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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Hon. Donald Hocker, Circuit Court Judge

Appellate Case No. 2018-000022

State of South Carolina ..... Respondent,

vs.

Adam Rowell ..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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Question I: Did the trial court err in admitting the blood test results from Sample A, the 8:54 pm blood draw, when the hospital records establish that Adam Martyn Rowell did not arrive at the emergency room until 9:00 pm, the records do not establish whether the blood was drawn from his arm or a central line, the blood is unaccounted for for a 30 minute period and a person who allegedly received the blood from the nurse did not testify?

Question II: Did the court of appeals err in holding the objection to the admissibility of Sample A, the 8:54 pm blood draw, was not preserved for appellate review when it was raised during the trial and in a post trial motion with no objection from the State?

Question III: Did the court of appeals err in holding the test results from Sample B, the SLED blood draw, was harmless error when it was the basis for an inference charge and the jury could have rejected Sample A as not being proven to be reliable?

Question IV: Did the court of appeals err in holding the trial judge did not need to conduct an evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the solicitor for the 8th judicial circuit when such a question was asked during jury voir dire?

Statement of the Case

Procedural History

Adam Martyn Rowell was formally arrested on December 16, 2014, upon his release from the hospital, and charged with one count of felony driving under the influence resulting in death and one count of felony driving under the influence resulting in great bodily injury. [1] He was indicted on March 27, 2015. He was tried before the Honorable Donald R. Hocker and a jury on February 13 to 27, 2017. The jury convicted him of the two charges. Judge Hocker sentenced him to 13 years in prison and a fine of $10,100 on the felony driving under the influence resulting in death. He was sentenced to 8 years and a fine of $5,100 on the felony driving under the influence resulting in great bodily injury. The two sentences are to run concurrent with each other. Rec. on App. at 1343, l 18 to 1344, l 6.

Mr. Rowell filed a Motion for a New Trial on March 7, 2017 and a supplemental motion on March 29, 2017. A post-trial hearing on the Motion was held on November 27, 2017. Judge Hocker denied the post-trial motions by an order dated December 27, 2017. The Notice of Appeal was filed on January 3, 2018.

On July 7, 2021 the South Carolina Court of Appeals filed an Order holding that the SLED blood draw, Sample B, was improperly admitted into evidence, but affirmed the conviction of Mr. Rowell, holding the SLED blood draw was harmless error. On July 20, 2021 the State filed a petition for rehearing. After obtaining an extension, Mr. Rowell filed his petition for rehearing and rehearing *en banc* on August 2, 2021.

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[1] The trial judge made a finding that Mr. Rowell was arrested at the time of the reading of *Miranda* rights on November 16, 2014. Rec. on App. at 1207, l 21 to 1208, l 3.

On August 25, 2021, the court of appeals filed a new opinion addressing the rehearing petition filed by the state, again affirming the conviction and denying the rehearing petition of Mr. Rowell. On September 2, 2021, Mr. Rowell again filed a second petition for rehearing and a rehearing *en banc*. On March 2, 2022, the court of appeals issued a third opinion granting the petition for rehearing but again affirming the conviction of Mr. Rowell in the third opinion.

On March 15, 2022, Mr. Rowell filed his third petition for rehearing and rehearing *en banc*. On April 1, 2022, the court of appeals denied the petition for rehearing and rehearing *en banc*. This Petition for Writ of Certiorari is from that denial of Mr. Rowell's petition for rehearing.

Factual History

Adam Martyn Rowell was involved in a serious automobile accident on November 15, 2014. The accident resulted in the death of Jeremey Cockrell and serious injuries to Matthew Sanders. Mr. Rowell also received massive injuries resulting in transfusions of blood, blood products and saline solutions. He was airlifted to Greenville Memorial Hospital where he remained until December 16, 2014. Rec. on App. at 1175, ll 15-18.

The exact cause of the crash was in dispute, but the record established the collision occurred in the lane of traffic of Mr. Cockrell. The theory of the State was that Mr. Rowell crossed the center line and collided with the truck being driven by Mr. Cockrell. Rec. on App. at 491, ll 6-17. Mr. Rowell presented the testimony of Justin Pennington, an eye witness, that the truck driven by Mr. Cockrell had crossed the center line toward Mr. Rowell and Mr. Rowell then veered left to avoid the collision. Rec. on App. at 1014, ll 1-15.

