

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
Perry H. Gravely, Circuit Court Judge

Op. No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020)

2016-GS-39-2265

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

PETITIONER

APPELLATE CASE NO. 2020-001345

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Angela D. Brewer, Appellant.

Appellate Case No. 2017-002563

Appeal From Pickens County
Perry H. Gravely, Circuit Court Judge

Unpublished Opinion No. 2020-UP-255
Submitted June 1, 2020 – Filed August 26, 2020

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant
Deputy Attorney General William M. Blicht, Jr., both of
Columbia; and William Walter Wilkins, III, of Greenville,
all for Respondent.

PER CURIAM: Angela Brewer appeals her conviction for homicide by child abuse for which she was sentenced to twenty years' imprisonment. Brewer argues the circuit court erred (1) in admitting her statement to law enforcement because she

was too intoxicated to give the statement and to knowingly and voluntarily waive her Miranda rights; (2) in allowing a pathologist to testify to the results of a toxicology blood test he did not conduct; and (3) in denying her request for a continuance. We affirm.

FACTS

The State alleged Brewer caused the death of her 13-month-old grandson (Victim) by giving him lemonade laced with OxyContin to help him sleep. Brewer and her husband shared a residence with Brewer's daughter (Daughter), Daughter's fiancé (Son-in-law), and Daughter and Son-in-law's four children—including Victim. Son-in-law was the adoptive father of Victim.

On the day of Victim's death, October 17, 2014, Husband left for work around 5:00 a.m. He was scheduled to work the entire business day. Daughter and Son-in-law took two of their four children to school, but the school would not allow one of the children to stay due to the child's recent fever. Daughter and Son-in-law then returned to the residence intending to drop the child off, but the child wanted to go with them. Son-in-law and the child accompanied Daughter to her place of work at approximately 10:30 a.m. and then to Georgia around 12:00 p.m. At that point, Brewer was alone at her residence with Victim and the youngest child. Brewer told authorities that: while home with Victim and the youngest child, she fed Victim and gave him lemonade around 11:00 a.m.; Victim played in the living room area and drank more lemonade until he fell asleep while she held him around 1:15 p.m.; and she laid him down in a Pack 'n Play before feeding the other child and watching television. Brewer alleged that sometime between 2:45 and 3:00 p.m., Victim woke up and smiled at her before falling back asleep.

Sometime after 4:00 p.m., Husband got off work and telephoned Brewer while driving home. During their discussion, Brewer informed Husband that Victim was still asleep, at which point Husband responded that she should wake him up so that Victim would be able to sleep that night. Brewer then tried to wake Victim up, but he was unresponsive. Husband then rushed home, arriving to the house at approximately 4:30 p.m. When Husband arrived home, Brewer handed him Victim and Husband began performing CPR on him. Brewer then telephoned 911 for assistance and Victim was taken to the hospital via ambulance. Brewer also telephoned Daughter and Daughter rushed from Georgia to the hospital.

Tragically, emergency personnel were unable to resuscitate Victim and he was subsequently pronounced dead. Authorities from the Pickens County Sheriff's

Office, Pickens County Coroner's Office, the South Carolina Department of Social Services (SCDSS), and the State Law Enforcement Division (SLED) all responded to the hospital. Brewer cooperated with authorities at the hospital and advised that Victim had been "sickly" and "fussy" all day. However, due to her emotional state, law enforcement officials chose not to take a written statement from Brewer that night. No one was arrested or *Mirandized*¹ on this date. Further, Husband gave the Sheriff's Office written permission to search the residence. Law enforcement took pictures of the residence and retrieved bedding from the crib that Victim had been in, a can of formula, an empty bottle, and two sippy cups that were located either in or beside the Pack 'n Play. The sippy cups contained two different liquids—one reddish in color, the other yellow-brownish in color. Victim's autopsy was conducted the next day on October 18, 2014.

Subsequently, law enforcement officials sought a follow-up interview with Brewer to get a better timeline of the events that transpired because the atmosphere at the hospital the night of Victim's death was too emotional. On November 6, 2014, Brewer agreed to meet with a Pickens County detective for an interview. The detective questioned whether Victim could have gotten access to Brewer's OxyContin, but Brewer became argumentative and stated that was not possible because she kept her pills with her at all times in a child-proof container and counted them daily. Brewer was again not given *Miranda* warnings before this interview. After approximately thirty-five minutes of questioning, Brewer provided a written statement² to the detective.

On November 17, 2014, the autopsy report was completed and signed by the attending pathologist, Dr. James Fulcher. The report showed that Victim died from the presence of a high concentration of Oxycodone³ in his blood. Dr. Fulcher's report included the results of a toxicology blood test done by the National Medical Services laboratory (NMS) on November 2, 2014. At some point, items from the residence—including the liquids recovered from the sippy cups—were taken to SLED for chemical testing. On December 12, 2014, SLED published its chemical report on the liquids. The yellow-brownish liquid tested positive for

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² The document on which Brewer wrote the statement contained pre-prepared *Miranda* rights.

³ Oxycodone is sold under the trade names OxyContin and Percodan. OxyContin is a long-acting form of Oxycodone.

methamphetamine⁴ and caffeine, and the reddish liquid tested positive for Oxycodone.

On December 18, 2014, Lt. Rita Burgess with the Pickens County Sheriff's Office and SLED Agent Christine Cauthen met with Brewer for a subsequent interview. This interview was held at the Sheriff's Office in a formal interview room and was audio and video recorded. Lt. Burgess provided Brewer with a formal *Miranda* rights and waiver form that Brewer signed without incident. During the interview, Brewer stated that Victim did not act sick that day, that she woke up around 3:30 or 4:00 (a.m.) to watch the ID channel, that she usually sleeps during the day because she wakes up so early, and that she made lemonade in a container that morning. She also advised it was the first time that she had made lemonade for Victim. When Lt. Burgess and Agent Cauthen pressed Brewer about the death being an accident—comparing it to a case involving an accidental Benadryl overdose—Brewer hung her head and replied, "That was my baby." Brewer asked for a lawyer about forty-five minutes to an hour into the interview. The interview then ended, Lt. Burgess obtained a warrant, and Brewer was arrested that day. Brewer was eventually indicted for homicide by child abuse on October 11, 2016.

