STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Lexington County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2018-000850

THE STATE,

Respondent,

vs.

ERIC EMANUEL ENGLISH,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge correctly and properly admitted into evidence medical records containing the results of testing conducted at the requests of Appellant and another individual because the records, which were generated and kept in the regular course of Lexington Medical Center's business and which contained the results of testing conducted solely for purposes of medical diagnosis and treatment, did not constitute inadmissible hearsay, were inherently reliable, and were nontestimonial in nature, which meant their admission did not violate Appellant's right to confrontation even without the testimony of the analysts who conducted the testing.

STATEMENT OF THE CASE

In March of 2014, Appellant Eric Emanuel English was arrested following an investigation into allegations he engaged in sexual intercourse with his biological daughter when she was just seven years old. In October of 2017, the Lexington County Grand Jury indicted English for one count of first-degree criminal sexual conduct with a minor. On January 8, 2018, a jury trial was commenced in the Lexington County Court of General Sessions with the Honorable Eugene C. Griffith, Jr., circuit court judge, presiding. Appellant was not present at that time, and the trial proceeded forward in his absence. At the conclusion of the three-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant and sealed the sentence. Subsequently, Appellant was apprehended, and, on April 9, 2018, a sentencing hearing was conducted. During the hearing, the trial judge unsealed Appellant's sentence and imposed a forty-year term of imprisonment. Thereafter, defense counsel moved for reconsideration of Appellant's sentence, and a hearing was held on the motion on April 27, 2018. However, at the conclusion of the hearing, the trial judge declined to reconsider Appellant's sentence. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the morning of March 4, 2014, Nurse Lee Lamb was on duty in the health room at the elementary school where she worked when a seven-year-old female student ("Victim") came to her for assistance with dirty underwear. (R. p. 54; pp. 82-84). In response, Nurse Lamb provided clean underwear to Victim, who had also come by the health room on the preceding day to seek help with pants that needed to be "fixed," and advised Victim to tell her mother ("Mother") what had occurred. (R. pp. 83-86).

A few hours later, Victim returned to the health room, reported her underwear were again dirty, and told Nurse Lamb "it" was hurting while referring her "private area." (R. p. 86). At that point, Nurse Lamb attempted to get in contact with Mother, but her attempt to do so was not successful at that time. (R. pp. 86-87).

Just over an hour after that, Victim once again returned to the health room and informed Nurse Lamb her "private area" was itching and still hurting. (R. p. 87). In response, Nurse Lamb again provided Victim with clean underwear and let her know Mother, who had returned Nurse Lamb's earlier call, was going to try to leave work early in order to take her to the doctor. (R. pp. 87-88; p. 90).

Thereafter, when Victim got home from school later that day, Victim showed her dirty underwear to Mother and further revealed she had been sexually abused by Appellant, who was her biological father.[1] (R. pp. 56-61). At that point, Mother brought Victim to the emergency department at Lexington Medical Center, and the personnel at that location quickly referred her to Palmetto Health Richland for a child sexual abuse examination. (R. pp. 97-98). At that

[1] Although Appellant was Victim's biological father, he did not live with Victim and Mother and, instead, lived in a separate home with his own mother, his mother's boyfriend, his girlfriend, and another of his children. (R. pp. 56-57). However, prior to the disclosure of the sexual abuse, Victim regularly visited with Appellant on the weekends. (R. p. 56; p. 61; p. 73).

hospital, Nurse Gina Dyer-Goss, who was an expert in pediatric sexual examination, met with Victim, who reported she was "leaking" from her "private area" following a sexual assault that occurred a few days earlier. (R. pp. 91-92; p. 96; p. 99; p. 101). Nurse Dyer-Goss then conducted a physical examination of Victim and observed a thick, yellow-and-greenish discharge coming out of Victim's vagina. (R. p. 102). She further observed redness and swelling in Victim's genital area, and Victim reported she was experiencing tenderness and discomfort in that region of her body. (R. p. 102). As a result, Nurse Dyer-Goss collected samples of Victim's blood and urine along with swabs from Victim's vagina in order to check Victim for sexually-transmitted diseases, and she delivered the samples to the hospital's laboratory for analysis. (R. pp. 102-104). Upon analysis, Victim's urine sample tested positive for gonorrhea.[2] (R. pp. 118-119; pp. 232-240). Additional samples were then sent off to a different laboratory for further testing. (R. p. 104; p. 115; pp. 232-240).