The testimony from Mr. Rowell was that he had spent the day running errands for his family. He had anticipated going to a family dinner that night. He had spent the afternoon making trips

between the residence of his parents and Walmart. He was seen at Walmart about 2 pm by a friend who testified he was sober and gave no indications of being under the influence. Rec. on App. at 931, l 1 to 932, l 19. He was seen again at Walmart at about 7 pm on a store video. He again gave no appearance of being intoxicated. Mr. Rowell stated that at the time of the collision he was heading to dinner to celebrate the birthday of his grandmother.

He further testified that he observed the truck being driven by Mr. Cockrell cross the center line and appear to be coming at him. He then swerved left to avoid the collision but Mr. Cockrell then turned back to the right. They collided in Mr. Cockrell's lane of traffic.

The injuries to Mr. Rowell were so severe that he had to be airlifted to Greenville Memorial Hospital. Rec. on App. at 525, ll 13-24. The hospital records show that blood was taken from a person identified as Mr. Rowell at 8:54 pm. (Sample A) Rec. on App. at 662, ll 20-24. The records, however, also show that Mr. Rowell's Life Flight helicopter arrived at the hospital at 8:59 pm. State's Exhibit 70. At a post-trial hearing, the State produced an exhibit that showed a person identified as Mr. Rowell arrived at the hospital at 8:44 pm, some 15 minutes before the flight records show he arrived. Post-trial hearing at 23, ll 6-23. Angela Waite, the flight nurse, testified the helicopter departed the accident scene at 8:31 pm and the flight took 24 minutes. This would have put him at Greenville Memorial Hospital some 11 minutes after the State's exhibit showed he arrived. Before arriving at Greenville Memorial Hospital, Mr. Rowell had received 2,540 milliliters of fluids and blood products. This would have been approximately half of the amount of blood in Mr. Rowell. Rec. on App. at 353, ll 7-22.

Angela Waites, the flight nurse, testified she observed Amanda Baker, an emergency room nurse, draw the blood from Mr. Rowell. Rec. on App . at 579, ll 21-24. She testified it was taken

from the right arm. Rec. on App. at 583, ll 10-12. Ms. Baker did not remember taking blood from Mr. Rowell. Rec. on App. at 588, ll 21-23. Ms. Baker stated the hospital documents stated the blood was taken from a central line and not the arm. Rec. on App. at 591, ll 16-24. The central line was put in by Dr. Bradley Snow after Mr. Rowell arrived at the emergency room. Rec. on App. at 592, ll 14-15; 593, ll 15-19.

Sample A, taken in the emergency room, was sent to the lab, but, according to the hospital records, did not arrive there for approximately 30 minutes from the time it was taken. Rec. on App. at 597, ll 14-20. The lab technician listed as receiving the blood was Bill Evans. Rec. on App. at 671, l 18 to 672, l 9. The tubes for the blood drawn in the emergency room with their labels were destroyed after about a week. Rec. on App. at 558, ll 10-17. The analysis from the Greenville Memorial Hospital showed a plasma blood alcohol level of .219. Rec. on App. at 549, ll 14-19.

After Mr. Rowell had his surgery, during which many more liters of blood were given to him, the State obtained a search warrant for a blood sample, Sample B, and urine sample. Rec. on App. at 155, ll 13-25. Trooper Brunson Smith, who served the search warrant, also read the implied consent forms to Mr. Rowell. Rec. on App. at 154, ll 9-24. Mr. Rowell was unconscious at the time of the reading of the implied consent forms and the search warrant. A blood and urine sample were taken at 1:05 am on November 16, 2014. This was approximately five and a half hours after the wreck. The urine was never tested. Rec. on App. at 796, ll 2-8. The result of this test showed a blood alcohol level of .096. Rec. on App. at 902, ll 11- 12. Also found in the blood was diphenhydramine, commonly known as Benadryl, at a level of 4.9 micrograms per milliliter. Rec. on App. at1112, ll 20-25. This was on the high end of a toxic dose and .1 away from a lethal dose. Rec. on App. at 1114, ll 18-25; 1115, ll 10-25. The SLED lab report also contained a level of

acetone which would indicate the person was a diabetic. Rec. on App. at 1107, ll 3-25. The record does not contain any evidence that Mr. Rowell was diabetic. Mr. Rowell testified he was not diabetic nor does he take Benadryl. Rec. on App. at 1159, ll 6-9.