Brewer's trial took place over the course of four days in 2017. On December 11, 2017, a preliminary *Jackson v. Denno*⁵ hearing was conducted to determine the admissibility of Brewer's interview statements. Brewer argued her December statement to Lt. Burgess and Agent Cauthen should be excluded. Both law enforcement officials provided testimony regarding the statement and Brewer's physical state. Lt. Burgess testified that she and Agent Cauthen gave Brewer a ride to the Sheriff's Office at approximately 10:00 a.m. because she did not have transportation. Lt. Burgess stated that Brewer advised that she had taken her Oxycodone medication at 6:00 a.m. that morning but appeared coherent at the beginning of their discussion. However, Brewer became incoherent during the interview, at which point the interview was stopped and Lt. Burgess spoke with a judge about obtaining an arrest warrant for Brewer. Agent Cauthen also testified that Brewer appeared coherent and able to comprehend their questions at the beginning of the interview. Agent Cauthen testified that when Brewer appeared to fall asleep, they took a break to get something to drink. When they returned from break, Brewer advised that she had taken a Valium and that she had not informed them of that fact because the Valium did not affect her. Agent Cauthen stated that

⁴ Victim did not have methamphetamine in his blood.

⁵ 378 U.S. 368 (1964).

Brewer admitted she had taken the Valium around the time they arrived to pick her up for the interview.

After the circuit court had an opportunity to view the video of the statement, Brewer asserted the video should be excluded in its entirety because she was clearly intoxicated from her prescription medication and was unable to knowingly waive her *Miranda* rights. The State argued that Brewer validly waived her *Miranda* rights but conceded that around the 12:28-minute mark in the video, when the parties went on a break, the influence of the Valium took over and Brewer become visibly different. The State argued this latter portion of the video was nevertheless admissible under Rule 404(b), SCRE, to show intent and lack of accident or mistake. The circuit court ruled that at the beginning of the video, Brewer's responses to questions and general conversation appeared voluntary but acknowledged that later in the video, particularly after the break, "the influence of the Valium seem[ed] to kick in" and Brewer became "almost incoherent." The circuit court redacted any portion of the video taken before Brewer signed the *Miranda* waiver at the 11:49-minute mark, the portions after the parties returned from the break, and a few portions in between that the circuit court also found inadmissible on unrelated grounds.

On December 13, 2017, the third day of trial, the State called upon SLED Agent Timothy Grambow to testify. Agent Grambow worked in the toxicology department at SLED and was qualified as an expert in forensic toxicology. Agent Grambow testified that he personally tested a small can of baby formula and the two small vials of liquid. He explained the methamphetamine could have been found in the yellow-brownish liquid in different ways: (1) it could have been added directly to the liquid, or (2) it could have been smoked or made in a clandestine lab, and the residual from smoke vapors could have gotten inside the container. Agent Grambow stated there was an indication the reddish liquid contained methamphetamine, but he explained SLED's laboratory would not list an item in its official reports unless it was 100% certain the illicit substance was present.

Dr. Fulcher also testified on December 13th. Dr. Fulcher indicated that he was a pathologist and was subsequently qualified as an expert in forensic pathology and toxicology. Dr. Fulcher testified that as part of his examinations, he extracts blood and uses NMS instead of SLED for toxicology screens due to NMS's speed in returning results. He stated:

It might sound silly in a case like this. It becomes very problematic when it's an adult and there's an insurance

policy, and I've got a pending autopsy and that family is about to lose their house because the toxicology lab wants to take six months to do the report. We always use them.

Dr. Fulcher further testified that it was more likely Victim consumed Oxycodone in liquid form as opposed to time-release pill form, OxyContin is "more likely to be able to be dissolved in an acidic environment,"⁶ and Victim likely died within one to two hours of having ingested the drug.

Following Dr. Fulcher's testimony, the State rested. Brewer subsequently moved for a continuance, claiming she had not taken her prescription medication since she was taken into custody on December 11, 2017, and had issues sleeping as a result. Brewer argued this would have an effect on her decision whether to testify. The State argued a continuance would be an unnecessary delay, there was no real evidence that Brewer could not effectively communicate with the circuit court or her attorney, and she had in fact been speaking with her counsel throughout the day. The court then engaged in a personal colloquy with Brewer. Based on Brewer's responses, the circuit court found she was able to decide whether she needed to testify and denied the continuance request. After conferring with her counsel, Brewer decided not to testify.

Brewer was found guilty as indicted and sentenced to twenty years' imprisonment. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by admitting part of the statement Brewer made to law enforcement while she was under the influence of her prescription medication?
2. Did the circuit court err by allowing Dr. Fulcher's testimony regarding the results of the toxicology blood test in violation of Brewer's Sixth Amendment rights?
3. Did the circuit court err by denying Brewer's request for a continuance?

STANDARD OF REVIEW

⁶ The State argued this fact was why Brewer made lemonade with real lemons.

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "The admission of evidence is within the discretion of the [circuit] 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). Furthermore, "[t]he granting of a motion for a continuance is within the sound discretion of the [circuit] court and will not be disturbed absent a clear showing of an abuse of discretion." *State v. Geer*, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting *State v. Yarborough*, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005)). "An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265.

