth Amendment's protection,

the United States Supreme Court held that in criminal prosecutions, statements by the accused are not admissible unless the prosecution demonstrates the use of procedural safeguards. Miranda v. Arizona, 384 U.S. 426, 444 (1966). However, the required use of these safeguards is required only when the accused is in custodial interrogation. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda, supra. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002).

The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The

prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: Did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted); see also Withrow v. Williams, 507 U.S. 680, 693-694 (1993). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000) (citations omitted); see also State v. Miller, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007).

Over four decades ago, the South Carolina Supreme Court held "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). According to the Court, "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." Id. Further, the Court stated that "[p]roof of intoxication, short of rendering the accused unconscious of what he is saying,

goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence." Id. Nevertheless, after making these pronouncements of the law, the Court ruled as follows:

> While there is testimony that [Saxon] had been drinking rather heavily and was not acting normally, there is other testimony from which the conclusion may be reasonably drawn that he was not drunk and fully comprehended what he was doing and saying. In fact, [Saxon] testified, and the inferences to be drawn from his own testimony amply support the conclusion that his statement was understandingly and voluntarily given. The testimony was properly admitted in evidence.

Id. at 529-530, 201 S.E.2d at 117. Thus, the Court analyzed the facts presented to the trial judge to determine whether there was evidence that Saxon was "not drunk and fully comprehended what he was doing and saying." This holding contradicted the legal principles previously enunciated, which suggested that unless an individual were intoxicated to the point unconsciousness, then any statements made by the individual were not *per se* inadmissible. The Court's holding in the case rested upon its view that evidence existed in the record that Saxon "was not drunk and fully comprehended what he was doing and saying."

Three years after Saxon, the South Carolina Supreme Court had the opportunity to examine another case in which a statement was allegedly made while the defendant was intoxicated. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976). Collins and a co-defendant were charged with armed robbery of a local store. Id. at 568, 225 S.E.2d at 190-191. There was no dispute that on the day of the robbery, the men "had been drinking heavily." Id. at 568, 225 S.E.2d at 191. Collins was arrested on the day of the robbery for public drunkenness. Id. at 569, 225 S.E.2d at 191. A detective questioned Collins concerning the robbery about an hour after his arrest. Id. According to the detective, he "determined, by means of a field sobriety test, that [Collins] was capable of and did understand his rights before questions were asked." Id. To the contrary, the officer who arrested

Collins "stated that in his opinion, [Collins] was still intoxicated" after being questioned. Id. at 569-570, 225 S.E.2d at 191.

In deciding whether the trial judge abused his discretion in determining the statement by Collins was voluntarily and knowingly given, the South Carolina Supreme Court cited Saxon, supra, for the proposition that "[p]roof of accused's intoxication, short of rendering him unconscious of what he is saying, does not require in every case, that statements he made while in that condition be excluded from evidence." Id. at 572-573, 225 S.E.2d at 193. However, the Court based its ruling on the fact that "[t]he evidence, including the condition of the defendant presented a factual situation which the judge determined unfavorably to the defendant." Id. at 573, 225 S.E.2d at 193. See also, Gladden v. Unsworth, 396 F.2d 373, 381 (9th Cir. 1968) (ordering the state court to conduct a hearing on the voluntariness of Unsworth's statements where the undisputed evidence showed he was "in a state of gross intoxication" at the time of the making of the statements); Reddish v. State, 167 So.2d 858, 863 (Fla. 1964) (holding a defendant's confessions "should not be permitted to stand as evidence against" the defendant where the "totality of all the circumstances, such as the man's physical condition, in combination with the impact of narcotics, as well as the lack of clear-cut testimony regarding his mental condition at the time he gave the statements" meant the confessions "were not obtained in a manner consistent with constitutional standards against compulsive self-incrimination"); State v. Young, 875 P.2d 1119, 1123 (N.M. Ct. App. 1994) (remanding where the trial court erroneously determined the defendant's intoxication was irrelevant to the issue of waiver because "voluntary intoxication is relevant to determining whether a waiver was knowing and intelligent"); State v. Bramlett, 609 P.2d 345, 350 (N.M. Ct. App. 1980) *overruled on other grounds by* Armijo v. State Through Transp. Dep't, 737 P.2d 552 (N.M. Ct. App. 1987) (holding the contradictory testimony from the officers that the defendant was too

intoxicated to be released and was detained for his own protection, but was not so intoxicated that he could not provide a knowing waiver of his constitutional rights "offends the standards of fundamental fairness under the due process clause" "and is unworthy of the degree of belief necessary to sustain a finding of voluntary waiver").

To the extent this Court determines that Saxon stands for the proposition that intoxication just short of unconsciousness may *never* render a statement involuntarily made, Appellant argues against precedent. Appellant urges this Court to review the entire Saxon opinion, which demonstrates the South Carolina Supreme Court determined the trial judge did not abuse his discretion in finding Saxon's statement was voluntary because there was evidence in the record that Saxon was not intoxicated and fully understood what he was doing and saying. Additionally, Appellant points to evidence in the record that her intoxication rendered her unable to understand the import of her constitutional rights and the waiver of those rights.

The video of the interrogation showed Appellant's speech was slurred from the moment she walked into the interrogation room. The video showed a woman who contradicted herself repeatedly. State's Exhibit #18. Within seconds of answering a question, she would forget the answer she had provided. State's Exhibit #18. She constantly mumbled, requiring the officers to request her to repeat her answers multiple times. State's Exhibit #18. Her responses lacked internal coherence and were inconsistent with prior statements and undisputed facts, which the officers realized was result of intoxication, not an attempt to mislead. State's Exhibit #18. Comparing Appellant's conduct during an earlier interrogation, see State's Exhibit #17, with her conduct during the interrogation conducted by Burgess and Cauthen, it is apparent that Appellant was grossly intoxicated due to the use of her prescription medication at the time of the Burgess and Cauthen interrogation.