Argument

Question I

Did the trial court err in admitting the blood test results from Sample A, the 8:54 pm blood draw, when the hospital records establish that Adam Martyn Rowell did not arrive at the emergency room until 9:00 pm, the records do not establish whether the blood was drawn from his arm or a central line, the blood is unaccounted for for a 30 minute period and a person who allegedly received the blood from the nurse did not testify?[2]

The trial court erred in admitting the blood alcohol test result. This case should be controlled by *Benton v. Pellum,* 232 S.C. 26, 100 S.E.2d 26 (1957). The first glaring error in this case is the fact that the hospital records show that the blood was allegedly taken from Mr. Rowell before he arrived at the emergency room. The records show he arrived at the emergency room at 9:00 pm. State's Exhibit 70. The blood for Sample A was taken at 8:54 pm. Rec. on App. at 662, ll 20-24. There is disagreement as to who drew the blood. The Life Flight nurse testified the blood was drawn from the right arm of Mr. Rowell by emergency room nurse Amanda Baker. Rec. on App. at 583, ll 10-12. Ms. Baker did not recall drawing the blood. She testified the blood was drawn from a

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[2] The record refers to blood being drawn at three separate times. The trial judge stated he was admitting the 8:54 pm blood draw. The hospital records refer to a 9:08 pm blood draw. It is not known what happened to the 9:08 pm blood draw. The last blood draw was drawn at 1:05 am. Rec. on App. at 157, l 11-13. This is referred to as Sample B, the SLED blood draw, as it was analyzed by SLED.

central line and was drawn by Dr. Snow. Rec. on App. at 665, l 18 to 666, l 11. [3] The court of appeals found, "Sample A was drawn by Dr. Snow via a central line." *State v. Rowell*, 870 S.E.2d 175, 180 (S.C. Ct. App. 2022). The central line was put in at 9:08. (Rec. on App. at 1451, PROCEDURES). This finding by the court of appeals simply means that the blood tested could not have been Sample A which was drawn at 8:54. *Rowell,* at 177; Rec. on App. at 742, ll 19-20; 743, ll 7-10.

The reliability of the chain of custody for this blood draw is further brought into question when the State produced a document, in a post trial hearing, that showed Mr. Rowell arrived at Greenville Memorial Hospital at 8:44 pm. This was some 15 minutes before the evidence the State produced, State's exhibit 70, showed he arrived. Angela Waite, the flight nurse and a State's witness, testified she left the accident scene at 20:31 and the flight took 24 minutes. Rec. on App. at 525, ll 22 - 24. Whether Mr. Rowell arrived at the hospital at 8:44 pm or 8:59 pm might not matter in making decision to save his life.[4] However, the time matters a great deal when the State is attempting to show the blood sent to the lab to be analyzed was actually taken from Mr. Rowell. Obviously, if the blood was taken from a patient that arrived at 8:44 pm, the blood was not taken from Mr. Rowell, regardless of whose name is on the tube of blood or what the hospital records claim.

Emergency room nurse Amanda Baker testified that according to the documents, she did not

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[3] The time required to install a central line is not set forth in the record. Obviously it would take a few minutes. Thus, if Mr. Rowell arrived at the emergency room at 9 pm, the blood could not have been drawn from a central line until several minutes after 9 pm. Obviously, he did not have a central line placed in him on the flight to Greenville Memorial Hospital.

[4] Attached as to this petition is Exhibit A, a chart with references to the Record on Appeal, showing the inconsistency as to the time Mr. Rowell arrived at the hospital.

draw the blood but received it from Dr. Snow. Rec. on App. at 593, ll 15-19. Dr. Snow, however, while describing the general procedure as to drawing of blood in the emergency room, never testified he drew the blood or even how the blood was drawn. Rec. on App. at 341, l 14 to 342, l 12. Angela Waites, the flight nurse, testified she observed Baker draw the blood from Mr. Rowell. Rec. on App . at 579, ll 21-24. She testified it was taken from the right arm. Rec. on App. at 583, ll 10-12. Ms. Baker did not remember taking blood from Mr. Rowell. Rec. on App. at 588, ll 21-23.

To further complicate this chain of custody, the testimony says it was given to a technician named Bill Evans. Emergency room nurse Baker testified on direct as follows:

> Q. (By Mr. Garrett) But it sat down there – once you take it where does it go?
> A. (Ms. Baker) It goes into the tube, into the – into the bag, and then the tech takes it up there. And then they have to hand it to a person at the lab window.
> Q. And you do not recall doing that in this case?
> A. No.
> Q. Or giving it to a tech?
> A. No, sir.
> Q. Do you know what the name of the tech would be?
> A. The only one listed is Bill Evans. He's the only tech present, according to this documentation, the day that –
> Q. So there was a person named Bill Evans who had possession of the blood?
> A. Un-huh
> Q. Affirmative. That was yes?
> A. Yes
> Rec. on App. at 671, l 13 to 672, l 7.