LAW/ANALYSIS

I. Statement to Law Enforcement

Brewer argues that the influence of her prescription medication made her incapable of "voluntarily waiving her constitutional rights and unable to know what she was saying when she spoke to police." Brewer maintains that her slurred speech from the outset of the December statement and her struggle to stay awake during the interrogation are clear evidence of her intoxication. Therefore, she contends, the circuit court erred by admitting the involuntary statement. The State argues that the evidence shows that she was coherent and capable of understanding what she was doing and saying and that the circuit court properly considered the totality of the circumstances when it admitted a portion of the video into evidence. We agree with the State.

The Fifth Amendment provides that no person in a criminal case shall be compelled to be a witness against herself. U.S. Const. amend. V. The prosecution may not use statements stemming from a custodial interrogation of the defendant unless the defendant is first warned about her Fifth Amendment rights. *Miranda*, 384 U.S. at 444. "The test of admissibility of a statement is voluntariness." *State v. Childs*, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989). "If a defendant was advised of h[er] *Miranda* rights[] but chose to make a statement anyway, the 'burden is on the State to prove *by a preponderance of the evidence* that h[er] rights were voluntarily waived.'" *Id.* (quoting *State v. Washington*, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988)). "A determination whether a confession was 'given voluntarily requires an examination of the totality of the circumstances.'" *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) (quoting *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 694–95 (1996), *overruled on other grounds by State v.*

Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)). This court has recognized the following factors in a totality of the circumstances analysis:

background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

State v. Moses, 390 S.C. 502, 513–14, 702 S.E.2d 395, 401 (Ct. App. 2010).

Here, the circuit court properly considered the totality of the circumstances surrounding Brewer's waiver and did not abuse its discretion by admitting part of the December statement. *See Myers*, 359 S.C. at 47, 596 S.E.2d at 492 ("On appeal, the [circuit court]'s ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion."). The record reveals the circuit court viewed the video of the December statement and found Brewer's responses evinced voluntariness. Additionally, Lt. Burgess and Agent Cauthen both testified that Brewer appeared coherent and able to comprehend their questions during the interview. Furthermore, Brewer makes no argument that her background, experience, age, etc., contributed to the involuntariness of the December statement. *See Moses*, 390 S.C. at 513–14, 702 S.E.2d at 401.

Brewer hinges her argument entirely on the fact that she was under the influence of her prescription medication; however, our state's legal precedent makes clear that the mere fact a defendant was under the influence is inadequate to prove her statement was involuntary. *See State v. Saxon*, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) ("[P]roof that an accused was intoxicated at the time [s]he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that [s]he did not realize what [s]he was saying."); *see also State v. Collins*, 266 S.C. 566, 572–73, 225 S.E.2d 189, 193 (1976) ("Proof of [an] accused's intoxication, short of rendering h[er] unconscious of what [s]he is saying, does not require, in every case, that statements [s]he made while in that condition be excluded from evidence."). As noted by the State, there is evidence in the record that the circuit court considered the effect Brewer's prescription drugs had

on her statement. This is evident by the court's exclusion of the portion of the video where, by the court's estimation, the Valium "seems to kick in." Furthermore, Lt. Burgess testified that they ended the interview when Brewer became incoherent during questioning. Thus, evidence supports the circuit court's finding that Brewer was not impaired to the point that she did not realize what she was saying during the earlier portion of her statement. *See Collins*, 266 S.C. at 573, 225 S.E.2d at 193 ("The evidence, including the condition of the defendant[,], presented a factual situation which the [circuit court] determined unfavorably to the defendant. We cannot say that [it] erred.").

Accordingly, we find the circuit court did not abuse its discretion by admitting a portion of Brewer's December statement. *See State v. Sledge*, 428 S.C. 40, 58–59, 832 S.E.2d 633, 643 (Ct. App. 2019) (affirming the circuit court's admittance of the defendant's voluntary statements because the court "thoughtfully considered the fact that [the defendant] was *Mirandized* twice; his rights were clearly and carefully explained; [the defendant] paid close attention to the rights explained to him and acknowledged his waiver of rights in writing; []the atmosphere in the interview room was not hostile and there was no evidence of coercion or pressure to the extent his will was overborne[;]" and the evidence of the defendant's intoxication did not take away his ability to understand and process information or make rational decisions).

II. Pathologist Testimony

Brewer argues the circuit court erred by allowing Dr. Fulcher to present testimony regarding lab test results from NMS because Dr. Fulcher did not personally conduct or witness the lab testing. Brewer maintains this violated her rights pursuant to the Sixth Amendment's Confrontation Clause. The State argues the lab test results were not testimonial because NMS did "not have any objectively reasonable belief the results of the toxicology would be used in a criminal case." Thus, the primary purpose of the lab results was to assist Dr. Fulcher in determining the cause of Victim's death and did not invoke the Confrontation Clause.

The Sixth Amendment provides that in all criminal prosecutions, the accused has the right to confront witnesses against her. U.S. Const. amend. VI. This right to confront witnesses includes out-of-court testimony or statements introduced at trial that were made for the purpose of establishing or proving some fact. *See Crawford v. Washington*, 541 U.S. 36, 50–51 (2004). However, while "testimonial" hearsay is subject to Confrontation Clause scrutiny, nontestimonial hearsay is not. *Id.* at 68. "To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal

prosecution." *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n.6 (2011) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). "However, '[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *State v. Brockmeyer*, 406 S.C. 324, 342, 751 S.E.2d 645, 654 (2013) (quoting *Michigan v. Bryant*, 562 U.S. 344, 359 (2011)).

In determining the primary purpose of the out-of-court statement, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred."

Id. at 342–43, 751 S.E.2d at 655 (quoting *Bryant*, 562 U.S. at 360).

Brewer makes no specific argument as to why the lab results were testimonial in nature, merely arguing, "[t]he primary purpose of the lab report from NMS Labs was to establish past events that were potentially relevant to later criminal prosecution" and "the lab report was made under circumstances that would lead an objective witness reasonably to believe that the report, and the statements contained therein, would be available for use at a later trial." The State counters that: "NMS would not have had any objectively reasonable belief that 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." We agree with the State.

