STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2019-000641

THE STATE, Respondent,

v.

JERMASHA NELSON, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge abused her discretion by admitting Sergeant Booker's computer animation which depicted Appellant's vehicle being involved in a high speed collision with Gordon Ward's moped as a demonstrative exhibit when Appellant was not prejudiced by the animation because Appellant conceded she was involved in a high speed collision with Ward's moped and the animation had no bearing on whether Appellant was impaired at the time of the collision? And even if the trial judge erred in admitting the animation, whether any error was entirely harmless?

II.

Whether the trial judge abused her discretion by allowing Physician's Assistant Kate D'Orazio to offer her opinion that Appellant was under the influence of alcohol at the time of the wreck when D'Orazio had independent knowledge of Appellant's impairment based on Appellant's confession to D'Orazio that she had an elevated blood alcohol level? And if D'Orazio had relied solely on the results of Appellant's hospital blood draw in forming her opinion, whether Appellant was prejudiced when D'Orazio did not publish the results to the jury? Finally, whether the results of Appellant's hospital blood draw would have been admissible if the State had chosen to enter the results into evidence because the sample was taken for the purposes of medical diagnosis?

STATEMENT OF THE CASE

In July 2018, the Beaufort County Grand Jury indicted Appellant for one count of felony driving under the influence with death resulting. On April 8-10, 2019, a jury trial was held in the Beaufort County Court of General Sessions with the Honorable Carmen T. Mullen, presiding. Appellant was represented by Jared Newman, Esq. The State was represented by Assistant Solicitors Dustin Whetsel and Jesse Glenn of the Fourteenth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant. The trial judge sentenced Appellant to a term of fourteen years' imprisonment for driving under the influence with death resulting. Appellant filed a timely notice of appeal and an initial brief.

STATEMENT OF FACTS

In the early morning hours of September 5, 2016, a motor vehicle collision occurred on Trask Parkway in Beaufort County. (R. 101-02, 128). A Toyota Camry driven by Appellant crashed into the rear end of a moped driven by Gordon Ward. (R. 11, 138, 143, Court's Exhibit #10). Ward was thrown from the moped and landed on his back in the median of the highway. (R. 165). The blunt force trauma separated Ward's skull from his neck, resulting in instant death. (R. 259-60).

Misty Shipley and her husband Sean lived on a road off Trask Parkway near the scene of the crash. Misty heard a loud noise from outside that sounded like a car crash. (R. 102). Misty called 911 and went outside to view the scene of the crash. (R. 104, State's Exhibit #38). Misty located Appellant and began to speak with her while she was still on the phone with the 911 operator. Misty smelled a strong odor of alcohol coming from Appellant. (R. 107). Misty told the 911 operator "she's drunk...Oh yeah I can smell it." (State's Exhibit #38). At trial, Misty opined that Appellant was under the influence of alcohol. (R. 110). Sean overheard Appellant speaking to an unknown person on the phone. At trial, Sean recalled that Appellant said "something along the lines of come get me, they're going to blame me, or something along those lines." (R. 118, lines 20-22). After locating Ward's moped, Sean asked Appellant if she hit a moped. (R. 120-21). Appellant responded by saying "he hit the windshield." (R. 121, lines 4-5).

Paramedic Doug Tisdale arrived at scene of the wreck soon thereafter and began to treat Appellant. Based on his initial interaction with Appellant, Tisdale opined that Appellant had consumed alcohol and indicated his suspicion to his partner. (R. 167-68). Appellant later told Tisdale she had consumed two beers. (R. 173). Tisdale transported Appellant to Beaufort Memorial hospital for further treatment. (R. 168).

Trooper Michael Bucciantini was one of the first law enforcement witnesses to arrive at the scene of the wreck. After an initial investigation, Bucciantini left the scene and went to meet with Appellant at the hospital. Upon meeting with Appellant, Bucciantini noted that Appellant had a "very strong odor of alcoholic beverage. It was even overpowering, the odor of alcohol that every standard emergency room emits." (R. 12, lines 19-21; R. 145). Bucciantini also noted Appellant's "speech was very slurred, her eyes were bloodshot and glassy." (R. 146, lines 1-2). Appellant told Bucciantini she was on the way to her boyfriend's house when she struck the moped because it pulled out in front of her. (R. 12-13). Appellant also told Bucciantini she had consumed two beers. (R. 146). Investigator Dan Duhamel of the Beaufort County Sheriff's Office also observed Appellant in the hospital and noticed she emitted a strong odor of alcohol, slurred her words, and had glassy bloodshot eyes. (R. 184-85). Buscciantini and Duhamel both opined that Appellant was under the influence of alcohol. (R. 147, 185).