Even the state admitted that Appellant's speech was slurred and that she struggled to stay awake during the interrogation. R. 446, ll. 9-12. In fact, the state used this interrogation and Appellant's conduct to say that she was "kind of flippant about her medication." R. 446, ll. 9-12. The state told the jurors that the evidence to support Appellant's "flippant" attitude about her medication was evidence in the interrogation "where she's slurring her speech and hard to stay wake." R. 446, ll. 9-12. This was essential to the state's case because even under the state's theory, Appellant did not give drugs to Minor to kill him. R. 445, ll. 10-11. Instead, it was the state's theory that Appellant gave drugs to Minor so that he would sleep. R. 445, ll. 12-13; R. 451, ll. 16-18. Thus, it was necessary for the state to show that Appellant's conduct was "flippant" in connection with her pain medication in order to satisfy its burden of proving extreme indifference beyond a reasonable doubt. Further, the state encouraged the jurors to watch the "three interviews" to see "three very different Angela Brewers." R. 449, ll. 8-11. The state theorized that the "Angela Brewer [who] was there on October the 17th, 2014," when Minor died, "was probably a little bit more like the last interview." R. 449, ll. 10-12. In other words, the state used the interrogation in which Appellant was intoxicated due to ingesting her prescription medication, and in which it was obvious she was intoxicated, to argue to the jury that Appellant was intoxicated while she was tending to Minor on the day he died.

The trial judge erred in admitting Appellant's statement to law enforcement because Appellant's intoxication rendered her unable to voluntarily waive her constitutional rights and unable to know what she was saying when she spoke to police. Within mere hours of the interrogation, Appellant used two prescription narcotics to treat the pain she suffered. Appellant's inability to understand her constitutional rights and what she was saying to police rendered her statement involuntary. The state capitalized on the trial judge's error by using the statement in its

closing to show that Appellant was intoxicated from her use of her prescription drugs during the interrogation to argue that Appellant was intoxicated on the day that she cared for Minor, and to argue that Appellant's intoxication was the equivalent of extreme indifference to human life. Contrary to the judge's ruling, Appellant did not suddenly become intoxicated during the interrogation; rather, she was intoxicated from the very beginning. Therefore, the entire statement should have been ruled inadmissible.

II. The trial judge erred in permitting an expert witness – a pathologist – testify regarding lab test results where the analyst who conducted the actual testing did not testify violating Appellant's Sixth Amendment right to confront the witnesses against her.

Standard of review

"'The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted).

An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant facts

Prior to the pathologist, Dr. Fulcher, testifying, defense counsel objected to any testimony regarding lab tests conducted by NMS Labs in Willow Grove, Pennsylvania. R. 193, l. 2 – R. 194, l. 18. Defense counsel explained that the pathologist rendered his opinion on the cause of death based upon the findings of NMS Labs. R. 193, l. 23 – R. 194, l. 5. Specifically, defense counsel argued the testimony was inadmissible hearsay. R. 194, ll. 6-10. Additionally, defense counsel argued the testimony violated Appellant's right to confrontation pursuant to the Sixth Amendment. R. 194, ll. 11-16. Relying upon Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), defense counsel argued to exclude the expert's testimony regarding the lab results when no one from the lab would testify. R. 194, l. 11 – R. 196, l. 14. Defense counsel explained the pathologist did not conduct any testing and relied exclusively on the results from the lab in Pennsylvania. R. 196, ll. 18-21. NMS Labs issued its report on November 2, 2014, and the pathologist issued his report on November 17, 2014, relying upon the lab report. R. 197, ll. 1-5. Defense counsel argued that permitting the lab report to be used flew "in the face of the Constitution, the Sixth Amendment," "when the person or persons that did the lab reports are not present in court and cannot be tested by cross-examination." R. 197, ll. 12-17. Defense counsel objected to the pathologist's findings, admitting the doctor could testify to anything he found at the autopsy, but objected to his findings regarding blood levels because the doctor had not conducted those tests. R. 198, ll. 8-12.

The state argued Melendez-Diaz, supra, was inapplicable because the state intended to offer the pathologist's testimony under Rule 703, SCRE. R. 199, ll. 3-8. According to the state, this situation was distinguished from Melendez-Diaz, supra, because the state would present a witness the defendant could confront – the pathologist. R. 199, ll. 13-15.

The judge held the testimony was admissible. R. 201, ll. 4-7. The judge determined "the confrontation clause [was] met by the cross-examination of the witnesses here." R. 201, ll. 6-7. Prior to Dr. Fulcher testifying, defense counsel renewed his objection, and the judge maintained his earlier ruling. R. 383, ll. 5-16.

Thereafter, Dr. Fulcher explained how he handles autopsies requiring blood tests. He noted that he is "a member of a private group" that "charge[s] money for all these services to cover [their] costs." R. 390, ll. 13-16. He and his partner "decided as a protocol to use" whom the two believed was "the best laboratory in the country to run all [their] specimens." R. 390, ll. 17-18. According to Dr. Fulcher, that best laboratory in the entire country was "National Medical Services, ... located in a suburb of Philadelphia." R. 390, ll. 19-20. He went on to explain that he used NMS instead of SLED because SLED was "slow." R. 390, ll. 21-25. Next, Dr. Fulcher went on to vouch for the work performed by NMS.