The evidence shows that at the time Dr. Fulcher commissioned the toxicology screen, the authorities involved in the case did not suspect that Victim died from a drug overdose or that a crime had been committed. There had been no arrest made, nor was there clear evidence of criminal activity. *Compare Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (finding affidavits reporting the results of a forensic analysis that showed that the *material seized* by the police and connected to the defendant was *cocaine* were easily testimonial) *with Williams v. Illinois*, 567 U.S. 50, 79 (2012) (plurality opinion) (finding an independent lab report's DNA analysis of a vaginal swab in a rape case was not testimonial). Additionally, Dr. Fulcher testified that he routinely extracts blood as part of an autopsy. Therefore, we do not believe the NMS lab results had the primary purpose of assisting in an eventual criminal investigation, and hence, the lab results were not testimonial. *See*

Brockmeyer, 406 S.C. at 342, 751 S.E.2d at 654 ("Under the primary purpose analysis required by the Confrontation Clause, where the primary purpose of an out-of-court statement is to serve as evidence or 'an-out-of-court substitute for trial testimony,' the statement is considered testimonial." (quoting *Bullcoming*, 564 U.S. at 670 (Sotomayor, J., concurring))). Accordingly, the circuit court did not err in allowing Dr. Fulcher to testify to the lab results.

III. Motion for Continuance

Brewer argues the circuit court's denial of her motion for a continuance violated her due process rights. Brewer maintains that her mental capacity, due to a two-day lapse in taking her prescription medication, affected her decision regarding whether to testify in her own defense. She argues, therefore, she showed good cause to adjourn proceedings and reconvene the next morning. The State counters that the circuit court did not abuse its broad discretion in denying her motion because the circuit court engaged in a colloquy with Brewer and determined that based on her questions and responses she was fit to decide whether she wanted to testify. We agree with the State.

Continuances may be granted by a presiding judge only upon a showing of good and sufficient legal cause. Rule 7(a), SCRCrimP. "The granting of a motion for a continuance is within the sound discretion of the [circuit] court and will not be disturbed absent a clear showing of an abuse of discretion." *Geer*, 391 S.C. at 189, 705 S.E.2d at 447 (quoting *Yarborough*, 363 S.C. at 266, 609 S.E.2d at 595). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

The record shows that the circuit court conducted an inquiry into Brewer's capacity to effectively decide whether she wanted to testify in her case. After engaging Brewer in a lengthy colloquy, the circuit court did not find good cause for the continuance. See Rule 7(a) ("Continuances *may* be granted by a presiding judge . . . only upon a showing of good and sufficient legal cause . . ." (emphasis added)). Brewer was able to answer all of the circuit court's questions during the colloquy. Therefore, the circuit court's decision was not so arbitrary as to violate Brewer's due process rights. See *Ungar*, 376 U.S. at 589. We find the record contains no evidence warranting reversal of the circuit court's decision to deny the continuance. See *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)

("Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth.").

CONCLUSION

Based on the foregoing, Brewer's conviction is

AFFIRMED.⁷

LOCKEMY, C.J., and GEATHERS and HEWITT, JJ., concur.

⁷ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
 IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

APPELLANT

APPELLATE CASE NO. 2017-002563

Appeal from Pickens County

Perry H. Gravely, Circuit Court Judge

Opinion No. 2020-UP-255

PETITION FOR REHEARING

On August 26, 2020, this Court affirmed Appellant's conviction in an unpublished opinion without the benefit of oral argument. State v. Brewer, Op. No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and misapprehended by this Court in reaching its conclusions.

Statement to law enforcement

Contrary to this Court's opinion, the trial judge erred in admitting a statement made by Appellant to law enforcement where the evidence demonstrated Appellant was so intoxicated by

her prescription medication that she was incapable of knowingly and voluntarily waiving her rights and of voluntarily giving a statement. In arriving at this conclusion, this Court misapprehended the Supreme Court's opinion in State v. Saxon, 261 S.C. 523, 201 S.E.2d 114 (1973). Furthermore, to the extent, this Court insists upon reading Saxon, *supra*, to mean that intoxication just short of unconsciousness may *never* render a statement involuntarily made, Appellant argued against precedent, and this Court failed to consider Appellant's argument that Saxon, *supra*, was wrongly decided.

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

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

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

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

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

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

This Court concluded “the circuit court properly considered the totality of the circumstances surrounding [Appellant]’s waiver and did not abuse its discretion by admitting part of the December statement.” State v. Brewer, 2020-UP-255 (S.C. Ct. App. filed August 26, 2020). According to this Court, there was evidence in the record to show the circuit court considered the effect the prescription drugs had on Appellant’s statement as shown by the judge’s exclusion of a portion of the statement. Further, this Court noted that Appellant “hinge[d] her argument entirely on the fact that she was under the influence of prescription medication,” but that “our state’s legal precedent

ma[de] clear that the mere fact a defendant was under the influence is inadequate to prove her statement was involuntary.” Id. (citing State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973)). In rendering this opinion, this Court misapprehended the holding in Saxon.