On the following day, Dr. Katherine Atkinson, who was a board-certified pediatrician, conducted a follow-up examination on Victim. (R. pp. 124-126). During the examination, Dr. Atkinson found "a profuse amount of a green purulent vaginal discharge," which prevented her from effectively determining whether there were any signs of trauma to Victim's genitals. (R. p. 126; pp. 128-129). As part of the examination, Dr. Atkinson further reviewed Victim's medical records from the hospital for purposes of medical diagnosis and treatment, and she ultimately

[2] Later on during Appellant's trial, Dr. Henry Gilbert Potter, who was an expert in public health and preventative medicine, explained gonorrhea is a sexually-transmitted disease typically spread from a penis to a vagina, and he noted a seven-year-old child with gonorrhea would be presumed to have contracted it through sexual transmission. (R. pp. 155-157). Furthermore, he explained the incubation period for gonorrhea, which is treatable and curable, is typically two to five days from exposure. (R. pp. 159-160; p. 163).

diagnosed Victim with gonorrhea in light of her findings.[3] (R. pp. 127-128). Based on that diagnosis, Dr. Atkinson prescribed multiple antibiotics to Victim to treat the sexually-transmitted disease she had contracted.[4] (R. pp. 128-129).

Meanwhile, on that same day, Jamie Stroman, who was Mother's live-in boyfriend at that time, went to Lexington Medical Center and personally asked to be tested for sexually-transmitted diseases. (R. p. 77; pp. 130-132; p. 231). Based on Stroman's request, a nurse practitioner collected samples from Stroman's body for testing purposes, and the ensuing analysis of those samples revealed Stroman did not have gonorrhea.[5] (R. pp. 133-137; pp. 241-243).

Thereafter, on the following day, Appellant went to Lexington Medical Center on his own volition and similarly requested to be tested for sexually-transmitted diseases. (R. pp. 140-141; p. 146). In light of that request, Dr. Wesley Frierson, who was an emergency medicine physician, performed an examination of Appellant, collected penile swabs in order to test for gonorrhea and chlamydia, and sent the swabs to the hospital's laboratory for analysis. (R. pp. 142-143). As a result of the analysis, Dr. Frierson diagnosed Appellant with gonorrhea. (R. p. 145; p. 244).

A few weeks after that, Victim was referred to a children's advocacy center, and she was interviewed there by Brooke Wymer, who was the center's director of clinical services. (R. pp.

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[3] Initially, Dr. Atkinson also diagnosed Victim with syphilis, but she later determined Victim had not actually contracted that particular disease. (R. p. 120; p. 127).

[4] Had Victim not been treated for gonorrhea, the disease could have lasted for "quite some time" and resulted in permanent scarring. (R. p. 164).

[5] Although Stroman did not have gonorrhea, the analysis established he did have herpes. (R. p. 136).

63-65). During the course of the interview, Victim again disclosed she was sexually abused and indicated the sexual abuse occurred during a weekend visit to Appellant's home.[6] (R. pp. 65-66).

Subsequently, Appellant was arrested and indicted for first-degree criminal sexual conduct with a minor. (R. p. 5; pp. 148-149; pp. 245-246). Following the issuance of the indictment, Appellant's case was called to trial, he failed to appear despite having the requisite notice, and he was tried in his absence.[7] (R. p. 5; pp. 6-11). Ultimately, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 199). The trial judge then sentenced Appellant to a forty-year term of imprisonment for his heinous crime. (R. p. 202; p. 208; p. 229).

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[6] In a subsequent interview, Victim revealed she was also sexually abused by Stroman on an earlier occasion. (R. pp. 70-71; p. 77; p. 231). Following that disclosure, Stroman admitted he digitally penetrated Victim's vagina and was arrested. (R. pp. 38-39; p. 231). Thereafter, in March of 2017, Stroman was tried for and convicted of first-degree criminal sexual conduct with a minor based on his own sexual abuse of Victim. (R. pp. 38-39; p. 231).

[7] By the time of trial, Victim was eleven years old. (R. p. 53).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). Significantly, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's evidentiary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ARGUMENT

The trial judge correctly and properly admitted into evidence medical records containing the results of testing conducted at the requests of Appellant and another individual because the records, which were generated and kept in the regular course of Lexington Medical Center's business and which contained the results of testing conducted solely for purposes of medical diagnosis and treatment, did not constitute inadmissible hearsay, were inherently reliable, and were nontestimonial in nature, which meant their admission did not violate Appellant's right to confrontation even without the testimony of the analysts who conducted the testing.