Appellant declined to consent to having her blood drawn. (R. 13). Accordingly, Bucciantini left the hospital to obtain a search warrant for Appellant's blood and returned approximately an hour later to obtain a sample. (R. 13-16, 392-95). Bucciantini obtained a sample and sent it to SLED for analysis. (R. 25-27). Prior to trial, the trial judge suppressed the results of Appellant's blood test because of a scrivener's error in the search warrant. (R. 73). The trial judge suppressed the blood result because the words "medical and lab records" were included in the description of the property sought in the search warrant rather than the words "blood draw." (R. 73, 392-95).

Corporal Todd Proctor and Sergeant James Booker of the South Carolina Highway Patrol's MAIT team investigated the collision between Appellant and Ward. Proctor analyzed the collision data retrieval box in Appellant's vehicle to determine her speed immediately before

the collision. Proctor determined that Appellant was traveling at 108.1 miles per hour 2.8 seconds prior to her collision with Ward. (R. 209-10). Booker took measurements of various skid marks at scene of the collision and created a computer animation of the collision. (R. 236-37). The computer animation was admitted for demonstrative purposes over Appellant's objection. (R. 242).

Physician's Assistant Kate D'Orazio treated Appellant at the hospital. D'Orazio was tendered by the State as an expert in the field of emergency medicine. (R. 289). D'Orazio opined that Appellant was under the influence of alcohol based on her interaction with Appellant and her review of Appellant's medical records and lab results. (R. 294-95, 396-427). The lab results referenced by D'Orazio included an additional blood draw taken by the hospital that was not sent to SLED for analysis. (R. 279-80). The results of the hospital blood draw were not admitted into evidence or read to the jury. At the conclusion of trial, the jury returned a guilty verdict.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of 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). "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).

ARGUMENT

I.

The trial judge did not abuse her discretion by admitting Sergeant Booker's computer animation which depicted Appellant's vehicle being involved in a high speed collision with Gordon Ward's moped as a demonstrative exhibit when Appellant was not prejudiced by the animation because Appellant conceded she was involved in a high speed collision with Ward's moped and the animation had no bearing on whether Appellant was impaired at the time of the collision. However, even if the trial judge erred by admitting the computer animation, any error was entirely harmless.

Appellant argues the trial judge erred by admitting the computer animation of Appellant's automobile collision for demonstrative purposes because Sergeant Booker did not take into account the lighting conditions or Appellant's version of events in creating the animation. Accordingly, Appellant argues the computer animation was misleading to the jury. Appellant's argument is without merit. The trial judge did not abuse her discretion in admitting Booker's computer animation because it was a fair and accurate representation of the collision between Appellant and Ward. However, even if the trial judge erred in admitting the computer animation, any error was entirely harmless because Appellant was not prejudiced by the animation. Appellant never contested the fact that she was driving the vehicle that struck Ward, nor did she contest that she drove her vehicle in a reckless manner. Appellant only contended that she was not impaired when she collided with Ward. Therefore, Appellant was not prejudiced by the computer animation because the animation did not prove or disprove that she was driving under the influence of alcohol.

"A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." State v. Liverman, 386 S.C. 223, 233-234, 687 S.E.2d 70, 75 (Ct. App. 2009). "Demonstrative evidence includes items such as a photograph, chart, diagram, or video

animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance." Clark v. Cantrell, 339 S.C.369, 383, 529 S.E.2d 528, 535 (2000). A computer generated video animation is admissible as demonstrative evidence when:

> The proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.

Cantrell, 339 S.C. at 384, 529 S.E.2d at 536.

Here, the computer animation created by Booker was offered as a demonstrative exhibit to summarize his testimony. The computer examination was not admitted as substantive evidence. Initially, Appellant conceded the computer animation was admissible as a demonstrative exhibit. (R. 63). When the State announced their intention to use the computer animation as a demonstrative exhibit before the trial began, Appellant conceded: "If it's limited to that, I don't have a problem with it. I mean the actual facts aren't much in dispute, that the car hit the Moped from behind." (R. 63, lines 19-22). However, when the computer animation was offered as a demonstrative exhibit at trial, Appellant objected on the grounds that the animation was misleading because it did not take into the lighting conditions when the wreck occurred or Appellant's statement that the moped pulled out in front of her. (R. 240-41). On appeal, Appellant reiterates the argument of trial counsel and argues the animation was misleading to the jury because of the two aforementioned reasons. (Initial Brief of Appellant 7-10). Therefore, Appellant appears to concede that the computer animation met three of the four prerequisite requirements for admission prescribed by our Supreme Court in Clark v. Cantrell. Namely, Appellant concedes the computer animation was properly authenticated, it was relevant

evidence, and it was a fair and accurate representation of the wreck. Accordingly, the only question presented for this Court's analysis is whether the probative value of the computer animation substantially outweighed the danger of unfair prejudice, confusion of the issues or the danger of misleading the jury.