Over four decades ago, the South Carolina Supreme Court held “[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words.” State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). According to the Court, “proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused’s intoxication was such that he did not realize what he was saying.” Id. Further, the Court stated that “[p]roof of intoxication, short of rendering the accused unconscious of what he is saying, goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence.” Id. Nevertheless, after making these pronouncements of the law, the Court ruled as follows:

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

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

Three years after Saxon, the South Carolina Supreme Court had the opportunity to examine another case in which a statement was allegedly made while the defendant was intoxicated. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976). Collins and a co-defendant were charged with armed robbery of a local store. Id. at 568, 225 S.E.2d at 190-191. There was no dispute that on the day of the robbery, the men “had been drinking heavily.” Id. at 568, 225 S.E.2d at 191. Collins was arrested on the day of the robbery for public drunkenness. Id. at 569, 225 S.E.2d at 191. A detective questioned Collins concerning the robbery about an hour after his arrest. Id. According to the detective, he “determined, by means of a field sobriety test, that [Collins] was capable of and did understand his rights before questions were asked.” Id. To the contrary, the officer who arrested Collins “stated that in his opinion, [Collins] was still intoxicated” after being questioned. Id. at 569-570, 225 S.E.2d at 191.

In deciding whether the trial judge abused his discretion in determining the statement by Collins was voluntarily and knowingly given, the South Carolina Supreme Court cited Saxon, supra, for the proposition that “[p]roof of accused’s intoxication, short of rendering him unconscious of what he is saying, does not require in every case, that statements he made while in that condition be excluded from evidence.” Id. at 572-573, 225 S.E.2d at 193. However, the Court based its ruling on the fact that “[t]he evidence, including the condition of the defendant presented a factual situation which the judge determined unfavorably to the defendant.” Id. at 573, 225 S.E.2d at 193. See also, Gladden v. Unsworth, 396 F.2d 373, 381 (9th Cir. 1968) (ordering the state court to conduct a hearing on the voluntariness of Unsworth’s statements where the undisputed evidence showed he was “in a state of gross intoxication” at the time of the making of the statements); Reddish v. State, 167 So.2d 858, 863 (Fla. 1964) (holding a defendant’s confessions “should not be permitted to stand as evidence against” the defendant where the “totality of all the circumstances,

such as the man’s physical condition, in combination with the impact of narcotics, as well as the lack of clear-cut testimony regarding his mental condition at the time he gave the statements” meant the confessions “were not obtained in a manner consistent with constitutional standards against compulsive self-incrimination”); State v. Young, 875 P.2d 1119, 1123 (N.M. Ct. App. 1994) (remanding where the trial court erroneously determined the defendant’s intoxication was irrelevant to the issue of waiver because “voluntary intoxication is relevant to determining whether a waiver was knowing and intelligent”); State v. Bramlett, 609 P.2d 345, 350 (N.M. Ct. App. 1980) *overruled on other grounds by* Armijo v. State Through Transp. Dep’t, 737 P.2d 552 (N.M. Ct. App. 1987) (holding the contradictory testimony from the officers that the defendant was too intoxicated to be released and was detained for his own protection, but was not so intoxicated that he could not provide a knowing waiver of his constitutional rights “offends the standards of fundamental fairness under the due process clause” “and is unworthy of the degree of belief necessary to sustain a finding of voluntary waiver”).

Thus, the *holdings* of Saxon and Collins reveal that intoxication – even short of unconsciousness – may render a statement made to police involuntary. This Court’s reliance upon the dicta from Saxon and Collins or misinterpretations of those opinions requires rehearing.

The interrogation of Appellant began at 11:46 a.m., on December 18, 2014, when the police obtained a waiver of rights from her. R. 34, ll. 3-25; R. 35, l. 4 – R. 36, l. 13; R. 41, ll. 5-17; R. 48, ll. 18-23; R. 49, ll. 20-22; R. 50, ll. 1-12; R. 507; State’s Exhibit #18. During the course of the interrogation, Appellant explained that she had taken her prescribed oxycodone at 6 a.m. that morning. R. 36, ll. 18-23; R. 40, ll. 17-19; R.50, ll. 16-24; State’s Exhibit #18. Later, it was revealed that Appellant took a valium shortly before the officers picked her up for the interrogation. R. 40, ll. 20-24; R. 52, ll. 7-15; R. 52, ll. 16-20. Thus, it was undisputed that

Appellant had ingested prescription oxycontin and valium prior to her interrogation by law enforcement.

Over the course of the interrogation, Appellant's mental and physical condition deteriorated. Appellant's conduct did not suddenly change; instead, "there was a steady and gradual decline in her ability to speak and her speech being slurred." R. 39, l. 25 – R. 40, l. 4; R. 54, ll. 11-15; R. 56, ll. 10-15 (officer testifying that Appellant "just started sliding downhill" during the interrogation); see also State's Exhibit #18 (showing Appellant's ability to comprehend deteriorate under the influence of her prescription medication).

"At some point" it became clear to the interrogating officers that Appellant was "under the influence of something." R. 37, ll. 3-5; R. 51, ll. 13-14; see also R. 37, ll. 8-9 (officer testifying that Appellant "made a few statements that were - - that were incoherent"); State's Exhibit #18 (showing Appellant's slurred speech and non-sensical responses from the beginning of the video). Appellant was no longer coherent and "seemed to be falling asleep." R. 51, ll. 13-15; R. 53, ll. 16-20; see also State's Exhibit #18 (showing officer repeatedly question Appellant regarding her drowsiness and Appellant showing signs of fatigue, slurring her speech, being thick-tongued, not remembering what she said just moments prior, and saying that she did not understand and could not remember). In response, the officers stopped the interrogation briefly. R. 37, l. 9; R. 51, ll. 19-20; R. 57, ll. 3-6; see also State's Exhibit #18. An officer walked Appellant outside to see if she could wake up. R. 51, ll. 22-23; see also State's Exhibit #18. The officer then resumed the interrogation with Appellant's condition steadily deteriorating. R. 52, ll. 7-9; R. 57, ll. 7-11; see also State's Exhibit #18. In other words, the interrogation did not end when Appellant became incoherent, as this Court stated in its opinion. In fact, the officers were

well aware of Appellant's state, but continued the interrogation with no regard for Appellant's ability to understand or comprehend.