Appellant contends the trial judge committed reversible error by admitting into evidence the results of Appellant's and Stroman's diagnostic medical tests that were conducted at their behests to determine whether they had gonorrhea just as the then-seven-year-old victim did. In support of that contention, Appellant—while relying on State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971), which has been effectively abrogated by subsequent changes in the law—maintains the test results could not properly be admitted without the testimony of the analysts who actually conducted the tests because, without such testimony, the results allegedly constituted inadmissible hearsay. To the contrary, the medical records, which were kept in the ordinary course of Lexington Medical Center's business and were generated for purposes of medical diagnosis and treatment, containing the test results did not constitute inadmissible hearsay pursuant to now-controlling South Carolina law. Furthermore, the admission of those records did not violate Appellant's constitutional right to confrontation because the records were nontestimonial in nature. As a result, the trial judge properly admitted the medical records into evidence during trial. Appellant's conviction should be affirmed.

RELEVANT FACTS

Towards the beginning of Appellant's trial, the solicitor advised the trial judge she intended to introduce medical records containing the results of the diagnostic testing conducted on the samples collected from Victim, Appellant, and Stroman, and she asserted those records

were admissible pursuant to the business record exception to the general rule prohibiting the admission of hearsay. (R. pp. 24-25). The solicitor further noted all the testing was done for medical treatment purposes, indicated the medical records containing the test results were kept in the ordinary course of business, and contended such records were inherently reliable in nature. (R. pp. 25-27). In rebuttal, defense counsel—while citing to James—objected to the admission of the records unless the individuals who actually performed the testing were present to testify during trial. (R. pp. 27-28). Furthermore, defense counsel explained his objection to the records was based on hearsay grounds. (R. p. 29). After considering the arguments of counsel, the trial judge indicated he was inclined to admit the records if a sufficient foundation was established for their admission. (R. p. 29). However, he expressly indicated his ruling was subject to change based on what was ultimately presented during trial and invited the parties to further argue the matter as the trial moved forward. (R. p. 29).

Thereafter, during the course of trial, Victim recounted the details of the sexual abuse she suffered at Appellant's hands, indicated Appellant put his "private" into her "private" while she was on a weekend visit to his home when she was approximately six or seven years old, and noted he ejaculated during the incident. (R. pp. 56-60). Furthermore, Victim explained yellow-and-brownish "stuff" began to come out of her body subsequent to the sexual abuse, which ultimately led to her seeking help from the school nurse and revealing the abuse to her mother. (R. pp. 60-61).

In addition to that testimony, Wymer confirmed Victim disclosed the sexual abuse during a forensic interview, and a recording of the interview was admitted into evidence and played for the jury. (R. pp. 64-66; p. 69). Moreover, Nurse Lamb recounted the details of Victim's visits to the health room and requests for clean underwear, and the medical personnel who treated Victim

after the sexual abuse was disclosed testified about their findings and observations in providing treatment to her, including in regard to the troubling symptoms she was exhibiting. (R. pp. 98-105; pp. 107-108; pp. 125-129). Furthermore, Dr. Atkinson testified she diagnosed Victim with gonorrhea during the course of treating her, and the medical records establishing Victim had gonorrhea were admitted into evidence—over defense counsel's objection—as business records after testimony was presented establishing they were kept in the ordinary course of the hospital's business, maintained for the patient's benefit, and carefully tracked to ensure accuracy.[8] [9] (R. pp. 113-117; pp. 119-120; pp. 127-128).

Beyond that testimony and evidence, Nurse Pamela Levi, who was a family nurse practitioner at Lexington Medical Center, recounted Stroman came to the center on March 5, 2014, and requested to be tested for sexually-transmitted diseases due to the fact he had engaged in unprotected sex two weeks earlier. (R. pp. 130-132). Based on Stroman's request, Nurse Levi indicated samples were collected by another individual, Nurse Janice Black, and tested for a variety of sexually-transmitted diseases. (R. pp. 132-134). Nurse Levi further confirmed contemporaneous patient records were kept and maintained in the ordinary course of the center's business of treating patients, and she affirmed she personally reviewed and verified Stroman's test results once they were entered in the center's record system. (R. pp. 134-135). At that point, the solicitor moved to admit a true and accurate copy of Stroman's patient record containing his

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[8] In objecting to Victim's medical records, defense counsel again cited to James and broadly asserted the admission of the records would violate the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution along with Article I, Section 10 of the South Carolina Constitution. (R. p. 117).

