STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Pickens County
Hon. Perry H. Gravely, Circuit Court Judge
Appellate Case Tracking No. 2020-001345

The State, Respondent,

v.

Angela D. Brewer, Petitioner.

Opinion No. 2020-UP-255 (S.C. Ct. App. filed August 26, 2020)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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II. The Court of Appeals properly affirmed the trial court's decision admitting the testimony of the pathologist regarding lab results because those lab results were not testimonial in nature and did not implicate the Sixth Amendment right to confrontation. Further, any error in admission was entirely harmless.

STATEMENT OF THE CASE

Procedural History

On October 11, 2016, the Pickens County Grand Jury indicted Petitioner for homicide by child abuse. She proceeded to trial on December 11-14, 2017, before the Honorable Perry H. Gravely and a jury. The jury found Petitioner guilty as charged. Judge Gravely sentenced Petitioner to twenty years in prison.

Petitioner timely served and filed a Notice of Appeal. After briefing, the Court of Appeals affirmed Petitioner's conviction and sentence. State v. Brewer, Op. No. 2020-UP-255 (S.C. Ct. App. filed August 26, 2020). Petitioner filed a Petition for Rehearing, which was denied September 10, 2020. On October 29, 2020, Petitioner served her Petition for Writ of Certiorari. This Return follows.

ARGUMENT

I. The Court of Appeals properly utilized the proper standard and correctly affirmed the trial court's decision admitting Petitioner's statement when it was made with a knowing and voluntary waiver. At the time of the waiver she was competent and demonstrated an understanding of the rights she was waiving. Further, once her coherence or understanding diminished, law enforcement took a break and the court ruled none of the recording after the break was admissible.

The Court of Appeals correctly affirmed the trial court's decision to admit Petitioner's statement as knowingly and voluntarily made. The trial court clearly did not abuse his discretion in admitting a portion of Petitioner's statement because there was evidence indicating Petitioner knowingly and voluntarily waived her rights and was not so intoxicated as to render her incapable of understanding what she was doing and saying.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (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." Id.

"On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion." State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing State v. Von

Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996)). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." Id. at 378-379, 652 S.E.2d at 448 (citing State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)).

Merits

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966). In order to introduce into evidence a confession, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and, if the result of custodial interrogation, was taken in compliance with Miranda. See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). To determine the voluntariness of a statement, the circuit court must first conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009). "The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

In Miranda, the United States Supreme Court (USSC) created procedural safeguards to protect an individual's right against compelled self-incrimination, holding:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant

> way and is subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. 436, 478–79. Failure to comply with these constitutional safeguards renders the person's statements inadmissible against that person. Id. The USSC has embraced a flexible approach regarding Miranda warnings whereby courts consider the totality of the circumstances. See Wyrick v. Fields, 459 U.S. 42, 47–49 (1982). The waiver must also be made with the full awareness of 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). The trial judge's determination of whether a statement was knowingly, intelligently, and voluntarily made requires an examination of the totality of the circumstances surrounding the waiver. State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). The critical question is whether the defendant's "will has been overborne [or] his capacity for self-determination critically impaired . . . ." Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (emphasis added).

In reviewing a statement given by someone intoxicated, this Court has stated:

> The 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. Therefore, **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. Proof 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.

State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) (emphasis added). Several years later this Court indicated: "Proof 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." State v. Collins, 266 S.C. 566, 572–73, 225 S.E.2d 189, 193 (1976) (emphasis added). The mere fact of drug or alcohol use does not preclude a finding of a knowing and voluntary waiver of rights. See United States v. Phillips, 506 F.3d 685 (8th Cir. 2007) (waiver was voluntary despite defendant's claimed intoxication from four ecstasy pills and a cup of brandy).

In this case, two officers testified that at the time of the initial waiver of rights, Petitioner was coherent and appeared to understand the rights she was waiving. During the testimony of Detective Burgess, the following colloquy occurred:

> Q At the time y'all began this interview, did she appear to be able to understand what y'all were discussing?
>
> A She did. She seemed very coherent.
>
> Q Okay. Did she have coherent responses to your questions?
>
> A In the beginning, yes.
>
> Q At some point, does it become clear that she is under the influence of something?
>
> A Yes, it does.
>
> Q Okay. And, at that point, do y'all break in the interview, or what do y'all do?