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

Appellant respectfully requests this Court rehear this matter to examine the significant facts overlooked or misapprehended that demonstrate the totality of the circumstances rendered the entirety of the statement inadmissible. The video of the interrogation showed Appellant's speech was slurred from the moment she walked into the interrogation room, as Judge Gravely found. The video showed a woman who contradicted herself repeatedly. State's Exhibit #18. Within seconds of answering a question, she would forget the answer she had provided. State's Exhibit #18. She constantly mumbled, requiring the officers to request her to repeat her answers multiple times. State's Exhibit #18. Her responses lacked internal coherence and were inconsistent with prior statements and undisputed facts, which the officers realized was result of intoxication, not an attempt to mislead. State's Exhibit #18. Comparing Appellant's conduct during an earlier interrogation, see State's Exhibit #17, with her conduct during the interrogation conducted by

Burgess and Cauthen, it is apparent that Appellant was grossly intoxicated due to the use of her prescription medication at the time of the Burgess and Cauthen interrogation.

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

This Court erred in concluding the circuit court properly considered the totality of the circumstances surrounding Appellant's waiver and statement. State v. Brewer, Op. No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020). Appellant respectfully disagrees because the circuit court erred in admitting Appellant's statement to law enforcement because the totality of the

circumstances – her severe intoxication – showed Appellant’s intoxication rendered her unable to voluntarily waive her constitutional rights and unable to know what she was saying when she spoke to police from the moment the interrogation began. Shortly before the interrogation, Appellant used two prescription narcotics to treat the pain she suffered. Appellant’s inability to understand her constitutional rights and what she was saying to police rendered her statement involuntary. Contrary to the judge’s ruling, Appellant did not suddenly become intoxicated during the interrogation; rather, she was intoxicated from the very beginning. Therefore, the entire statement should have been ruled inadmissible. The state capitalized on the trial judge’s error by using the statement in its closing to show that Appellant was intoxicated from her use of her prescription drugs during the interrogation to argue that Appellant was intoxicated on the day that she cared for Minor, and to argue that Appellant’s intoxication was the equivalent of extreme indifference to human life.

To the extent this Court’s opinion was based upon the premise that Saxon stands for the proposition that intoxication just short of unconsciousness may *never* render a statement involuntarily made, Appellant argues against precedent. In other words, if this Court affirmed the circuit court’s admission of Appellant’s statement into evidence because Appellant’s sole argument was that her intoxication made her unable to understand the import of her constitutional rights and the waiver of those rights, and this Court’s reading of Saxon is that intoxication alone is insufficient to render a statement involuntary, Appellant respectfully requests this Court rehear the matter to explain that intoxication alone may result in an involuntary statement.

Conduit testimony in violation of the Confrontation Clause

This Court held the admission of the toxicology lab results through the pathologist, who did not conduct the toxicology tests, was not a violation of the Confrontation Clause because the lab

results were not testimonial as the results did not have “the primary purpose of assisting in an eventual criminal investigation.” State v. Brewer, 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020). This Court rests its holding upon the fact that the pathologist requested the toxicology screen at a time when the police did not suspect the deceased died as a result of a drug overdose or that a crime had been committed. According to this Court, “[t]here had been no arrest made, nor was there clear evidence of criminal activity.” Id. Appellant respectfully requests this Court rehear this matter because the Court has misapprehended or overlooked critical facts and controlling case law.

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

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

the prosecution presented three “certificates of analysis” showing the results of the chemical testing performed on the evidence at the state lab. Id. The certificates indicated the only key facts necessary for the prosecution of Melendez-Diaz – the weight of the substance and that the substance was cocaine. Id. Melendez-Diaz objected to the certificates as violating his right under the Confrontation Clause. Id. at 309.

The Supreme Court held there was “little doubt” that the certificates fell “within the core class of testimonial statements” described in Crawford. Id. at 310. While the documents were labeled certificates, the documents were “quite plainly affidavits.” Id. The certificates were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” Id. at 310-311 (quoting Davis, 547 U.S. at 830). “[N]ot only were the affidavits ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’” but under state law, the sole purpose of the affidavit was to provide evidence of the composition, quality, and net weight of the substance. Id. at 311 (quoting Crawford, 541 U.S. at 52). Thus, the Court held Melendez-Dias was entitled to be confronted with the analysts at trial. Id.

The Court rejected the argument that forensic analysts were excepted from the Confrontation Clause because they conducted so-called “neutral scientific testing.” Id. at 318. The Court explained “[f]orensic evidence is not uniquely immune from the risk of manipulation.” Id. Noting that most laboratories producing forensic evidence are administered by police agencies and report to the heads of those agencies. Id. As a result, the forensic scientists “sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” Id. (internal quotation omitted). Thus, “[c]onfrontation is one means of assuring accurate forensic analysis.” Id. “Confrontation is designed to weed out not only the fraudulent

analyst, but the incompetent one as well.” Id. at 319. “Like expert witnesses generally, an analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.” Id. at 320.

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

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

Confronted with a variation on the issue presented in Melendez-Diaz, the Supreme Court held the Confrontation Clause affords an accused the right to be confronted with the actual analyst who conducted the forensic chemical testing of his blood which was used against him in his driving while intoxicated (DWI) trial – not a “surrogate witness.” Bullcoming v. New Mexico, 564 U.S. 647, 651 (2011). Following an automobile accident involving Bullcoming, the police arrested him for DWI and obtained his blood for chemical testing. Id. at 652. To

determine Bullcoming's blood alcohol level, the police sent the sample to a state lab. Id. at 652-653. The lab produced a standard form identifying the participants in the testing and the forensic analyst's finding. Id. at 654. The form was certified by the forensic analyst. Id. At Bullcoming's trial, the state introduced the certified form against Bullcoming as a "business record" through another analyst who neither observed nor reviewed the actual analyst; the state did not call the actual analyst who conducted the testing and produced the form. Id. at 655.