Mr. Evans did not testify. The State never attempted to explain his absence or his unavailability. The blood took over 30 minutes to go up one floor. The State never attempted to explain why this blood drawn in an emergency room was not immediately sent to the lab one floor up.

This court has said, " [T]he party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed." *Benton,* at 33, 100 S.E.2d at 537. The chain in this case is fatal from the very beginning. The records show the blood was taken from a person before Mr. Rowell was admitted to the emergency room. According to the flight records, the blood was even taken before the helicopter carrying Mr. Rowell touched down at Greenville Memorial Hospital. The hospital records have Mr. Rowell being admitted over 10 minutes before he arrived at the hospital. This is a factual impossibility. The only attempt to explain this impossibility was the testimony of Dr. John Reddic, who referred to it as "clock slop." Rec. on App. at 744, ll 11-16. The problem with the theory of the State is no one involved in drawing the blood testified it is their standard practice to look at their watch for the time when drawing blood. Angela Waite testified Amanda Westhart was the nurse recording the events, including the times of the blood draw and other events. Rec. on App. at 580, l 24 to 581, l 3; 654, l 18. Even though she was named as a possible witness, Ms. Westhart never testified. Rec. on App. 37, l 8. As a result, the record does not show what source she used to record the times. Nothing in this record suggests that Ms. Westhart used a watch or that any source of time she used was not in keeping with the clock in the emergency room or laboratory. To conclude there was "clock slop" in this case is complete speculation. "Clock slop" can never be a basis for admitting a blood sample when the medical record times make it factually impossible for the blood that was analyzed to be the blood of the person it purports to be.

In addition, the tech who received the blood was immediately supposed to walk the blood to the lab on the second floor. Rec. on App. at 668, ll 5-12. The records show the blood was handed

to a tech named Bill Evans who never testified nor was there any attempt to explain why it took 30 minutes to walk up one floor. Ms. Baker testified she normally labels the blood. Rec. on App. at 590, ll 12-14. But the testimony also shows that at times the blood is not labeled and the lab has to call the emergency room to get the information. As Mr. Robert Smith testified, "In some cases there are times when they don't put collection information, and in that instance I would call to the ER to get the collection information." Rec. on App. at 698, l 4-8. As no one from Greenville Memorial Hospital had a recollection about the collection process in this case, whether the blood was labeled or the lab had to call the ER to get the information is unknown. And if the sample sent to the lab was the sample of the person admitted at 8:44 pm and drawn at 8:54 pm, then that person was not Mr. Rowell. The State is required to prove the proper labeling and handling of the blood drawn. As the labels were destroyed, the State is unable to disprove the lab technician called and obtained information from the ER and that the information obtained was incorrect. Under the times established in this case, this fact is more than a mere possibility. In fact, it is the only explanation that explains the very serious time differences.

While the testimony was that the tubes the blood are placed in are self-sealing, Mr. Smith testified he would not be able to tell if the tubes had been tampered with. As he stated, "There would be no way I would know if it was tampered with before it got to me." Rec. on App. at 688, ll 23-24. He later stated the obvious and said if the cap was missing off the tube and it had spilled, he would not test it.

Mr. Smith further testified that he did not know from whom he received the blood. Rec. on App. at 602, ll 3-9. He admitted he has no knowledge as to how he received the blood. Rec. on App. at 597, l 21 to 598, l 3. This information may have been available to the State had they checked

the scanning records of when a person entered the laboratory. Rec. on App. at 602, ll 5-9. When a person has control of an item that is not sealed, that person must testify to preserve the chain of custody. The court of appeals has acknowledged that an incorrect date may not be a basis for holding a chain of custody is not valid. In doing so the court said, " Although a discrepancy existed as to the dates Dailey received the evidence, no evidence was presented to indicate the drugs were not within the control of identifiable people during the entire time." *State v. Johnson*, 318 S.C. 194, 196, 456 S.E.2d 442, 444 (Ct. App. 1995). Here, the record establishes that the blood vial, apparently not sealed, was in the control of an unidentified person who brought it to the lab.

Many of these unanswered questions as to whether Mr. Rowell's blood was actually tested could have been answered if the original vial and labels had been retained. They were destroyed a week or so after the blood was tested. Rec. on App. at 558, ll 10-17. Had the label been preserved, then the lower court would have known if the tube had been labeled or if the lab had to call to obtain the information. The trial court would have known if the lab copied the information correctly when they put it in their computer. Some of the unanswered questions in this chain could have been answered. But if the blood tested is that of the person who arrived at 8:44 pm, then the unanswered question is - whose blood was it?