A She made a few statements that were -- that were incoherent. At that point, we stopped the interview.

(T.77-78; R.36-37). Further, during the testimony of Agent Cauthen, she explained Miranda warnings were given to Petitioner and then asked:

Q Did Ms. Brewer appear to understand what was going on with that?

A Yes, ma'am.

Q Did you ask her prior to that whether or not she had taken any medication?

A I'm not sure if it was prior to Miranda or after Miranda. But I did ask her if she was under the influence of any alcohol or drugs at that time. And she advised me she had taken Oxycodone that morning.

Q At what time?

A I believe it was 6:00 a.m. Yes, ma'am, it was.

Q Sorry. Did you ask her that because you were concerned, or is that just a standard question you ask?

A That's a standard question that I ask usually -- well, it is a standard question – I'm sorry – not usually.

Q At the beginning of this interview, did she appear coherent to you?

A Yes, ma'am.

Q Did she appear to understand what you were asking her?

A Yes, ma'am.

Q Was she answering your questions?

A Yes, ma'am.

Q At some point, do you notice that she does not appear to be coherent anymore?

A Yes, ma'am. She seemed to be falling asleep.

Q And what did you do at that time?

A I -- I don't remember if I asked her at that time if she had taken anything else and she didn't tell me, or if I just asked her if she was sleepy. But I know that we, actually, left the room at that point to take a break . . . .

(T.91-92; R.50-51).

Importantly, the trial court viewed the video recording of Petitioner's statement and witnessed first-hand her behavior and responses. Only after he reviewed the video (State's Exhibit 18) did the trial court make its findings. In doing so, the court acknowledges the "little slurring" of some of her speech but indicates her responses and general conversation show the statement was voluntary and Petitioner knew what was going on. (T.224-225; R.171-172). It is clear he considered her intoxication as a factor, but ultimately determined it did not render the waiver of her rights involuntary.

Further, the trial court found that at some point in the video Petitioner became "almost incoherent" and indicated there was a "distinct difference" in her behavior and responses. (T.225; R.172). As significant additional evidence he expressly considered Petitioner's intoxication in making his ruling, he excluded any portion of the video beyond when he believed she had become impacted by the drugs she took and only allowed the State to play a portion of the overall recording.[1] (T.229; R.176).

[1] As even more evidence the trial court properly considered the video, he required redaction of several comments made by Petitioner during the portion of the overall statement he allowed into evidence. (T.229; R.176).

The trial court properly considered the totality of the circumstances, including Petitioner's intoxication, in determining her waiver of Miranda rights was knowing and voluntary and the initial portion of the statement she made to Detective Burgess and Agent Cauthen was admissible. Evidence exists in this record to support his finding and, as a result, he did not abuse his discretion in making his ruling admitting a portion of State's Exhibit 18. As a result, this Court should deny the Petition for Writ of Certiorari as to Question I.

II. The Court of Appeals properly affirmed the trial court's decision admitting the testimony of the pathologist regarding lab results because those lab results were not testimonial in nature and did not implicate the Sixth Amendment right to confrontation. Further, any error in admission was entirely harmless.

The Court of Appeals correctly found the lab results were non-testimonial in nature and so the Confrontation Clause was not implicated. As a result, the Court properly affirmed the trial court's admission of the lab results. Even if it was error to admit the lab results without someone from the lab testifying any error was harmless in light of the other evidence in the record.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (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." Id.

"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." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Merits

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987) (citing California v. Green, 399 U.S. 149 (1970); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)).

The United States Supreme Court (USSC) explained the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" Crawford v. Washington, 541 U.S. 36, 51 (2004). The Court then defined testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. The USSC further articulated: "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." Id.

As a result, the Court "exempted [nontestimonial] statements from Confrontation Clause scrutiny altogether." Id. Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." Davis v. Washington, 547 U.S. 813, 821 (2006) (citing Crawford, 541 U.S. at 51). "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." Id.