[9] Notably, on appeal, Appellant has *not* challenged the trial judge's ruling admitting the medical records containing the results of the analysis of the samples collected from Victim's body. (App. Br. pp. 1-14). As a result, the trial judge's ruling regarding those particular records has become the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (explaining unchallenged and unappealed rulings are the law of the case).

test results, and defense counsel objected. (R. pp. 134-136). However, the trial judge overruled the objection and admitted the results as a business record. (R. p. 136). Nurse Levi then confirmed Stroman tested negative for gonorrhea upon analysis as reflected in the results. (R. pp. 136-137).

Likewise, Dr. Frierson testified Appellant—similar to Stroman—came to the hospital and personally requested to be checked for sexually-transmitted diseases on March 6, 2014. (R. pp. 140-141). As a result of that request, Dr. Frierson indicated he collected swabs from Appellant's penis for testing purposes, sent the swabs to the hospital's lab for analysis, and viewed and verified the results of the testing after it was entered in the hospital's record system. (R. pp. 142-143). He further confirmed contemporaneous patient records were kept in the ordinary course of the hospital's business for the purpose of patient care, he stated he relied upon those records for treatment purposes, and he personally verified Appellant's patient record containing the test results. (R. pp. 143-144). At that point, the solicitor moved to admit the record, defense counsel renewed his objection, and the trial judge overruled the objection while finding the record to be admissible as a business record. (R. p. 144). Dr. Frierson then confirmed Appellant tested positive for gonorrhea. (R. p. 145).

Following the presentation of that testimony and evidence, the case was submitted to the jury, and the jury convicted Appellant of first-degree criminal sexual conduct with a minor. (R. p. 199). Subsequently, the trial judge sentenced Appellant to a forty-year term of imprisonment for the conviction. (R. p. 202; p. 208; p. 229).

ANALYSIS

Nearly fifty years ago, our Supreme Court issued a decision in State v. James, 255 S.C. 365, 369, 179 S.E.2d 41, 43 (1971), that addressed an issue involving the admissibility of

testimony regarding the results of chemical testing conducted by a non-testifying third party. In that case, the trial judge permitted several doctors to testify to the arsenic content found in James's husband's urine based solely on a report prepared by an out-of-state laboratory over an objection from James's defense counsel that was raised on hearsay grounds. Id. at 368, 179 S.E.2d at 42. Thereafter, James was convicted of two counts of administering arsenic poison with intent to kill, and she appealed. Id. at 367, 179 S.E.2d at 42. On appeal, the Supreme Court reversed. Id. at 372, 179 S.E.2d at 44. In reversing, the Supreme Court instructed:

> Where the results of tests or analyses are offered to prove an essential element of a crime or connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses. Otherwise, the effect of their admission would be to allow a witness to testify without being subject to cross-examination, and thus deprive the accused of his constitutional right to be confronted with and to cross-examine the witnesses against him.

Id. at 370, 179 S.E.2d at 43. Thus, the Supreme Court found the challenged testimony in James's case to be inadmissible on hearsay-based and confrontation-based grounds.[10] [11] Id.

Significantly though, a few years after the decision in James was reached, the South Carolina General Assembly adopted the Uniform Business Records as Evidence Act. S.C. Code Ann. § 19-5-510. Pursuant to that legislation, "[a] record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business,

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[10] Notably, since it was decided, James has been only been cited by a South Carolina appellate court in a published decision on a single occasion, and, in that lone decision from 1985, James was merely referenced for the general proposition "[h]earsay testimony is inadmissible because the adverse party is denied the opportunity to cross-examine the declarant." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 150-151 (1985).

[11] Bizarrely, after finding the testimony about the test results was improperly admitted in James, the Supreme Court remanded the matter for entry of a judgment of acquittal. James, 255 S.C. at 371-372, 179 S.E.2d at 44.

at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." Id. As a result, our legislature created a new method by which medical records could be admitted into evidence during a trial in South Carolina without running afoul of the then-existing hearsay prohibitions. See State v. Sarvis, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct. App. 1994) ("The Uniform Business Records as Evidence Act provides an exception to the hearsay rule for certain records of an act, event, or condition."); Benchoff v. Morgan, 302 S.C. 116, 121, 394 S.E.2d 19, 22 (Ct. App. 1990) ("Generally, medical records are properly admitted under the Business Records as Evidence Act as an exception to the rule against hearsay.").