> I believe in them. They have been the preeminent lab in uncovering novel opiates. And one of the best things I like about them is they take specimens from the entire country. So they see the really weird stuff first, because they do more volume across the country.
>
> They've got a handful, like five or six people that have died from this really weird opiate in two rural counties in Pennsylvania. It happened in a week period and went away. They got a test for that compound. If you sent that anywhere else, they wouldn't find it.
>
> So when I get their report back - - I can never say a report is absolute, you know. Only - - only God knows what is absolute truth. And we are trying to get as best we can to that. However, as far as our ability to test, this represents the finest lab in this country that we can send specimens to.

R. 391, ll. 7-22.

Dr. Fulcher then informed the jurors about the results of the testing conducted by NMS labs. Specifically, he informed the jurors of the specific levels of oxycodone and oxymorphone found in Minor's blood, ocular fluid, and gastric contents. R. 392, ll. 2-21. When asked to

explain what "those numbers" meant, Dr. Fulcher read from the NMS report. R. 393, l. 9 – R. 394, l. 25.[1] Thereafter, Dr. Fulcher informed the jurors that the amount of drugs in Minor's system caused his death. R. 395, ll. 13-15.

On cross-examination, Dr. Fulcher stated he sent the specimens to the Pennsylvania lab via FedEx. R. 408, ll. 12-16. He elaborated:

> I package them in a box. I seal the box. I initial the box. I put it in a sealed envelope for FedEx marked as biohazardous substances. It's next day aired to the lab. They open the package, document that the box hasn't been tampered with, it's still sealed, and start their analysis documenting their processing of the specimens along the way.

R. 408, l. 20 – R. 409, l. 1. He admitted he was not present when the package was opened. R. 409, ll. 2-4. He also admitted that he was not present when the tests were performed and could not address any questions related to the controls or protocols that were used in this particular case. R. 409, ll. 5-15. He admitted to the ever-present possibility of contamination. R. 409, ll. 16-19.

During re-direct examination, the state sought to clean up the mess it had created with using Dr. Fulcher to testify about the NMS lab results:

Q. Dr. Fulcher, how often do you use this lab in Pennsylvania?

A. 100 percent of the time, which would approximately be 700 case - - well, 650 cases a year.

Q. Okay. And on those 650 cases, do you always give a cause of death and a manner of death?

A. I do, yes.

Q. And do you sign that report?

A. I do.

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[1] Defense counsel objected again when the witness began reading from the NMS lab report. R. 393, ll. 12-16. The judge overruled the objection. R. 393, ll. 21-23.

Q. Would you add your signature to the report if there was any concern of you that this lab does not appropriately test substances?

A. At some point, you have to trust people to do the right thing, so, yes.

Q. Do you have any concern that this lab does not appropriately test substances?

A. I do not. I've had conversations with their director, PhD toxicologists about more unusual substances showing up. And I feel like they're offering me the best product I can purchase.

R. 413, ll. 6-25.

In closing, the solicitor likened the NMS lab to the SLED lab about which the jurors had heard when a SLED analyst testified regarding the lab's protocols and methodologies employed for certain tests. The solicitor informed the jurors that the SLED testing conducted in the case on liquid found in Minor's sippy cup was "solid and reliable evidence." R. 447, ll. 1-3. According to the solicitor, the SLED analyst "discussed at length that the testing that he does is reliable. That it is peer reviewed. That it is incredibly scientific." R. 447, ll. 4-6. The SLED agent also "testified that he takes putting his signature on a report very seriously. And unless he firmly believes that that is what happened, he's not going to attach his signature to it. And he's not going to risk his professional reputation on a report that he doesn't think is accurate. And Dr. Fulcher told you the same thing." R. 447, ll. 16-22.

Continuing on this point, the solicitor admitted there was "some question about sending it off to a lab, a nationally-recognized lab." R. 447, ll. 23-24. Any question was absolved by Dr. Fulcher's signature – Dr. Fulcher, according to the solicitor, said "I would not attach my signature to the thousands of reports that I give if I didn't believe in what that lab was doing, if I didn't believe it was secure." R. 447, l. 24 – R. 448, l. 2. Thereafter, the solicitor recounted Dr. Fulcher's testimony regarding the NMS Lab report. R. 448, ll. 3-11.

Discussion

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

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

In Davis, the United States Supreme Court sought to "determine more precisely which police interrogations produce testimony" that is barred by the Confrontation Clause. 547 U.S. at 813. During a 911 call, the victim identified the defendant as her attacker. Id. However, the victim did not testify at trial. Id. at 819. The Davis Court ruled the 911 call was admissible. Id. at 826-30. The Court stated, "A 911 call . . . and at least the initial connection with a 911 call is ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances

requiring police assistance." Id. The Court noted an important distinction between calls for emergency assistance and interrogations by the operator about the facts of the incident. Id. at 828-29. The Court stated, "This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot... evolve into testimonial statements once that purpose has been achieved." Id. at 828 (internal quotations and citations omitted). The Court noted that after the operator told the victim to be quiet and "proceeded to pose a battery of questions," those statements could be construed as testimonial. Id. at 828-29. The Court noted that trial courts "should redact or exclude the portions of any statement that have become testimonial." Id. at 829.

As explained by the Court, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822. Conversely, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. However, in Bryant, 562 U.S. at 358, the Supreme Court explained "there may be *other circumstances*, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." (emphasis in original). When a court makes "the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." Id. at 358-359. According to the Court, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." Id. at 359.

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

"The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution." Id. at 361 (internal citations omitted). This is because "the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished," and "the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." Id. Like an excited utterance, "[a]n ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency." Id.

Examining whether an on-going emergency existed, the Court explained the inquiry is "highly context-dependent." Id. at 363. According to the Court, the examination must include whether the threat is to police and the public. Id. "[T]he duration and scope of an emergency may depend in part on the type of weapon employed." Id. at 364. Even the "medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the

ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." Id. at 365. Additionally, the "victim's medical state ... provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public." Id.