The Supreme Court held the "surrogate testimony" of the second analyst could not satisfy the Confrontation Clause. Id. at 659-662. The Court rejected the argument that the analyst was a "mere scrivener" of what the gas chromatograph machine generated. Id. at 659-661. For example, the actual analyst's report indicated the sample arrived intact with the seal unbroken, the sample matched the lab number, that he performed a particular test on the sample, and that he adhered to certain protocol. Id. at 660. These representations were exactly the types of areas for a lawyer to probe on cross-examination. Id. Further, the Court rejected the suggestion that an analyst's report drawn from machine-produced data overcomes the Sixth Amendment bar because the Constitution requires the reliability of such evidence be tested by the crucible of cross-examination. Id. at 661.

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

dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Id. at 662.

The South Carolina Supreme Court applied Melendez-Diaz and Bullcoming in State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013). Brockmeyer objected to a witness reading into evidence computerized chain-of-custody logs of items that were introduced by the state. Brockmeyer, 406 S.C. at 339-340, 751 S.E.2d at 653. The Court concluded the chain-of-custody records at issue were non-testimonial. Id. at 352, 751 S.E.2d at 660. Reading Melendez-Diaz very narrowly, the Court concluded the chain of custody documents "were not created 'for the sole purpose of providing evidence against the defendant.'" Id. (quoting Melendez-Diaz, 557 U.S. at 323). Additionally, the Court was persuaded that the documents were not testimonial because they did "not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items." Id. Thus, the Court concluded "the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their 'primary purpose' is not to constitute evidence in a criminal trial." Id. The statements were "exempt from the Confrontation Clause." Id.

In a case analyzing the connection between the Confrontation Clause and expert testimony, the United States Supreme Court addressed whether an expert who testified that a DNA profile produced by an outside laboratory matched a profile produced by the state police lab using a sample of the defendant's blood violated the Confrontation Clause. Williams v. Illinois, 567 U.S. 50, 56 (2012). Writing for four justices, Justice Alito noted that "an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be

true” as long as the party who calls the expert introduces other evidence establishing the facts assumed by the expert. Id. at 57. The Court carefully crafted the opinion to explain that “this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted.” Id. at 57-58. “Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.” Id. at 58.

Very important to the resolution of the Williams case, the Court held the expert did not testify to the truth of the matter concerning the work done by outside laboratory in the case nor did the expert “vouch for the quality of the [outside laboratory]’s work.” Id. at 71. As mentioned, it was critical that the expert’s testimony concerning the conclusions of the outside laboratory was not offered for the truth of the matter, but merely to show what the expert relied upon on arriving at her own conclusions. Id. at 71-72. Finally, and perhaps most significantly, the Court explained its conclusion was dictated by the fact that Williams was tried by a judge, not a jury. Id. at 72.

The Court explained the trier of fact – the judge – would have understood that the expert’s statements regarding the work conducted by the outside laboratory were not offered as substantive evidence. Id. The Court held that if Williams had been tried by a jury “there would have been a danger of the jury’s taking [the expert’s] testimony as proof that the [outside laboratory] profile was derived from the sample obtained from the victim’s vaginal swabs.” Id. “Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could *not* have gone to the jury.” Id. (emphasis added). Where Williams was tried by a judge

only, the Court “assume[d] that the trial judge understood that the portion of [the expert]’s testimony ... was not admissible to prove the truth of the matter asserted.” Id. at 72-73.

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

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

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

Particularly helpful for resolution of the case sub judice is the Tenth Circuit Court of Appeals’ opinion in United States v. Garcia, 793 F.3d 1194 (10th Cir. 2015). Garcia challenged the admissibility of a “gang expert” whose testimony was based on conversations with gang members. Garcia, 793 F.3d at 1211. Garcia argued the expert’s testimony consisted of parroting testimonial hearsay from those he had interviewed. Id. The Tenth Circuit explained that “[s]pecial considerations arise under the Confrontation Clause in the context of expert testimony.” Id. at 1212. The relevant rule of evidence in federal court, much like the South Carolina rule, permits an expert to rely on testimonial hearsay; however, the rule cannot override the Confrontation Clause. Id. Thus, the Tenth Circuit reasoned that to reconcile the rule and the Confrontation Clause, the expert must exercise independent judgment in assessing and using the

hearsay to reach an expert opinion. Id. In this way, “[t]he expert’s opinion will be an original product that can be tested through cross-examination.” Id. (citing United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009)).

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

As an initial matter, it must be noted that although this Court affirmed the circuit court’s decision to admit the lab results through a conduit witness, this Court’s analysis centered upon a finding that the lab results were not testimonial, which was not the finding made by the circuit court. In fact, the circuit court made no attempt to analyze the purpose of the lab results. Instead, the circuit court judge found simply that the Confrontation Clause was satisfied because Appellant could cross-examine the pathologist. This finding was erroneous. Additionally, this Court’s conclusion that the lab results were not testimony because the lab results were not obtained with the primary purpose of establishing past events potentially relevant to later criminal prosecution is not supported by the evidence.

