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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.: 2018-000897

RECEIVED

JAN 22 2019

SC Court of Appeals

Rosa S. St. Gelais

Appellant,

v.

Julius L. Leary

Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE OF MARIJUANA IN ST. GELAIS' URINE TEST AT THE HOSPITAL BECAUSE THE EVIDENCE LACKED RELIABILITY AND PROBATIVE VALUE AS IT DID NOT SHOW THE MARIJUANA AMOUNT OR TIME OF CONSUMPTION.

- I. St. Gelais properly preserved her appellate arguments before the trial court to be heard by the Appellate Court.

St. Gelais raised the issue she argues in her appellate brief to the trial court that the evidence of her alleged marijuana ingestion was improperly admitted because it was not reliable, not relevant to the issues at trial, and lacked probative value. Further, this evidence should not have been allowed before the jury because of the unfair prejudice it created.

The state's issue preservation rules require that an issue be raised and ruled upon by the trial court before it can be heard by the appellate courts. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). "It is axiomatic that an issue cannot be raised for the first time on appeal." Id. "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, ___ (2005).

Leary argues that St. Gelais did not argue the issue of unfair prejudice to the trial court. This argument ignores that St. Gelais argued to the trial court that if the evidence of marijuana had any probative value it should still be excluded because of unfair prejudice.

St. Gelais' motion to exclude argued that the marijuana evidence lacked relevance and probative value, "but even if it were relevant the court should prohibit the admission of this urine screen because any minimal probative value is substantially outweighed by the unfair prejudice, confusion of the issues, and misleading of the jury that such evidence would cause." (R., pp. 20-

21.) St. Gelais further argued at trial that Leary was offering the marijuana test results to portray St. Gelais as having bad character. (R. p. 203, ll. 10-18.)

St. Gelais made a motion for a new trial after the jury returned a defense verdict following the trial court's admission of the evidence of marijuana in St. Gelais' system. In this motion, St. Gelais argued the trial court should grant her a new trial because it improperly admitted the evidence of marijuana in her system because that evidence lacked reliability and relevance, and if it was relevant then the unfair prejudice it created substantially outweighed what little probative value the evidence had.¹ (R., pp. 25-26.)

The record, thus, reflects that St. Gelais argued, inter alia, that the marijuana allegedly in St. Gelais' system should be excluded because of the danger of unfair prejudice it created. St. Gelais properly preserved this argument for appellate review.

Leary also argues that the limiting instruction from the trial judge to the jury regarding the marijuana evidence makes the admission of such evidence proper. This argument ignores that the evidence was not properly admissible so such an instruction cannot cure the defect.

Rule 105 allows for limiting instruction per request in certain circumstances. "When evidence which is admissible ... for one purpose but not admissible ... for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Rule 105, SCRE.

¹ Leary never provided any independent, expert testimony regarding the relevance of the marijuana on St. Gelais' symptoms. Instead he has relied upon his own self-serving testimony that St. Gelais was exhibiting abnormal behavior after the wreck such as a headache and dizziness. He testified this behavior was inconsistent with someone who had been rear ended but was consistent with someone under the influence of marijuana. The Court should not give weight to this self-serving, unsupported testimony.

In this case, the trial judge instructed the jury that “[t]hose records are not to be considered for any purpose other than them talking about the symptoms in this case or any symptoms that the Plaintiff alleges that she had.” (R. p. 125, ll. 8-11.) The judge went on to instruct the jury that fault was not at issue in the trial, and “you can only use that testimony – whatever that you believe about that testimony you can only use it for that limited purpose of – as related to an potential symptoms in this case.” (R. p. 95, ll. 11-17.)

This limiting instruction was made by the trial court sua sponte without a request by St. Gelais pursuant to Rule 105. By overruling St. Gelais’ objection to the marijuana evidence, the trial court ruled that such evidence was properly admissible so St. Gelais did not have an obligation to accept or oppose a limiting instruction. See State v. Wilson, 389 S.C. 579, ___, 698 S.E. 2d 862, 865 (Ct. App. 2010) (“In this vein, because the admission of proper evidence requires no curative charge, an overruled party is under no obligation to accept a curative instruction in order to preserve the issue for our review.”). The unrequested limiting instruction by the trial judge does not change the fact that the trial court improperly admitted the evidence of marijuana in St. Gelais’ urine screen at the hospital for the reasons argued in St. Gelais’ appellate brief. Further, the limiting instruction does not cure the unfair prejudice caused by the admission of this evidence, which is the rationale for not letting juries hear such evidence.

II. Ex parte Dep’t of Health & Environmental Control requires an adequate chain of custody to prove reliability of the drug-test results given these facts.

Leary cites to Ex parte Dep’t of Health & Environmental Control, 350 S.C. 243, 565 S.E.2d 292 (2002), for the proposition that a chain of custody is not required for tests performed in medical facilities and relied upon by medical professionals for diagnosis and treatment because such tests are reliable. In that case, the Supreme Court held that records of an HIV positive blood test performed by DHEC did not require a chain of custody because they were reliable in a criminal

case where the results were being used to show that the defendant knowingly exposed someone to HIV. Id. The Court reasoned that because HIV is a permanent condition, the results could be confirmed by another test, and if that test came back negative then it would show that the DHEC test was a false positive giving the defendant protection from a faulty test result. Id. at 250. The Court differentiated this situation from a DUI defendant prosecuted based upon a blood alcohol test taken at the time of arrest; the DUI defendant has no such protection because blood-alcohol content is a temporary condition so the law requires the “indicia of reliability provided by a chain of custody.” Id. The Court also noted that in a wrongful death civil action in a car wreck case, “the Court of Appeals required a chain of custody for the driver’s urinalysis, taken for the purposes of showing the defendant had marijuana and cocaine in his system at the time of the accident.” Id. at 248 (citing Stevens v. Allen, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999)).

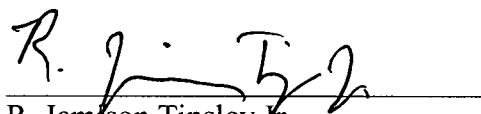
The present case requires a proper chain of custody of St. Gelais’ urine drug screen to establish the requisite reliability. Like the DUI example in Ex Parte DHEC, St. Gelais’ alleged intoxication from marijuana is a temporary condition that cannot be retested rather than a permanent condition such as HIV. Further, the records themselves dispute their own reliability as they state “No Chain Of Custody Result Must Not Be Used For Non Medical Purposes (Employment or Legal Testing).” (R. p. 269.) Pursuant to Ex Parte DHEC, the urine drug screen results of St. Gelais lack the requisite reliability to be admitted as a business record so the trial court should have excluded these results.

CONCLUSION

The trial court abused its discretion and erred in admitting evidence of the unreliable, unfairly prejudicial drug test from the hospital that showed marijuana in St. Gelais’ blood where the test lacked a chain of custody and explicitly said not to use it for legal purposes. St. Gelais

properly preserved these issues for review. The Court should, therefore, reverse the circuit court's denial of St. Gelais' new trial motion and remand the case to the circuit court for a new trial where this evidence will not be admitted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Jamfson Tinsley Jr.", is written over a horizontal line.

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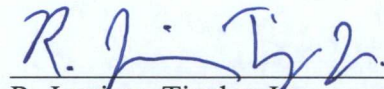
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CERTIFICATE OF COUNSEL

Counsel for the Appellant hereby certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b).



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