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

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

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

of the phrasing of the question, the victim necessarily has prosecution in mind when she answers." Id. at 368.

The United States Supreme Court analyzed a case similar to the one sub judice – testimony regarding a forensic lab report from a witness who did not conduct the actual testing that resulted in the report. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). "The Massachusetts courts admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine." Id. at 307. The Court was to answer whether those affidavits were testimonial, meaning the affiants were witnesses whose presence was required pursuant to the Sixth Amendment. Id. Police found numerous bags containing a white substance on Melendez-Diaz's person and in a location where he had been. Id. at 308. The police submitted the evidence to a state laboratory for chemical analysis. Id. During Melendez-Diaz's trial for distributing and trafficking cocaine, the prosecution presented three "certificates of analysis" showing the results of the chemical testing performed on the evidence at the state lab. Id. The certificates indicated the only key facts necessary for the prosecution of Melendez-Diaz – the weight of the substance and that the substance was cocaine. Id. Melendez-Diaz objected to the certificates as violating his right under the Confrontation Clause. Id. at 309.

The Supreme Court held there was "little doubt" that the certificates fell "within the core class of testimonial statements" described in Crawford. Id. at 310. While the documents were labeled certificates, the documents were "quite plainly affidavits." Id. The certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" Id. at 310-311 (quoting Davis, 547 U.S. at 830)). "[N]ot only were the affidavits 'made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial,'" but under state law, the sole purpose of the affidavit was to provide evidence of the composition, quality, and net weight of the substance. Id. at 311 (quoting Crawford, 541 U.S. at 52). Thus, the Court held Melendez-Dias was entitled to be confronted with the analysts at trial. Id.

The Court rejected the argument that forensic analysts were excepted from the Confrontation Clause because they conducted so-called "neutral scientific testing." Id. at 318. The Court explained "[f]orensic evidence is not uniquely immune from the risk of manipulation." Id. Noting that most laboratories producing forensic evidence are administered by police agencies and report to the heads of those agencies. Id. As a result, the forensic scientists "sometimes face pressure to sacrifice appropriate methodology for the sale of expediency." Id. (internal quotation omitted). Thus, "[c]onfrontation is one means of assuring accurate forensic analysis." Id. "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." Id. at 319. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." Id. at 320.

Particularly important for the case sub judice, the Court pointed out that the affidavits submitted against Melendez-Diaz were "bare-bones" stating only that the substance was cocaine. Id. "At the time of trial, [Melendez-Diaz] did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." Id. Such areas are ripe for cross-examination to explore the exercise of judgment and risk of error in the chosen methodology. Id.

Next, the Court rejected the argument that the affidavits were admissible because they were akin to the types of official and business records admissible at common law. Id. at 321. The Court explained that while "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status," such documents may not be admitted "if the regularly conducted business activity is the production of evidence for use at trial." Id. (citing Palmer v. Hoffman, 318 U.S. 109 (1943)). Thus, the analysts' certificates did not qualify as business or public records. Id. at 321-322.

Confronted with a variation on the issue presented in Melendez-Diaz, the Supreme Court held the Confrontation Clause affords an accused the right to be confronted with the actual analyst who conducted the forensic chemical testing of his blood which was used against him in his driving while intoxicated (DWI) trial – not a "surrogate witness." Bullcoming v. New Mexico, 564 U.S. 647, 651 (2011). Following an automobile accident involving Bullcoming, the police arrested him for DWI and obtained his blood for chemical testing. Id. at 652. To determine Bullcoming's blood alcohol level, the police sent the sample to a state lab. Id. at 652-653. The lab produced a standard form identifying the participants in the testing and the forensic analyst's finding. Id. at 654. The form was certified by the forensic analyst. Id. At Bullcoming's trial, the state introduced the certified form against Bullcoming as a "business record" through another analyst who neither observed nor reviewed the actual analyst; the state did not call the actual analyst who conducted the testing and produced the form. Id. at 655.

The Supreme Court held the "surrogate testimony" of the second analyst could not satisfy the Confrontation Clause. Id. at 659-662. The Court rejected the argument that the analyst was a "mere scrivener" of what the gas chromatograph machine generated. Id. at 659-661. For example, the actual analyst's report indicated the sample arrived intact with the seal unbroken,

the sample matched the lab number, that he performed a particular test on the sample, and that he adhered to certain protocol. Id. at 660. These representations were exactly the types of areas for a lawyer to probe on cross-examination. Id. Further, the Court rejected the suggestion that an analyst's report drawn from machine-produced data overcomes the Sixth Amendment bar because the Constitution requires the reliability of such evidence be tested by the crucible of cross-examination. Id. at 661.

Addressing the argument that the surrogate witness was qualified as an expert witness with respect to the gas chromatograph machine and the lab's procedures, thus enabling his testimony to satisfy the Confrontation Clause, the Court held the "surrogate testimony of the kind" the witness "was equipped to give could not convey what [the actual analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed." Id. "Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." Id. at 661-662. The Confrontation "Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Id. at 662.

The South Carolina Supreme Court applied Melendez-Diaz and Bullcoming in State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013). Brockmeyer objected to a witness reading into evidence computerized chain-of-custody logs of items that were introduced by the state. Brockmeyer, 406 S.C. at 339-340, 751 S.E.2d at 653. The Court concluded the chain-of-custody records at issue were non-testimonial. Id. at 352, 751 S.E.2d at 660. Reading Melendez-Diaz very narrowly, the Court concluded the chain of custody documents "were not created 'for the sole purpose of providing evidence against the defendant.'" Id. (quoting Melendez-Diaz, 557

U.S. at 323). Additionally, the Court was persuaded that the documents were not testimonial because they did "not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items." Id. Thus, the Court concluded "the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their 'primary purpose' is not to constitute evidence in a criminal trial." Id. The statements were "exempt from the Confrontation Clause." Id.