To further add to the confusion in this matter, the record also reflects that a blood sample was taken at 9:08 pm. Rec. on App. at 683, ll 20-23. The laboratory personnel never reported they received two blood samples from Mr. Rowell. The trial judge admitted to the confusion when he stated, "If there was another blood draw – I mean, I can't control that." Rec. on App. at 686, l 13-14. He concluded that the 8:54 pm blood draw was the one being admitted. But as noted, this blood draw was even before Mr. Rowell had arrived at the emergency room and had the central line

installed.

As to the obligation to establish a valid chain of custody, this court has said, "DSS has the burden to establish a chain of custody for the blood samples 'as far as practicable.'" *S.C. Dep't of Soc. Servs. v. Cochran,* 356 S.C. 413, 418, 589 S.E.2d 753, 755 (2003). This includes the obligation to establish the item tested is in fact the blood of the person it is being introduced against. The State has failed in their burden in this case. What is left to speculation, among other things, is not only whether the blood tested is the 8:54 pm blood draw or the 9:08 pm blood draw, but whose blood is it? Was the 8:54 pm blood draw related to the patient who arrived at 8:44? The trial judge found it was the 8:54 pm blood draw being introduced but acknowledged that there was apparently a 9:08 pm blood draw for which there is no record of a test being performed on it.

The State attempted to explain the lack of clear evidence as to the chain of custody by saying the emergency room was "controlled chaos." Rec. on App. at 685, l 8. But because there is "controlled chaos" is not a reason to sustain a bad chain of custody. The court of appeals attempted to explain the time differences by stating, "The factual circumstances of this case reflect that the exact syncing of times between medical and flight personnel was unlikely." *Rowell*, at 180. As noted in the third petition for rehearing at pages 7-8, the hospital time and the medical flight time were in sync.[5] This factual statement by the court of appeals is simply incorrect. The inconsistent times are within the records of the Greenville Hospital system.

As a practical matter, the emergency room is not concerned with a chain of custody. If a problem arose because of the "controlled chaos" then the labeling on the tube would be available to

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[5] The third petition for rehearing at pages 7-10 discusses at length all the discrepancies within the records of the Greenville Hospital system.

double check in case of a question. Once the emergency is over, the hospital has no interest in keeping the tubes and labels and they are discarded. While discarding the tube and label a week or so later would seldom, if ever, have an impact on the medical treatment rendered, it is of great importance to verify the blood tested is the blood of Mr. Rowell. This is true when the criminal case arises and memories have faded to the extent they have in this case.

If a SLED blood draw were to have the same discrepancies that exist as to the Sample A in this case, the evidence would not be admitted. Under those circumstances a Court would not admit the SLED blood draw because too many questions remain unanswered and the State had failed to prove the blood tested was actually the blood of the defendant. This Court should not accept "clock slop" or "controlled chaos" as a reason to excuse a proper chain of custody. The process would simply not be reliable enough to permit the introduction of the blood alcohol test evidence in court. The fact that these problems exist with a non-SLED blood draw should not be a basis for admitting the blood evidence in this case. A court should look at the reliability of the entire process and not the entity making the blood draw. We do not have one standard for the admissibility of the evidence for SLED and another for all others. If it is unreliable for SLED, it is unreliable for all others.

The Supreme Court of Alabama has held that a chain of custody similar to the above would not be sufficient to establish a proper chain of custody. The case involved the chain of custody for a drug sale which had been handled by experienced law enforcement officers. The Court said:

> In the instant case, there were clearly missing links in the State's chain of custody. There is no evidence, either direct or circumstantial, reflecting what Larimer did with the substance he purchased from Lee or reflecting how Larimer handled and safeguarded the substance while it was in his possession before it was delivered to Gulledge. There was no evidence reflecting that the substance was ever sealed in an evidence envelope or safeguarded in any way by Larimer. There

> is no evidence, either direct or circumstantial, reflecting what Gulledge did with the substance while it was in his possession or how Gulledge handled or safeguarded the substance while it was in his possession. There is no evidence reflecting that the substance was ever sealed in an evidence envelope or safeguarded in any way by Gulledge. Moreover, Cannon did not state that the substance was in a sealed condition when she received it. Her testimony reflected only that she sealed the envelope the evidence was in after she completed her testing. To reiterate, there is no testimony reflecting where the substance was kept or how it was kept before it was presented to Cannon. Nor was there any evidence that when the substance was received at the lab it was packaged so as to be tamper-resistant.
> *Lee v. State,* 748 So. 2d 904, 912 (Ala. Crim. App. 1999), overruled on other grounds by *Pruitt v. State*, 954 So. 2d 611 (Ala. Crim. App. 2006)

Birge v. State, 973 So. 2d 1085, 1092 (Ala. Crim. App. 2007)("In order to establish a proper chain, the State must show to a 'reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain.' Because the proponent of the item of demonstrative evidence has the burden of showing this reasonable probability, we require that the proof be shown on the record with regard to the various elements discussed below.")(internal citations omitted).