In Davis, 547 U.S. 813 (2006), the USSC announced the "primary purpose" test for determining whether an out-of-court statement is testimonial in nature. The Court

explained statements are testimonial where their primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." Id., at 822. In Michigan v. Bryant, 562 U.S. 344 (2011), the USSC further expounded on the primary purpose test, indicating the Court must consider "all of the relevant circumstances." Id. at 369. The Court found where an out-of-court statement's primary purpose is "to create a record for trial" or "creating an out-of-court substitute for trial testimony" then the statement is testimonial and falls within the requirements of Crawford and the Confrontation Clause.

In 2009, the USSC extended the holding of Crawford to forensic "certificates of analysis" in which sworn statements, indicating the content of plastic bags submitted for testing was found to be cocaine, were submitted in lieu of testimony by an analyst. See Melendez–Diaz v. Massachusetts, 557 U.S. 305 (2009). The Court held the laboratory certificates were "within the 'core class of testimonial statements,' " making them inadmissible under the reasoning of Crawford. Melendez–Diaz, 557 U.S. at 310. The Melendez–Diaz majority explained the certificates were a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. Additionally, the Court noted the certificates were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 311.

In Bullcoming v. New Mexico, 564 U.S. 647 (2011), the defendant objected to the admission of a blood alcohol report when the analyst that prepared the report did not testify, but a co-worker served as a witness. The USSC found the defendant was entitled to cross-examine the analyst that created the report because "a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police

investigations." Id. at 665. The Court further explained: "[the analyst's] certificate is 'formalized' in a signed document." Id. The Court summarized its finding indicating: "In sum, the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the analyst's] assertions as testimonial." Id.

Subsequently, the USSC decided Williams v. Illinois, 567 U.S. 50, 135 S.Ct. 2221 (2012). The case, which ended in a four-one-four decision, addressed the use of a DNA profile produced by an out-of-state lab in which no one from that lab testified. The profile was used by a State's witness to compare to a known sample taken from the defendant and the State's witness indicated the samples were a match. Four of the Justices found the DNA profile created by the Maryland lab was non-testimonial because it's primary purpose was not to "accuse petitioner or to create evidence for use at trial." The Justices found "its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." Id. at 2243. Justice Thomas agreed the report with the DNA profile was non-testimonial, but concluded it was because the "report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact." Id. at 2260. The remaining four Justices found the report was testimonial and a confrontation clause violation occurred when the analyst who prepared the report failed to testify. Id. at 2277.

In Ohio v. Clark, 576 U.S. 237, 135 S. Ct. 2173 (2015), the USSC explained: "Our Confrontation Clause decisions . . . do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony." Id. at 250, 135 S.Ct. at 2183. The Court stated: "We have never

suggested . . . that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'" Id. at 250-251, 135 S.Ct. 2183 (citing Bryant, 562 U.S. at 358).

Objectively, the purpose behind the National Medical Services (NMS) laboratory report was to assist Dr. Fulcher in determining cause and manner of death for the minor victim. (T.462-463; R.403-404). Dr. Fulcher performed the autopsy on the minor victim on October 18, 2014. At that time he extracted the various fluids tested by NMS and sent them to the lab. Until the lab results were obtained, the child's death was unexplained. It was not until after the lab results were obtained that law enforcement believed Oxycontin was the cause of death, and once they had that information they began questioning Petitioner regarding Oxycontin. (T.88-89; R.47-48). Only after the lab results were obtained did the investigation into the minor's death become one focused on Petitioner and her overdosing of the minor victim with Oxycontin.

NMS would not have any objectively reasonable belief the results of the toxicology would be used in a criminal case. The lab was merely providing a toxicology as part of a routine autopsy as requested many times by Dr. Fulcher—as many as 650 times a year. (T.449; 472; R.390; 413). Dr. Fulcher even explained that many times he performs an autopsy it is for insurance purposes and not part of a criminal investigation. (T.450; R.391). Additionally, state statute requires an autopsy any time a child's death is unexplained, including in circumstances indicating SIDS. See S.C. Code Ann. §§ 17-5-520 and -540 (Supp. 2018). As a result, even if NMS knew the requested toxicology

report was for a child, it would not have been evident that the results would have been for a criminal case.