Then, over twenty years after James was decided, the South Carolina Rules of Evidence were adopted and put into effect. See Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995."). Pursuant to those rules, records kept in the ordinary course of business are not excluded by the general rule prohibiting the admission of hearsay evidence. See Rule 803(6), SCRE (instructing the hearsay rule does not require the exclusion of "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness"). Likewise, statements made for the purposes of medical diagnosis or treatment are similarly not excluded by the general hearsay prohibition. See Rule 803(4), SCRE (stating the hearsay rule does not require the exclusion of "[s]tatements made for purposes of medical diagnosis or treatment and

describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment").

Beyond those changes and modifications to the law in South Carolina, the United States Supreme Court clarified what is guaranteed by the constitutional right to confrontation in a series of decisions issued well after our Supreme Court reached its decision in James. See State v. Daise, 421 S.C. 442, 452-453, 807 S.E.2d 710, 715 (Ct. App. 2017) (discussing a series of United States Supreme Court decisions addressing the Confrontation Clause that began in 2004). Through that series of cases, the United States Supreme Court explained the constitutional right to confrontation is only applicable when out-of-court statements are testimonial in nature, which generally means the statements were taken for use at trial or made for the primary purpose of creating an out-of-court substitute for trial testimony. See Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [Ohio v. Roberts, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."); see also Michigan v. Bryant, 562 U.S. 344, 358-359 (2011) (instructing the Confrontation Clause does not prevent the admission of a statement "not procured with a primary purpose of creating an out-of-court substitute for trial testimony" as such statements are nontestimonial); Davis v. Washington, 547 U.S. 813, 821 (2006) ("Only [testimonial] statements . . . cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other

hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (citation omitted)). Significantly, business records, which generally would include medical records, have consistently been found to be nontestimonial in nature. See Bryant, 562 U.S. at 362, n. 9 (explaining both statements made for purposes of medical diagnosis and treatment *and* business records "by their nature" are "made for a purpose other than use in a prosecution"); Crawford, 541 U.S. at 56 (recognizing "by their nature" business records are not testimonial); see also United States v. Ellis, 460 F.3d 920, 924 (7th Cir. 2006) ("[I]t is clear that statements embodied in a business record are nontestimonial."); Berkley v. State, 298 S.W.3d 712, 715 (Tex. App. 2009) ("[M]edical records, created for treatment purposes, are not 'testimonial' within the meaning of Crawford.").

In the case sub judice, Appellant contends the trial judge reversibly erred by admitting the results of his and Stroman's diagnostic testing for sexually-transmitted diseases that were contained in medical records from their personal visits to Lexington Medical Center. In making that particular contention, Appellant—relying on the decision in James—maintains the test results constituted improper hearsay and could not be admitted without the testimony of the analysts who actually performed the test. Importantly though, James, which was primarily decided based on concerns regarding the constitutional right to confrontation, has been greatly undermined and effectively abrogated by changes to the law that have occurred in the nearly five decades that have passed since it was originally decided. Compare James, 255 S.C. at 370, 179 S.E.2d at 370 (finding medical test results must be substantiated by the person who conducted the test in order to be admissible because "[o]therwise, the effect of their admission would be to allow a witness to testify without being subject to cross-examination, and thus *deprive the accused of his constitutional right to be confronted with and to cross-examine the witness*

against him" (emphasis added)); with Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312, n. 2 (2009) (explaining "medical reports created for treatment purposes" are not considered to be testimonial); and State v. Cooper, 291 S.C. 351, 355, 353 S.E.2d 451, 454 (1987) (recognizing the right to confrontation is not absolute). Because James is now of questionable value in light of the changes in the law that have occurred since it was decided, the admissibility of the test results in Appellant's case was not controlled by its holding but, instead, was controlled by the relevant evidentiary rules and current law regarding hearsay and the right to confrontation now in effect. See State v. Shands, 424 S.C. 106, 122, 817 S.E.2d 524, 532 (Ct. App. 2018) (finding a decision reached before South Carolina's evidentiary rules were adopted not to be controlling in a case arising after the rules were adopted); cf. State v. King, 422 S.C. 47, 66, 810 S.E.2d 18, 28 (2017) ("[T]he Georgia case cited by the Court of Appeals is now of questionable value as a state statute has been enacted to address this issue.").