The trial judge did not abuse her discretion by ruling the probative value of the computer animation substantially outweighed any danger of unfair prejudice or misleading the jury. At trial, the only fact ever in dispute was whether Appellant was under the influence of alcohol at the time of the wreck. Appellant never contested whether she was responsible for the accident or challenged the manner in which the wreck occurred. Appellant merely contested whether she was impaired at the time of the wreck. From Appellant's opening statement through her closing argument, she maintained the State should have charged her with reckless homicide and not felony driving under the influence with death resulting. In his opening statement, counsel for Appellant made the following declaration

> Mr. Newman: The State has to prove that [Appellant], and we don't believe they can, was materially and appreciably impaired due to alcohol, and that impairment caused, or was a causal factor, in this accident. Excessive speed would be something else. And I think you are going to hear evidence of excessive speed. I don't think there's any question about that. That would be a different charge. It would be a reckless homicide or vehicular homicide. She is not charged with that. She is charged with driving under the influence where a death resulted. And as the Solicitor kind of foreshadowed to you, we don't believe there's proof beyond a reasonable doubt, or proof that she was under the influence alcohol. And you can't equate recklessness, if that's what you would find, because of excessive speed. And I think you're going to hear the speed is something like 100, 110 miles an hour, period. Excessive speed. That's recklessness. That's not driving under the influence. This is why we are here, this is why [Appellant] has plead not guilty. Were this a different charge, maybe a different result. But she's not guilty of under the influence element of that. (sic)

(R, 98, lines 1-24). Appellant continued to emphasize this theory of the case in her closing argument. Counsel for Appellant made the following argument:

> Mr. Newman: The State has chosen to charge her with felony DUI. And the Solicitor is right, the only thing that we really challenge is that she was not provably under the influence of alcohol at the time of the accident.
>
> ....
>
> So, you know, the State's burden on reasonable doubt is they have to erase on that element. And I will tell you, she admits to being the driver. That is not a question. And you've heard about excessive speed, and that's recklessness. And that's a different question. The State has to prove that she was under the influence of alcohol at the time of the accident.
>
> ....
>
> So I ask you to look basically at the one element, under the influence. We do not believe that the State has proven with competent evidence in this court that that is beyond a reasonable doubt. They've proven she was speeding, they've proven that the Moped, who the rider was positive for marijuana, was driving almost in the center of the road. They have proven those things. No question about that. But what they have not proven is that she was under the influence. She needs to be charged with another charge, and that's reckless homicide, and that's not before you today. And she can be made to be answerable and held on that, but not this charge.

(R. 332, lines 1-4, lines 21-25; R. 333, lines 1-2; R. 337, line 25; R. 338, lines 1-12).

Appellant conceded every element of the offense she was charged with except whether she was impaired at the time of the wreck. The computer animation created by Booker had no bearing on whether Appellant was under the influence of alcohol at the time of the wreck because it did not depict Appellant swerving or driving poorly except for her extreme speed. (Court's Exhibit #10). Therefore, the computer animation was not prejudicial to Appellant because it only depicted an event which Appellant had already conceded took place. Not only did the computer animation not prejudice Appellant, but it also had considerable probative value. Booker was tendered as an expert in collision reconstruction (R. 224) Booker's testimony consisted primarily of discussing photographs of the scene and the various gouge and skid mark measurements he took from the scene. (R. 221-37). The computer animation that Booker created

was presented as a demonstrative exhibit to help summarize his complicated findings to the jury. When admitting the computer animation as a demonstrative exhibit, the trial judge noted that Appellant was free to cross examine Booker on whether his animation factored in Appellant's statements or any of the lighting conditions. (R. 242). On cross examination, counsel for Appellant chose not to question Booker about whether he factored Appellant's statements into his animation, but he did question him about the lighting conditions (R. 244-51). The jury was free to give the video animation whatever weight they determined to be appropriate[1]. The trial judge did not abuse her discretion in admitting the computer animation as a demonstrative exhibit.