In a case analyzing the connection between the Confrontation Clause and expert testimony, the United States Supreme Court addressed whether an expert who testified that a DNA profile produced by an outside laboratory matched a profile produced by the state police lab using a sample of the defendant's blood violated the Confrontation Clause. Williams v. Illinois, 567 U.S. 50, 56 (2012). Writing for four justices, Justice Alito noted that "an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true" as long as the party who calls the expert introduces other evidence establishing the facts assumed by the expert. Id. at 57. The Court carefully crafted the opinion to explain that "this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted." Id. at 57-58. "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." Id. at 58.

Very important to the resolution of the Williams case, the Court held the expert did not testify to the truth of the matter concerning the work done by outside laboratory in the case nor did the expert "vouch for the quality of the [outside laboratory]'s work." Id. at 71. As

mentioned, it was critical that the expert's testimony concerning the conclusions of the outside laboratory was not offered for the truth of the matter, but merely to show what the expert relied upon on arriving at her own conclusions. Id. at 71-72. Finally, and perhaps most significantly, the Court explained its conclusion was dictated by the fact that Williams was tried by a judge, not a jury. Id. at 72.

The Court explained the trier of fact – the judge – would have understood that the expert's statements regarding the work conducted by the outside laboratory were not offered as substantive evidence. Id. The Court held that if Williams had been tried by a jury "there would have been a danger of the jury's taking [the expert's] testimony as proof that the [outside laboratory] profile was derived from the sample obtained from the victim's vaginal swabs." Id. "Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could *not* have gone to the jury." Id. (emphasis added). Where Williams was tried by a judge only, the Court "assume[d] that the trial judge understood that the portion of [the expert]'s testimony ... was not admissible to prove the truth of the matter asserted." Id. at 72-73.

Recognizing that its opinion had the potential to open the door to abuse – allowing an expert to express an opinion based on factual premises not support by any admissible evidence and revealing the out-of-court statements on which the expert relied – the Court posited "four safeguards to prevent such abuses." Id. at 79-80.

> First, trial courts can screen out experts who would act as mere conduits for hearsay be strictly enforcing the requirement that experts display some genuine "scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." Second, experts are generally precluded from disclosing inadmissible evidence to a jury. Third, if such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises. And fourth, if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that

> are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact.

Id. at 80-81 (internal citations omitted).

Particularly helpful for resolution of the case sub judice is the Tenth Circuit Court of Appeals' opinion in United States v. Garcia, 793 F.3d 1194 (10th Cir. 2015). Garcia challenged the admissibility of a "gang expert" whose testimony was based on conversations with gang members. Garcia, 793 F.3d at 1211. Garcia argued the expert's testimony consisted off parroting testimonial hearsay from those he had interviewed. Id. The Tenth Circuit explained that "[s]pecial considerations arise under the Confrontation Clause in the context of expert testimony." Id. at 1212. The relevant rule of evidence in federal court, much like the South Carolina rule, permits an expert to rely on testimonial hearsay; however, the rule cannot override the Confrontation Clause. Id. Thus, the Tenth Circuit reasoned that to reconcile the rule and the Confrontation Clause, the expert must exercise independent judgment in assessing and using the hearsay to reach an expert opinion. Id. In this way, "[t]he expert's opinion will be an original product that can be tested through cross-examination." Id. (citing United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009)).

In South Carolina, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Rule 703, SCRE. Nevertheless, the Supreme Court has held that "merely because testimony does not violate applicable rules of evidence does not necessarily mean it meets constitutional standards." State v. Hutto, 325 S.C. 221, 221, 481 S.E.2d 432, 433 (1997). Here, Dr. Fulcher's testimony

regarding the testing and results of that testing by NMS Labs violated Appellant's right to confront the witnesses against her.

The lab results were testimonial in nature and Appellant did not have a prior opportunity to cross-examine the author of the statements contained within the lab report. The blood, ocular fluid, and gastric contents were sent to NMS Labs from Dr. Fulcher who was acting in his capacity as a medical examiner for Greenville County investigating the death of Minor. Dr. Fulcher admitted that he could have sent the specimens to SLED, the state lab, but he declined to do so because SLED is too slow for his liking. The primary purpose of the lab report from NMS Labs was to establish past events that were potentially relevant to later criminal prosecution. The lab report was made under circumstances that would lead an objective witness reasonably to believe that the report, and the statements contained therein, would be available for use at a later trial. While the report was not admitted into evidence, it was clear from the testimony of Dr. Fulcher that the report was a formal document.

Repeatedly, Dr. Fulcher vouched for the reliability of NMS Labs. He called the lab the "best in this country" and his frequent praise of the lab actually grew wearisome. His glowing praise of the lab included his personal guarantee of the lab technician's abilities, which the solicitor used in closing argument to ask the jurors to trust Dr. Fulcher's testimony regarding the lab tests. Although Dr. Fulcher was equipped to interpret the lab results for his purposes related to the autopsy, he was not equipped to give the testimony that would have been necessary from the lab technician who performed the actual tests – what the analyst knew, what the analyst observed about the testing, and the particular test used. Not presenting the actual analyst prevented defense counsel from cross-examining the analyst on the lack of proper training, any

deficiencies in judgment, and the risk of error in the chosen methodology – all areas protected by the Confrontation Clause.