This Court correctly noted that the pathologist requested the toxicology screen prior to an arrest; however, this Court’s indication that the police did not suspect that a crime had been

committed was not correct. On October 17, 2014, the police officers were confronted with a deceased child with no apparent cause of death from a visual inspection of the exterior of the child. The police immediately suspected the child did *not* die as a result of natural causes. Further, the police questioned Appellant on the day of the child's death about what medications Appellant used. R. 106, ll. 2-15. Such questioning is not surprising in light of what the police suspected. Based on the items seized from Appellant's home *on the day of death*, it appears the police suspected the deceased suffered from a lethal overdose of Appellant's prescription medications. Using a consent to search, the police seized and/or took photographs of Appellant's medications and "sippy cups" found throughout the house. R. 220, l. 5 – R. 226, l. 6; R. 292, ll. 20-24 (lead investigator directed forensics to seize the sippy cups). Most importantly, the police questioned Appellant on November 6, 2014, which was after the lab issued its report, but prior to the pathologist issuing his autopsy report and there was no indication the police were aware of the lab report at the time, about the access of the deceased's to Appellant's medications. R. 232, l. 9 – R. 233, l. 2. Although the date was not given by one of the lead investigators, it was clear that the police requested the sippy cups be tested by SLED, which occurred prior to the interrogation of Appellant on December 18, 2014. R. 281, l. 21 – R. 282, l. 10; R. 311, ll. 1-3 (one investigator "believed" the results were received in December 2014); R. 374, ll. 17-21 (SLED agent testifying his report was dated December 12, 2014). Appellant requests rehearing because these significant facts were overlooked or misapprehended by this Court in arriving at its opinion.

Dr. Fulcher explained how he handles autopsies requiring blood tests. He noted that he is "a member of a private group" that "charge[s] money for all these services to cover [their] costs." R. 390, ll. 13-16. He and his partner "decided as a protocol to use" whom the two

believed was “the best laboratory in the country to run all [their] specimens.” R. 390, ll. 17-18. According to Dr. Fulcher, that best laboratory in the entire country was “National Medical Services, ... located in a suburb of Philadelphia.” R. 390, ll. 19-20. He went on to explain that he used NMS instead of SLED because SLED was “slow.” R. 390, ll. 21-25. Next, Dr. Fulcher went on to vouch for the work performed by NMS.

I believe in them. They have been the preeminent lab in uncovering novel opiates. And one of the best things I like about them is they take specimens from the entire country. So they see the really weird stuff first, because they do more volume across the country.

They’ve got a handful, like five or six people that have died from this really weird opiate in two rural counties in Pennsylvania. It happened in a week period and went away. They got a test for that compound. If you sent that anywhere else, they wouldn’t find it.

So when I get their report back - - I can never say a report is absolute, you know. Only - - only God knows what is absolute truth. And we are trying to get as best we can to that. However, as far as our ability to test, this represents the finest lab in this country that we can send specimens to.

R. 391, ll. 7-22.

Dr. Fulcher then informed the jurors about the results of the testing conducted by NMS labs. Specifically, he informed the jurors of the specific levels of oxycodone and oxymorphone found in Minor’s blood, ocular fluid, and gastric contents. R. 392, ll. 2-21. When asked to explain what “those numbers” meant, Dr. Fulcher read from the NMS report. R. 393, l. 9 – R. 394, l. 25.¹ Thereafter, Dr. Fulcher informed the jurors that the amount of drugs in Minor’s system caused his death. R. 395, ll. 13-15.

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

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

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

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

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

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

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

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

A. I do, yes.

Q. And do you sign that report?

A. I do.

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

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

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

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

R. 413, ll. 6-25.

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

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

The lab results were testimonial in nature and Appellant did not have a prior opportunity to cross-examine the author of the statements contained within the lab report. The blood, ocular fluid, and gastric contents were sent to NMS Labs from Dr. Fulcher who was acting in his capacity as a medical examiner for Greenville County investigating the death of Minor. Dr. Fulcher admitted that he could have sent the specimens to SLED, the state lab, but he declined to do so because SLED is too slow for his liking. The primary purpose of the lab report from NMS

Labs was to establish past events that were potentially relevant to later criminal prosecution. The lab report was made under circumstances that would lead an objective witness reasonably to believe that the report, and the statements contained therein, would be available for use at a later trial. While the report was not admitted into evidence, it was clear from the testimony of Dr. Fulcher that the report was a formal document.

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

There can be little question that the lab results testified to by Dr. Fulcher were offered for the truth of the matter asserted. The results also were not offered simply to explain Dr. Fulcher’s analysis or determination for the cause of death. The results were offered to inform the jury of the drug levels present in Minor’s blood, ocular fluid, and gastric contents. Thus, unlike the DNA results offered in Williams, *supra*, the lab results presented in the instant case were offered for the truth of the matter asserted. Additionally, the Supreme Court relied heavily upon the fact that Williams was tried by a judge only, not a jury. As the Court explained, had Williams been

tried by a jury, the evidence as presented – without the calling of the analyst who arrived at the result relied upon by the other analyst – could not have gone to the jury. Appellant was tried by a jury, not a judge, who would have been able to discern when evidence was not being offered for the truth of the matter asserted. In fact, in closing, the solicitor used the lab test results to support the criminal charge against Appellant – that Minor died as a result of a drug overdose at the hands of Appellant. The jury was informed by Dr. Fulcher of the pristine reputation of NMS Labs and the unimpeachable results achieved in this case, but Appellant was unable to explore the areas guaranteed to her by the Confrontation Clause including challenging the analyst’s competency and judgment.

Appellant respectfully requests this Court rehear this matter based upon the significant points overlooked or misapprehended.

Respectfully Submitted,

s/Susan B. Hackett
SUSAN B. HACKETT
Appellate Defender

This 1st day of September, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is wblitch@scag.gov; and Angela D. Brewer, #374893, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 1st day of September, 2020.

s/Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

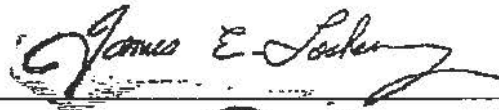
v.

Angela D. Brewer, Appellant.

Appellate Case No. 2017-002563

ORDER

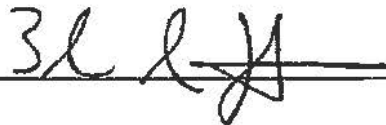
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C. J.



J.



J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
William M. Blicht, Jr., Esquire
William Walter Wilkins, III, Esquire
The Honorable Perry H. Gravely

FILED
Sep 10 2020