Harmless Error

Even if the trial judge erred in admitting the computer animation as a demonstrative exhibit, any error in its admission was entirely harmless because Appellant was not prejudiced by the video.

"Whether an error is harmless depends on the circumstances of the particular case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Id. "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Error is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

[1] In her closing instructions to the jury, the trial judge informed them they were free to give expert testimony whatever weight they saw fit. (R. 349-50).

As noted above, Appellant never contested that she was the driver of the vehicle nor whether she was speeding. In fact, Appellant even admitted that her driving was reckless and claimed the State should have charged her with reckless homicide. (R. 337-38). The only element of felony driving under the influence where death results that Appellant contested is whether she was impaired when the wreck occurred. Therefore, a computer animation that showed Appellant's vehicle colliding with a moped at a high rate of speed could not have possibly affected the jury's verdict when Appellant openly admitted she drove a vehicle at high rate of speed that collided with a moped. The jury returned a guilty verdict against Appellant because of the evidence that she was impaired, not because of a computer animation of the crash that had no bearing on her impairment. Appellant's conviction and sentence should be affirmed.

II.

The trial judge did not abuse her discretion by allowing Physician's Assistant Kate D'Orazio to offer her opinion that Appellant was under the influence of alcohol at the time of the wreck because D'Orazio had independent knowledge of Appellant's impairment based on Appellant's confession to D'Orazio that she had an elevated blood alcohol level. However, even if D'Orazio had relied solely on the results of Appellant's hospital blood draw, D'Orazio did not publish the results to the jury. Furthermore, the results of Appellant's hospital blood draw would have been admissible if the State had chosen to enter them into evidence because the sample was taken for the purposes of medical diagnosis.

Appellant next argues the trial judge erred by allowing Physician's Assistant Kate D'Orazio to offer her opinion that Appellant was under the influence of alcohol because D'Orazio didn't have any independent personal knowledge of Appellant's impairment. Appellant further contends it was improper to allow D'Orazio to give her opinion on Appellant's impairment because she based her opinion on a review of Appellant's medical records which included a blood draw taken by the hospital that was not admitted into evidence. Appellant's argument lacks merit for two reasons. First, D'Orazio treated Appellant in the hospital and

personally interacted with her. Appellant confessed to D'Orazio that she had consumed alcohol and that her blood alcohol level was going to be elevated. (R. 403). Therefore, D'Orazio had independent personal knowledge about Appellant's impairment. Second, even if D'Orazio relied solely on the results of Appellant's hospital blood draw in forming her opinion, Appellant's medical records were not entered into evidence and the jury was never informed of Appellant's blood alcohol content. However, had the State chosen to enter the results of the hospital blood draw into evidence, the results would have been admissible even without a chain of custody because they were taken for the purposes of medical diagnosis rather than criminal prosecution. Despite the State not attempting to enter the results of the hospital blood draw at trial, the results were nonetheless admissible. Thus, the trial judge did not err by allowing D'Orazio to offer an opinion on Appellant's impairment.

Rule 703 of the South Carolina Rules of Evidence allows an expert witness to base their opinion on facts or data "perceived by or made known to the expert at or before the hearing." Rule 703 SCRE. The rule further provides that if the data is "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." Id. "Under South Carolina law, unless a test is conducted for medical purposes, the result of that test is not reliable unless the proponent can demonstrate a chain of custody." Jamison v. Morris, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009). "Medical records are routinely admitted as business records." Ex parte DHEC, 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." Id.

Appellant argues D'Orazio did not have independent personal knowledge of Appellant's impairment and therefore should not have been allowed to give her opinion on the subject.

Appellant contends D'Orazio lacked independent personal knowledge based on the following exchange between D'Orazio and the trial judge during the proffer of D'Orazio's testimony:

> The Court: Let me ask you, do you have also any independent personal knowledge, like smelling alcohol about her to know?
>
> D'Orazio: No.
>
> The Court: And would you have gotten close enough to her to know that or no?
>
> D'Orazio: Sure. I just—I don't recall.
>
> The Court: You don't recall. Okay. Okay. Fair enough.