There can be little question that the lab results testified to by Dr. Fulcher were offered for the truth of the matter asserted. The results also were not offered simply to explain Dr. Fulcher's analysis or determination for the cause of death. The results were offered to inform the jury of the drug levels present in Minor's blood, ocular fluid, and gastric contents. Thus, unlike the DNA results offered in Williams, supra, the lab results presented in the instant case were offered for the truth of the matter asserted. Additionally, the Supreme Court relied heavily upon the fact that Williams was tried by a judge only, not a jury. As the Court explained, had Williams been tried by a jury, the evidence as presented – without the calling of the analyst who arrived at the result relied upon by the other analyst – could not have gone to the jury. Appellant was tried by a jury, not a judge, who would have been able to discern when evidence was not being offered for the truth of the matter asserted. In fact, in closing, the solicitor used the lab test results to support the criminal charge against Appellant – that Minor died as a result of a drug overdose at the hands of Appellant. The jury was informed by Dr. Fulcher of the pristine reputation of NMS Labs and the unimpeachable results achieved in this case, but Appellant was unable to explore the areas guaranteed to her by the Confrontation Clause including challenging the analyst's competency and judgment.

III. Violating Appellant's right to due process of law, the trial judge erred in denying Appellant's request for a brief continuance or recess where "good cause" existed, in light of her serious medical condition and the jail's failure to provide her with her prescribed medication, which rendered her unable to make an intelligent and voluntary decision regarding whether she would testify in her defense.

Standard of review

"'The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.'" State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005)). "'An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.'" Id. (quoting State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law."). Even if there was no evidentiary support, "'[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.'" Geer, 391 S.C. at 190, 705 S.E.2d at 447 (quoting State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005)); see also State v. Wyatt, 317 S.C. 370, 372-373, 453 S.E.2d 890, 891-892 (1995) (stating that error without prejudice does not warrant reversal).

Relevant facts

After the state rested its case, defense counsel requested a brief continuance or recess to permit Appellant to resume her medication in order to make a knowing and voluntary decision regarding whether she would testify or exercise her constitutional right to silence. R. 418, l. 19 – R. 420, l. 25. Counsel explained that when the trial started on Monday the judge had Appellant

taken into custody. R. 418, ll. 20-21. However, the jail had not permitted Appellant to take any of her medications as prescribed. R. 418, l. 24 – R. 419, l. 1. Specifically, Appellant was prescribed Cymbalta, Trazodone, a generic Depakote, blood pressure medicine, and heart medicine. R. 419, ll. 1-20. Counsel explained that Appellant did not sleep at all the night before the state rested its case, and that her "fearfulness" regarding not taking her blood pressure and heart medications had "overridden to some degree her ability to function and make decisions." R. 419, ll. 11-18. Of course, the lack of Cymbalta and Trazodone also affected Appellant's ability to make decisions. R. 419, ll. 18-20.

Defense counsel explained that he had discussed with Appellant her right to testify over the course of the case. R. 420, ll. 3-6. During the court's afternoon break, he discussed the matter with Appellant again, and she indicated her brain was "totally addled" because she could not think and could not make a decision. R. 420, ll. 6-12. In light of her condition, Appellant asked defense counsel to make the decision for her. R. 420, ll. 13-16. Defense counsel was concerned that Appellant was "not in a state of mind to make the decision to testify or not to testify." R. 420, ll. 19-22. Noting that it was 2pm on Wednesday afternoon, counsel requested the court to adjourn for the day to allow Appellant to resume her medication. R. 420, l. 23 – R. 421, l. 3. When court resumed the following morning, the court could inquire regarding her decision to testify. R. 421, ll. 1-3.

The state argued the request was "an unnecessary delay" and that there had been "no real evidence that she can't effectively communication with the court or with her attorneys." R. 480, l. 25 - 481, l. 2. In response, defense counsel explained that he had "noticed a significant difference" her conduct on Wednesday than during other times of the representation. R. 422, ll.

16-17. He specified that her conduct was different in "her types of questions, and her number of questions" and that she had a "much different personality." R. 422, ll. 16-20.

Thereafter, the judge engaged Appellant in a colloquy. Appellant explained that she took Cymbalta twice a day, Depakote once at night, two blood pressure pills in the morning, Simvastatin at night, a heart pill every day, Trazodone, and an aspirin for her heart. R. 423, ll. 16-22. Trazodone is a mood stabilizer, which was prescribed by Appellant's psychiatrist. R. 423, l. 23 – R. 424, l. 8. Appellant suffered from bipolar disorder and post-traumatic stress disorder. R. 424, l. 14. Trazodone and Cymbalta worked together to stabilize her mood. R. 424, ll. 13-14. Appellant explained that in light of her not receiving her medicine, she had not slept and was enduring significant pain. R. 425, ll. 12-17. The medicines also helped her concentrate and think in an orderly fashion. R. 425, ll. 18-21. When Appellant did not take her medicine, her mental illnesses would manifest in her inability to focus and concentrate. R. 426, ll. 2-6. The medication also assisted her in "get[ting her] words out like they're supposed to be out." R. 426, ll. 6-7.

Appellant admitted that she had communicated with her lawyers throughout the trial. R. 427, ll. 4-11. However, she explained she had difficulty following some of the testimony of the witnesses. R. 427, ll. 12-25. She explained it would take her longer to process information. R. 428, ll. 1-5. Further, Appellant noted that she had taken her medicine on Monday, prior to being taken into custody; therefore, she had only missed a few doses and re-starting her medicine on Wednesday afternoon would catch her up. R. 428, ll. 6-13.