When looking to the now-controlling law regarding hearsay and confrontation, the trial judge committed no error by admitting the records containing the results of the medical testing conducted at Appellant's and Stroman's requests. Initially, that is true because the records, which were established to have been generated and kept in the regular course of Lexington Medical Center's business of treating patients, were admissible pursuant to both our evidentiary rules and the Uniform Business Records as Evidence Act as contemporaneous records kept and maintained in the ordinary course of business. S.C. Code Ann. § 19-5-510; Rule 803(6), SCRE. Likewise, because the test results were issued for diagnostic purposes, they constituted statements made for the purposes of medical diagnosis and treatment, which are not considered to constitute inadmissible hearsay. Rule 803(4), SCRE; see State v. Doerflinger, 285 P.3d 217, 224 (Wash. Ct. App. 2012) (recognizing a non-testifying radiologist's findings were made for the

purposes of diagnosis and treatment and, thus, did not constitute inadmissible hearsay). Additionally, since the records contained the results of medical testing conducted for and relied upon for diagnostic purposes by medical professionals, those records were inherently reliable and trustworthy under the circumstances even without the testimony of the analysts who actually conducted the tests. See Jamison v. Morris, 385 S.C. 215, 227, 684 S.E.2d 168, 174 (2009) (instructing the trustworthiness of medical records is *presumed*, which means the results of tests done for medical treatment purposes "are admissible without a chain"); Ex parte Dep't of Health & Envtl. Control, 350 S.C. 243, 250, 565 S.E.2d 293, 297 (2002) ("The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment."); see also Thomas v. Hogan, 308 F.2d 355, 361 (4th Cir. 1962) ("There is good reason to treat a hospital record entry as trustworthy. Human life will often depend on the accuracy of the entry, and it is reasonable to presume that a hospital is staffed with personnel who competently perform their day-to-day tasks. To this extent at least, hospital records are deserving of a presumption of accuracy even more than other types of business entries." (footnote omitted)); State v. Garlick, 545 A.2d 27, 35 (Md. 1988) (holding the inherent reliability and trustworthiness of test results conducted for medical purposes permits the admission of such results *even without* the introduction of the testimony of the technician who actually performed the testing). Furthermore, since the testing was conducted *solely for the purposes of medical diagnosis and treatment*, the medical records containing the results of the testing were nontestimonial in nature, which meant their admission did not implicate or violate Appellant's constitutional right to confrontation. See Bryant, 562 U.S. at 358 (explaining the "basic objection" of the Confrontation Clause is "to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements *taken for use at trial*" (emphasis

added)); cf. Doerflinger, 285 P.3d at 222 (holding a non-testifying radiologist's findings were nontestimonial because "they were simply a confirmation of a condition about which the treating physician inquired in order to determine appropriate treatment" as opposed to an out-of-court substitute for trial testimony).

For those reasons, the trial judge did not abuse his broad discretion by admitting the medical records containing the results of diagnostic testing conducted solely at the requests of—and for the benefit of—Appellant and Stroman into evidence during trial. See State v. Chisholm, 395 S.C. 259, 270, 717 S.E.2d 614, 619 (Ct. App. 2011) ("The rationale for admitting laboratory test results as business records is that if it is sufficiently trustworthy to be relied upon for medical treatment, it is sufficiently trustworthy to be admitted as a business record." (citation and internal quotations omitted)); see also Melendez-Diaz, 557 U.S. at 312, n. 2 (2009) (recognizing medical reports generated for treatment purposes are nontestimonial in nature); cf. Jamison, 385 S.C. at 227, 684 S.E.2d at 174 ("Here, we have a situation where a sample was drawn at a hospital for medical purposes but never tested. Had the hospital performed Carlos' BAL test as part of its medical treatment of him, the results would have been a part of Carlos' medical record. Under Ex parte DHEC, those results would be presumed reliable as a business record regardless of a chain of custody."). Appellant's conviction should be affirmed.

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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September 4, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2018-000850

THE STATE,

Respondent,

vs.

ERIC EMANUEL ENGLISH,

Appellant.

CERTIFICATE OF COUNSEL

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

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