Finally, there is no indication the report issued by NMS had the "solemnity of an affidavit or deposition" required under Justice Thomas' evaluation of whether a statement is testimonial in nature. The information presented by Dr. Fulcher from NMS appears to simply be a toxicology report documenting what they examined and what they found. (T.451; 467; R.392; 408). Nothing indicates it was issued in the form of a notarized affidavit or other certification which would provide a basis of formality to the document. Instead, it was presented as merely a lab report documenting the results of their tests. As a result, the report would not be testimonial in nature under either the four Justice's theory or Justice Thomas' theory on determining the nature of the statement. As a result, the trial court did not err in admitting the testimony because the admission of the statement did not implicate the Confrontation Clause.

Harmless Error

Even if the admission of the specific findings of the NMS lab report violated Petitioner's rights under the Confrontation Clause, the admission of those case specific findings were entirely harmless in light of other evidence in the record. The remaining facts as presented by the State created a clear link to Petitioner and the minor victim's cause of death—Oxycontin overdose.

"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." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict."

State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

This Court has recently reiterated that even a Confrontation Clause violation may be harmless and explained the analysis for determining harmless error:

> A [C]onfrontation [C]lause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that we are persuaded, beyond a reasonable doubt, that the violation did not affect the verdict. When determining whether an error is harmless, this Court considers, inter alia: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Perez, 423 S.C. 491, 498, 816 S.E.2d 550, 554 (2018) (internal citations and quotation marks omitted).

In the instant case, the testimony by Dr. Fulcher which would have been excluded by the Confrontation Clause if this Court finds the report was testimonial was the testimony regarding the specific concentrations of Oxycontin found in the minor victim's blood, eye fluid, and stomach contents. The remainder of his testimony including his finding of cause of death as Oxycontin overdose and manner of death of homicide would both be admissible as expert opinion. The specific concentration, while illustrating lethality of the dosage given by Petitioner, is not necessary to prove homicide by child abuse beyond a reasonable doubt.

Further, the State presented evidence directly linking Petitioner to the death of the child victim. Petitioner was the lone adult home with the minor victim at the time of his death. (T. 167; R.118). Petitioner would fix the kids pink lemonade to drink, and was the only one to fix the drink. (T.196; 198; R.147; 149). Two kids drink cups were taken from either in or beside the Pack n' Play where the minor victim had been sleeping. (T.395; R.336). A toxicologist from SLED tested the liquid found in the cups. In one, he found caffeine and methamphetamine. (T.429; R.370). He explained the methamphetamine likely got in the liquid as vapors from when it was being smoked or made. (T.431; R.372). In the liquid from the other cup, he found Oxycodone. (T.433; R.373). Petitioner had a prescription for Oxycodone in the form of Oxycontin. (T.314; R.257). Testimony indicated the only means of administering the drug had to be through a liquid since there was no evidence the child consumed a pill. (T.457-458; R.398-399). Finally, Dr. Fulcher explained that in the United States Oxycontin or Oxycodone is not used in a pediatric setting. (T.455; 464; R.396; 405). Dr. Fulcher testified in his expert opinion the cause of death was Oxycontin overdose and the manner of death was homicide. (T.462-463; R.403-404). As a result, even without the specific levels being admitted into evidence, the State demonstrated: 1) the infant died of an Oxycontin overdose and the death was not accidental; 2) he was administered Oxycontin through a liquid; 3) in the United States, Oxycontin is not legally given to infants; 4) Petitioner had a prescription for Oxycontin; 5) Petitioner was the only one home and fixed the lemonade the minor victim drank; and 6) the cup being used by the minor victim and found where he had been sleeping contained Oxycontin. Accordingly, even if it was error to include the testimony regarding the concentrations of Oxycontin and information off the report,

the error was entirely harmless. As a result, this Court should deny the Petition for Writ of Certiorari as to Question II.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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