Judge Gravely refused to grant Appellant's request for a brief recess or continuance to permit Appellant to take her prescribed medication so that she could make an informed decision about whether to testify. Judge Gravely determined that based on his questions and her

responses, it found it "appropriate for her to decide whether she needs to testify or not." R. 428, l. 23 – R. 429, l. 3. Thereafter, he immediately proceeded into a colloquy with Appellant on her constitutional rights. R. 429, l. 4 – R. 431, l. 22. Judge Gravely gave Appellant "a few minutes" to discuss her decision with her counsel. R. 431, ll. 23-24. Appellant then told Judge Gravely that she would not testify. R. 432, ll. 15-16.

Discussion

The Fourteenth Amendment to the United States Constitution guarantees criminal defendants the right to due process of law. U.S. Const. amend. XIV. "The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon "a showing of good and sufficient legal cause." Rule 7(c), SCRCrimP. As such, "[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006)("An abuse of discretion occurs when the trial court's ruling is based on an error of law").

"It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case." State v. Meggett, 398 S.C. 516, 523, 728

S.E.2d 492, 496 (Ct. App. 2012)(quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," the decision must rest upon "the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafitr, 376 U.S. 575, 589 (1964).

The South Carolina Supreme Court recently decided a case concerning the granting of a continuance. In Winkler v. State, 418 S.C. 643, 659, 745 S.E.2d 686, 695 (2016), the Court held the trial judge erred in failing to grant Winkler an extension of time in order to investigate evidence of brain damage. After Winkler was convicted, he filed an application for post-conviction relief and was appointed counsel. Id. Approximately two months into the representation, counsel suspected Winkler may suffer from brain damage. Id. at 660, 745 S.E.2d at 695. Counsel requested funding to investigate, which was approved, and engaged a neuropsychologist. Id. The neuropsychologist recommended neuroimaging and consulting a neurologist or neuropsychiatrist. Id. at 660, 745 S.E.2d at 696. Counsel, thereafter, requested funding for neuroimaging. Id. The judge approved the request. Id. Subsequently, counsel moved to extend the deadlines in the scheduling order by ninety days, explaining the testing and analysis would require approximately ten weeks. Id. at 660-661, 745 S.E.2d at 696. The judge extended the deadline for filing an amended application, but refused to extend the PCR trial date. Id. at 661, 745 S.E.2d at 696.

Although Winkler obtained the recommended MRI scan, he was unable to obtain the recommended PET scan because of elevated blood glucose levels. Id. Thereafter, counsel began working to treat Winkler's previously undiagnosed and untreated diabetes. Id. Despite Winkler receiving diabetes treatment, weeks later, a physician explained his blood sugar was still too high

to perform an accurate study of his brain, and that an additional six to eight weeks of treatment would be required, followed by an additional six to eight weeks for analysis. Id. Counsel filed a second motion to extend the deadlines, requested a continuance of six months to file his final amended PCR application and adjustments of other dates, including the trial date. This request was denied. Id. at 662, 745 S.E.2d at 696.

The Supreme Court explained that the PCR statute, much like the Rules of Criminal Procedure, provided that additional time should be granted "if 'good cause is shown to justify a continuance.'" Id. at 663, 795 S.E.2d at 697 (quoting S.C. Code Ann. § 17-27-160(c)). The Court found the PCR court abused its discretion in denying Winkler's second motion for additional time because Winkler presented "good cause" for the continuance. Id. The Court emphasized the diligence with which counsel acted at each stage. Id. The Court found no evidence to support the PCR judge's finding that PCR counsel had "'ample opportunity'" to investigate and develop the evidence related to potential brain damage. Id. In fact, the Court found "it would have been impossible for PCR counsel to obtain PET scans in time to have an expert review them and be prepared to testify at the PCR trial." Id. Thus, Winkler provided "good cause" to justify a continuance. Id. According to the Court, the PCR court's denial of the continuance request "left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler's brain damage." Id.

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), the South Carolina Supreme Court held the trial court abused its discretion in denying McMillian's motion for continuance in order to obtain the transcript of his first trial, which ended in a hung jury, in order to prepare for his second trial. McMillian requested the transcript timely, but the second trial

started prior to his receipt of the transcript. Id. at 19, 561 S.E.2d at 603. He moved for a continuance to obtain the transcript in order to impeach the witness against him, but this request was denied. Id. The Court explained that "[t]he only 'neutral' witness for the state during McMillian's second trial was Dorothy Williams Rumph." Id. at 21, 561 S.E.2d at 604. As such, the Court found "her credibility was essential to McMillian's defense." Id. This fact was reinforced by the fact that the first jury deadlocked, 8-4, after re-hearing her testimony. Id. According to the Court, "[t]he crucial nature of Rumph's testimony cannot be overstated." Id. In fact, the Court concluded "the verdict hinged upon her credibility, and that McMillian was hindered in his ability to impeach her" without the transcript from the first trial. Id. at 23, 561 S.E.2d at 605.

In another continuance case, State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989), the South Carolina Supreme Court held the trial judge erred in failing to grant a continuance. Tanner and Taylor were in a car accident in which two people died. Id. at 461, 385 S.E.2d at 833. At trial, the evidence was conflicting as to whether Tanner or Taylor was the driver, with Tanner's defense being he was not the driver. Id. Although Tanner's counsel was aware that blood, skin, and hair samples were taken from the car in which he and Taylor were occupants, the solicitor informed counsel that the samples were lost or misplaced. Id. at 462, 385 S.E.2d at 834. Ten minutes before the pre-trial hearing, SLED brought the samples to court, and defense counsel learned of their availability. Id. Requesting a continuance, Tanner's counsel asked to conduct an independent examination of the samples, or at least to wait for a SLED analysis. Id. Denying the request, the judge ruled the state could not use the samples in its case against Tanner. Id.