(R. 280, lines 13-21). As the aforementioned exchange indicates, D'Orazio testified that she did not recall smelling alcohol on Appellant, but did not say she had no independent knowledge of Appellant's impairment. However, after reviewing Appellant's medical records, the following exchange took place between the Assistant Solicitor and D'Orazio on direct examination:

> Assistant Solicitor Whetsel: I'm going to ask you an opinion question. You personally treated [Appellant], correct?
>
> D'Orazio: Correct.
>
> Assistant Solicitor Whetsel: You had an opportunity to review her records well?
>
> D'Orazio: I did.
>
> Assistant Solicitor Whetsel: Based on all that, based on your treatment, based on your review, would you have an opinion as to if she was under the influence of alcohol when she presented to the emergency department?
>
> D'Orazio: Based upon the charting here, and my history and labs, I would say yes, she was under the influence of alcohol.

(R. 294, lines 15-25; R. 295, line 1).

A review of Appellant's medical records reveals that D'Orazio had an ample basis to offer an opinion on Appellant's impairment even if the results of Appellant's blood draw were not included. D'Orazio began her shift at Beaufort Memorial Hospital on September 5, 2016 at

approximately 7:00 AM and took over Appellant's care from Physician's Assistant Andrew Kolb. (R. 275, 290). Upon commencing her care for Appellant, D'Orazio made the following notes at 9:00 AM: "pt informs us she is going to jail upon discharge, she tells me that she has an elevated ETOH level." (R. 403). Prior to Appellant's admission of intoxication, D'Orazio noted the following at 8:45 AM: "Pt is uncooperative at first and verbally aggressive to staff and law enforcement. 0850: Pt now agrees to receive blood draw, but is still verbally aggressive toward staff." (R. 413).

The trial judge did not abuse her broad discretion by allowing D'Orazio to offer her opinion on Appellant's impairment, because D'Orazio had independent personal knowledge regarding Appellant's impairment. D'Orazio testified she based her opinion on Appellant's medical records, her history with Appellant, and her lab results. (R. 294-95). D'Orazio witnessed Appellant's behavior in the hospital and even noted that Appellant confessed to her that she would have an elevated blood alcohol level. (R. 403, 413). Therefore, D'Orazio did not need to rely on Appellant's hospital blood draw results to form an opinion on Appellant's impairment, because Appellant admitted to D'Orazio that her blood alcohol level would be elevated. (R. 403). Therefore, the trial judge properly allowed D'Orazio to offer an opinion on Appellant's impairment.

Even if D'Orazio had relied exclusively on Appellant's hospital blood draw results in forming her opinion, the trial judge did not err in allowing D'Orazio to offer her opinion because the State did not enter Appellant's medical records into evidence or publish Appellant's blood alcohol reading to the jury. Appellant cites our Supreme Court's opinion in Jamison v. Morris[2], to argue that D'Orazio should have been precluded from offering her opinion on Appellant's

[2] Jamison v. Morris, 385 S.C. 215, 684 S.E.2d 168 (2009).

blood alcohol level just as the plaintiff's expert in Jamison should have been. (Initial Brief of Appellant 13). However, Appellant's reliance on Jamison is misplaced. D'Orazio never offered her opinion on Appellant's blood alcohol level or otherwise indicated what it was. Accordingly, D'Orazio did not offer an opinion on Appellant's blood alcohol level as the expert in Jamison did. Jamison 385 S.C. at 226, 684 S.E.2d at 174. Additionally, the court in Jamison noted there is a distinction to be made when blood is tested for purposes of medical diagnosis versus being tested for law enforcement purposes. The underage driver who was involved in the car wreck at issue in Jamison had his blood drawn at the hospital for medical purposes, but the driver died before the sample could be tested. Id. The blood sample was subsequently transported to SLED where it was tested at the request of the law enforcement officer who was investigating the accident. Id. The Court noted:

> 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. The fact that the BAL test was performed not for medical purposes necessitates that the proponent be able to demonstrate a chain of custody insofar as practicable in order for the results to be deemed reliable. Without that showing, the test performed by S.L.E.D. on a sample drawn but not tested for medical purposes, is unreliable.

Jamison 385 S.C. at 227, 684 S.E.2d at 174.

Here, unlike in Jamison, the blood sample drawn from Appellant was used for medical diagnostic purposes and not for law enforcement purposes. The hospital sample was never used or tested by law enforcement as evidenced by Bucciantini's efforts to secure a search warrant for a separate blood sample. (R. 25-27, 392-95). Therefore, the State would not have been required to demonstrate a chain of custody for the hospital blood sample in order for it to have been deemed reliable. Thus, the hospital blood sample would have been admissible if the State had

chosen to enter it into evidence. Despite the State's decision not to enter the results of the hospital blood draw into evidence, the trial judge did not err in allowing D'Orazio to give her opinion of Appellant's impairment based on her review of the results of the blood draw and her personal interactions with Appellant. Appellant's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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