This court has said, "The party offering evidence is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final analysis." *State v. Cribb*, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992) Similarly, the Illinois Supreme Court has said, "There is no dispute that the State has a burden of showing a continuous chain of possession over the contraband in order to establish the proper foundation for admitting it into evidence." *People v. Witanowski*, 104 Ill. App. 3d 918, 925, 433 N.E.2d 334, 340 (1982). Here, the state has not shown a continuous chain of custody of the blood allegedly drawn at 8:54 pm. As noted earlier, the blood is unaccounted for for a 30 minute

period. The individual who the records show initially received the blood, Bill Evans, did not testify. We do not know if the blood was sealed to prevent tampering when received by Mr. Evans or if Mr. Evans took the blood out of any package before it arrived at the lab. We do not even know if Mr. Evans delivered the blood to the lab or was it delivered by some unknown third party. The State simply failed to establish a continuous chain of custody. *People v. Gibson*, 287 Ill. App. 3d 878, 882, 679 N.E.2d 419, 422 (1997) held, "A chain of custody requires proof of delivery, presence and safekeeping." Such facts are not established in this case.

This case should be also controlled by *Cribb*. In *Cribb* the case involved a non-legal blood draw at a hospital just as this case. In holding the proper chain of custody had not been established, the Court noted the following facts:

> Two nurses attended Cribb upon his admission to the emergency room. One of the nurses testified that the other nurse administered an intravenous solution (IV) to Cribb and that it was customary for blood to be drawn by the person administering the IV. The nurse who administered the IV did not recall drawing blood from Cribb, but assumed that she drew his blood when she started the IV because that was her standard procedure. The lab technician did not know who drew Cribb's blood or how it was transferred to the lab. Neither Cribb's medical records nor the label on the blood sample discloses the person(s) who drew the sample and transported it to the lab. *Id.* at 518, 522, 426 S.E.2d at 309.

Many of the facts found to be flawed in *Cribb* exist here. There is confusion as to who drew the blood. There is confusion as to when the blood was drawn. There is confusion as to whether the blood could even belong to Mr. Rowell. The lab technician who tested the blood did not know from whom he received the blood. He could not even testify the blood had not been tampered with. He could not testify with assurance that the blood was labeled or if he had to call the ER to get the information. All these factors make the alcohol blood test result in this case unreliable.

This Court should grant the Petition for Writ of Certiorari and hold that a proper chain of custody has not been established and the trial court erred in admitting the blood alcohol test result from Sample A, the 8:54 pm blood draw.

Question II

Did the court of appeals err in holding the objection to the admissibility of Sample A, the 8:54 pm blood draw, was not preserved for appellate review when it was raised during the trial and in a post trial motion with no objection from the State?

In addition to the chain of custody problems discussed above, at the time Sample A, the 8:54 pm alleged blood draw, was taken, Mr. Rowell had received fluids from either saline solution and blood products equal to 2540 milliliters. Rec. on App. at 522, l 23 to 523, l 1. What effect this had on Mr. Rowell's blood alcohol level is not known as the State produced no expert testimony as to how it would affect the reading. Based upon the various transfusions Sample A was not 100% the blood of Mr. Rowell. In holding that Sample B, the SLED blood draw, was harmless error, the court of appeals impliedly held that because of the fact that 150% of his blood had been replaced, the reading was not reliable. Under this holding, the fact that over 50% of Mr. Rowell's blood had been replaced should make Sample A not reliable. The testimony at trial gave no basis for finding a 50% replacement of blood reliable and 150% unreliable. The State produced no testimony as to how reliable a blood alcohol reading is after a person has had massive blood transfusions.