The Court found that the trial judge abused his discretion in denying the defense's motion for continuance because the judge failed to consider the potential exculpatory value of the samples. Id. at 463, 385 S.E.2d at 834. In light of Tanner's defense that he was not the driver, the samples were "critical" to the case because "[a] testing of the samples could have supported Tanner's contentions that he was merely a passenger by demonstrating that some of Ms. Taylor's hair or blood was located on the driver's side of the car. Discovering who the samples belonged to and the samples' exact location in the car may also have aided Tanner's accident reconstruction expert in arriving at his opinion about who was driving." Id. Thus, the Court held, "the eve of trial production of these samples warranted the granting of a continuance so that the defendant could adequately ascertain the samples' full evidentiary harm," and that "[n]o real harm would have befallen the state from this continuance." Id.

The Court held a defendant was entitled to a continuance where his attorneys were incapacitated due to illness. Varn v. Green, 50 S.C. 403, 403, 27 S.E. 862, 862 (1897). One attorney was "confined to his bed and unable to attend court," and the other, "who, although attending court was unable to articulate above a whisper, and only then with great pain, owing to an attack of grip and sore throat." Id. The trial judge refused to grant the continuance request because the case "had been so long upon the docket." Id. "Considering all the circumstances," the Court held the defendant was entitled to a continuance of the case on account of the illness of his counsel, and that the circuit judge abused his discretion in forcing the case to trial under the circumstances." Id. The Court concluded the judge committed an error of law by allowing his exercise of discretion "be controlled by his custom to require clients to employ other counsel when the counsel engaged were too sick to conduct the cause, and the cause had been long on the docket." Id.

The Court found error in refusing to grant a continuance where the defendant's wife, who was a crucial witness in the case, was unable to attend court due to her advanced stage of pregnancy. State v. Williamson, 115 S.C. 315, 315, 105 S.E. 697, 698 (1921). Wife's doctor submitted an affidavit, stating it would be dangerous for her to testify at the trial. Id. at 315, 105 S.E. at 697. However, it was undisputed, she was "a most important witness for her husband; the killing of [the decedent] having occurred on account of alleged opprobrious language used to her by him a few days before the killing, ... and she was present and witnessed the homicide." Id. The Court held the trial judge "was manifestly in error in not continuing the case, on showing made and under all of the facts and circumstances of the case." Id. at 315, 105 S.E. at 698.

As noted by the solicitor, defense counsel's request for a continuance in the instant case involved concerns regarding Appellant's competency to stand trial. An individual's constitutional right to due process of law as provided in the Fourteenth Amendment to the United States Constitution prohibits the conviction of an incompetent defendant. Medina v. California, 505 U.S. 437, (1992); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). Therefore, states must provide procedures adequate to protect this right. Pate, 383 U.S. at 378. South Carolina statutory law provides that whenever a judge "has reason to believe that a person on trial before him, charged with the commission of a criminal act ... is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or assistant in his own defense as a result of lack of mental capacity," the judge *shall* order an examination of the individual by the Department of Mental Health. S.C. Code Ann. § 44-23-410. The test for determining competency to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." State v. Weik, 356 S.C. 76, 81, 687 S.E.2d 683, 685

(2002) (citing Dusky v. United States, 362 U.S. 402 (1960)); State v. Bell, 293 S.C. 391, 395-396, 360 S.E.2d 706, 708 (1987). Competency to stand trial relates to the time the defendant is before the court for trial, not the time of the alleged offense. Monahan v. State, 365 S.C. 130, 616 S.E.2d 422 (2005).

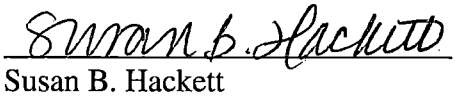
The trial judge abused his discretion by denying Appellant's brief recess or continuance request where Appellant established good cause for the continuance. At the time of the request, the record was replete with evidence of Appellant's medical conditions and her prescription medications. Appellant's neurologist was treating her for "neck pain, shoulder pain, arthritis, carpal tunnel syndrome, lumbar radiculopathy, which is a pinched nerve, and then herniated lumbar disk." R. 258, ll. 1-5. The neurologist indicated he had prescribed oxycontin for Appellant's pain management. R. 258, ll. 6-22. In addition to the oxycontin prescribed by the neurologist, Appellant's husband and daughter testified about additional medications that Appellant took. R. 121, l. 17 – R. 122, l. 3 (Robby Brewer testifying about Appellant's "several different medicines" and that some were kept "in a day-by-day box" and others were in her pocketbook); R. 144, l. 20 – R. 145, l. 8 (Callen Harrison describing Appellant's pills). When defense counsel requested the brief recess, Appellant provided additional information regarding the prescription medications she required. Those prescriptions included two medicines, Cymbalta and Trazodone, that affected Appellant's brain and her ability to process and reason. Thus, Appellant's mental and cognitive capacity was at risk due to the jail's refusal to provide her with her prescribed medications.

Defense counsel repeatedly expressed his fear that Appellant was unable to make an informed decision regarding whether to testify in her own defense – presently – due to her inability to think as a result of her lack of prescription medications. The evidence presented by Appellant established "good cause" to overcome any desire by the state to continue working through the

afternoon. It was 2:30 p.m. on Wednesday, and defense counsel asked to adjourn for the afternoon and reconvene in the morning after Appellant received her prescribed medications. Counsel was not requesting an inordinate delay or an unreasonable delay. He merely wanted to delay the court's inquiry regarding Appellant's desire to testify until the following morning after she received her medicine. The trial judge abused his discretion in denying Appellant's request for a continuance where Appellant presented good cause – her mental capacity, due to a lack of medication – to continue the case.

CONCLUSION

Appellant respectfully requests this Court reverse her conviction and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of June, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

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This 3rd day of June, 2019.