In holding the issue as to the reliability of Sample A because of the massive blood transfusion was not preserved for appellate review, the court of appeals ignored two important facts. First, this issue was not raised below by the State nor was it raised on appeal. The State below never asked the trial judge to rule on whether this reliability issue was preserved. The comment as to reliability by

the State in it brief was, "Here Appellant never challenged the reliability of the methods used to test Sample A by Greenville Hospital." Br. of Resp. At 11. This is a correct statement as even the defense expert agreed the machine used by the Greenville Hospital was excellent. In holding this issue was not preserved, the court of appeals ignored the words of wisdom from Alex Sanders, the former Chief Justice of Court of Appeals, when he said, "More simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), opinion quashed, 286 S.C. 85, 332 S.E.2d 100 (1985). The court of appeals was never asked to rule upon the issue of whether the reliability issue was preserved. They raised this issue on their own.

Second, the court of appeals ignored, or at least did not discuss, the numerous places in the record where the issue was preserved. *See*, Third Petition for rehearing pages 2-5. Most notably, in the post-trial motions, defense counsel again raised the issue of the reliability of Sample A. In specific headings, the issue was referred to as "VI First Blood Draw - Contamination" and "VIII Both Blood Draws - Lack of Scientific Reliability." Rec. on App. at 1358 and 1360. The State received a copy of the post-trial Motion. The State never argued at the post-trial hearing that the issue as to the reliability of Sample A, as to its being contaminated, was not argued during the trial and ruled upon by the trial judge. In response to this motion, the trial judge stated:

> I've gone through your motion and your supplemental motion. I've gone back through all my trial notes. I think basically, there may be two new issues: the juror issue and then – and I'm just going to refer to it as the "Greenville Hospital" issue. Everything else is basically what was raised during the course of the trial? Is that correct Mr. Henderson?
> MR. HENDERSON: That is correct, your honor.
> Rec. on App. at 1380, ll 17-25.

In the order denying the motion for a new trial, the trial court included Issues VI and VIII among those "issues that were argued during trial." Rec. on App. at 1423. The trial court denied relief as to VI and VIII and said "These arguments are again denied." Rec. on App. at 1423. In denying the motion for a new trial, he again ruled upon the reliability of both blood draws as to the samples being contaminated by blood transfusion and saline solutions. If the State, at the trial below, had not believed the issue as to the reliability of the blood test because of the massive transfusions had not been raised, then they could, and should have, objected to the issue being raised at the post trial hearing. Obviously the trial judge believed he had ruled upon the issue during the trial.

The court of appeals in its order in this case, appears to be in complete conflict with a prior decision by the court of appeals. Previously, the court had said, "[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *State v. Williams*, 417 S.C. 209, 229, 789 S.E.2d 582, 593 (Ct. App. 2016)(internal citations omitted). This principle was not followed in *Rowell*. This court should grant this Petition for Writ of Certiorari to resolve this conflict.

Sample A blood testing was not reliable

The court of appeals in this case has established that a blood sample in which more than 150% of a person's blood has been replaced is not reliable. As a result, a blood sample in which more than 50% of a person's blood has been replaced is also not reliable. Thus, under the principles established here, once the reliability issue is preserved for review, Sample A should also have been excluded and this case reversed.

Once the facts establish that a defendant has received massive transfusions of saline solution,

blood and blood products, the State should have the burden of proving that the numbers in a test result are in fact accurate as to the blood of the defendant. The State has not met its burden in this case.

Question III

Did the court of appeals err in holding the test results from Sample B, the SLED blood draw, was harmless error when it was the basis for an inference charge and the jury could have rejected Sample A as not being proven to be reliable?

The SLED blood draw was the only basis by which the jury was told they could infer a person was under the influence if the blood alcohol reading was over .08%

This court has said, "Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012). The facts of this case establish that the error was not harmless. The court of appeals did not mention nor apply this standard.

First, the court of appeals failed to acknowledge that the SLED blood draw, Sample B, was the only blood draw the State used to obtain a jury charge of an inference of intoxication at a level of .08. Without the Sample B blood draw, the trial court could not have charged the inference. Rec. on App. at 1309, l 17 to 1310, l 2. The court of appeals failed to recognize or even discuss the prejudice inherent in the inference charge as to Sample B which the opinion found not admissible. In the modified opinion, the court of appeals failed to address the inference charge and the prejudice that arose from it.

Second, the Court of appeals did not analyze the facts of this case based upon the jury

rejecting the hospital blood draw, Sample A, and convicting Mr. Rowell solely on the basis of the Sample B, the second blood draw. The jury, under the facts, could have rejected the first blood draw based upon the lack of a chain of custody. The jury heard the confusing times and could easily have discredited the first blood draw because it was taken before Mr. Rowell arrived at the hospital.

Third, the court of appeals failed to consider the jury could have had a reasonable doubt as to both blood draws, but concluded one confirmed the other. While neither alone would have convicted Mr. Rowell, both together did convince the jury. Neither of these theories can be excluded beyond a reasonable doubt as *Tapp* requires.

Under the appropriate standard of review, this court must conclude that the error was not harmless beyond a reasonable doubt. Under any of the three scenarios, this court could not conclude, as a matter of law, that the Sample B, the second blood draw, did not contribute to the verdict. The standard for finding harmless error is very high. As the court of appeals has said, "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996). No court could so conclude under the facts of this case. The court of appeals has not explained how the second blood drawn had little or no impact on the decision of the jury. Thus, the court of appeals has again failed to follow its own precedent in this case.

This court should grant the Petition for Writ of Certiorari and hold the admission of Sample B was prejudicial to Mr. Rowell and remand for a new trial.

Question IV

Did the court of appeals err in holding the trial judge did not need to conduct an

evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the solicitor for the 8th judicial circuit when such a question was asked during jury voir dire?

A judicial system that depends upon jurors also depends upon honest answers from honest jurors. This is basic to our system of justice. For when a juror lies in their response to a voir dire question, we seldom will know what motivates the false answer. Without a hearing in which the juror testifies, one will never know the reason for the false statement. "Where a trial judge grants counsel's request that the judge ask a particular question on voir dire, counsel is entitled to a truthful answer to the question." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982). And this truthful answer must be so whether the response be with an affirmative answer or through a failure to respond.

The court of appeals, in its opinion, failed to consider that the record, even without any testimony from Juror 164, establishes that the Juror was asked about pending criminal charges. This fact is undisputed. The Juror did not respond, which simply told the court and the lawyers, he had no pending criminal charges. As the court of appeals has previously said, "It is the duty of every potential juror to make true and full disclosures during voir dire because counsel is entitled to rely on the answers in determining whether to exercise a peremptory strike." *Long v. Norris & Associates, LTD,* 342 S.C. 561, 573, 538 S.E.2d 5, 11 (Ct. App. 2000). The record in this case establishes the response by Juror 164 was not truthful. Once the record establishes the juror's answer was not truthful, the obligation of the moving party is over. The record at that point is sufficient to grant the moving party a new trial.

In ruling on this issue, the court of appeals said, "Nothing required the trial court or a party

to hail a juror into court to testify on the issue of juror misconduct under the circumstances presented here." *Rowell.* at 182. The only circumstance the court of appeals discussed to justify this conclusion was that the trial judge concluded his juror voir dire was confusing to this juror. Without testimony from the juror, this conclusion was without any evidentiary support in the record when the record established many other jurors did not find the questions confusing. In making this finding, the court of appeals ignored the record in this case. As stated above, the record established the fact the Juror was not honest in his response. The court of appeals has failed to consider that the factual finding by the trial judge that the Juror did not understand the question, is not supported by any evidence in the record. Before a trial court could make this factual determination, the trial court would be required to place the Juror under oath and hear his testimony. Thus, the finding of the trial court that the Juror's concealment was unintentional is without any evidence in the record and is, therefore, an error as a matter of law. As this court has said, "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). With no factual basis to conclude, "[T]he Juror 164's concealment was unintentional," (Rec. on App. at 1426) the trial court erred as a matter of law in making such a conclusion.

The court of appeal erred in failing to acknowledge that *State v. Woods,* 345 S.C. 583, 550 S.E.2d 282 (2001) involved an actual hearing where the juror testified. As such, the case could not be used as support for the conclusion of the court of appeals, "We find the trial court did not abuse its discretion in failing to conduct an evidentiary hearing with Juror 164." *Rowell* at 182.

In addition, if the trial court asked an ambiguous question, then the case should also be reversed. A defendant is entitled to voir dire questions asked by a trial court that are not ambiguous.

If a trial court determines, after the fact, that a voir dire question asked by the judge was ambiguous, the defendant has been deprived of a fair voir dire and thus a fair trial.

This Court should reverse the conviction of Adam Martyn Rowell based upon the untruthful answer of Juror 164 during the voir dire process. A remand for a hearing as to Juror 164 would serve no purpose as memories will have faded. In addition there is no dispute that the relevant question was asked.

This court should grant the Petition for Writ of Certiorari and hold Juror 164 was not truthful in his answers to voir dire and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari of Adam Martyn Rowell should be granted and the conviction reversed and the matter remand for a new trial with instructions that both blood alcohol tests result be excluded.

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