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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenwood County
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2022-000571

THE STATE, Respondent,

v.

ADAM ROWELL, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Did the Court of Appeals err in holding the admission of Sample B was harmless error when Sample B was properly admitted by the trial judge? And even if Sample B was admitted in error, was any error harmless in light of the overwhelming evidence against Petitioner?

IV.

Did the Court of Appeals err in holding the trial judge was not required to conduct an evidentiary hearing when Petitioner did not preserve this issue for appellate review because he did not even attempt to secure Juror #164's attendance for his new trial hearing on November 27, 2017? And if preserved, did the trial judge err when he was able to review the record and determine that Juror #164's concealment was unintentional which rendered any additional testimony by Juror #164 unnecessary?

STATEMENT OF THE CASE

Procedural History

In March 2015, a Greenwood County Grand Jury indicted Petitioner for 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. On February 13-20, 2017, a jury trial was held in the Greenwood County Court of General Sessions with the Honorable Donald B. Hocker, presiding. Petitioner was represented by Billy Garrett, Esquire, Carson Henderson, Esquire, and Jane Merrill, Esquire The State was represented by Assistant Solicitors Micah Black and Wade Dowtin of the Eighth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Petitioner of both counts of felony driving under the influence. Following the verdict, the trial judge delayed sentencing for one week. On February 27, 2017, the matter was reconvened and the trial judge sentenced Petitioner to a term of thirteen years' imprisonment for felony driving under the influence where death results and eight years' imprisonment for felony driving under the influence where great bodily injury results. The sentences were to run concurrently, resulting in an aggregate sentence of thirteen years' imprisonment for Petitioner.

On March 7, 2017, Petitioner filed a motion for a new trial and supplemented that motion with a request for additional information on Juror #164 on March 27, 2017. (R. 1354-365, 1368-375). On November 27, 2017 the trial court convened a hearing on those motions. At the conclusion of the hearing, the trial judge took Petitioner's arguments under advisement and subsequently issued a written order denying Petitioner's motions on December 27, 2017. (R. 1423-427).

Petitioner appealed his convictions. On September 22, 2020, the Court of Appeals heard oral argument in Petitioner's case. On July 7, 2021, the Court of Appeals issued a published

opinion affirming Petitioner's convictions and sentences. On July 20, 2021, the State filed a petition for rehearing with the Court of Appeals. On August 2, 2021, Petitioner filed a petition for rehearing. The Court of Appeals denied both petitions for rehearing on August 25, 2021, but withdrew their previous published opinion and substituted a new published opinion that affirmed Petitioner's convictions and sentences. On September 2, 2021, Petitioner filed a second petition for rehearing which included a request for rehearing En Banc. On March 2, 2022, the Court of Appeals granted Petitioner's petition for rehearing, dispensed with additional briefing or argument, and withdrew their previous opinion and substituted a new opinion which affirmed Petitioner's convictions and sentences. State v. Rowell, 436 S.C. 54, 870 S.E.2d 175 (Ct. App. 2022). Petitioner filed another petition for rehearing and a petition for rehearing En Banc on March 15, 2022. The Court of Appeals denied Petitioner's petition for rehearing and petition to be reheard En Banc on April 1, 2022. Petition filed a petition for writ of certiorari with this Court on May 2, 2022.

Factual History

On November 15, 2014, Petitioner was involved in a head-on collision with a vehicle driven by Jeremy Cockrell on Highway 225 in Greenwood County. (R. 106, 123). The wreck occurred at approximately 7:20 PM. (R. 116-17). The two cars involved in the collision were a darker colored pickup truck driven by Petitioner and a red pickup truck driven by Cockrell. (R. 123, 136). When EMS arrived at the scene of the wreck at 7:23 PM, Cockrell was deceased, but his passenger, Matthew Sanders was still conscious and had serious injuries to his left leg. (R. 281, 296, 313). Sanders suffered a broken femur and had surgery the following day to place a rod inside his leg. (R. 192-93, 255, 257). Petitioner was conscious when first responders arrived, but his body was trapped behind the steering wheel. (R. 290-91).

Paramedic Derrick Oliver climbed into Petitioner's vehicle to stabilize Petitioner and remove him from the vehicle. Once inside the vehicle, Oliver could smell an odor of alcohol coming from Petitioner's breath. (R. 292). Soon thereafter, Trooper Brunson Smith of the South Carolina Highway Patrol approached the driver's side of Petitioner's vehicle and smelled the odor of an alcoholic beverage. (R. 138). Smith also observed a bottle of beer with liquid still inside of it in the backseat of Petitioner's vehicle. (R. 139). First responders cut the door and roof off of Petitioner's vehicle in order to remove him from the car. (R. 295). After Petitioner was removed from his vehicle, he was placed inside an ambulance. Once inside the ambulance, Paramedic Larry Kidd also smelled the odor of alcohol emanating from Petitioner. (R. 316-17). Petitioner was eventually airlifted to Greenville Memorial Hospital at 8:32 PM. (R. 143).

Petitioner's flight to Greenville Hospital lasted approximately twenty four minutes. (R. 525, 1454). During the flight, approximately 2,540 milliliters of blood and blood products were transfused into Petitioner's body. (R. 523, 1454). When Petitioner arrived at Greenville Hospital, a blood sample (Sample A) was taken by Nurse Amanda Baker at approximately 8:54 PM. (R. 544, 662, 1453). Sample A was received by the hospital laboratory at 9:24 PM. (R. 671, 1453). An analysis of Sample A was completed at 9:40 PM which yielded a blood alcohol level of .1897. (R. 738). After Petitioner's initial blood draw, he received an additional 9,510 milliliters of blood and blood products during his emergency surgery. (R. 367). Petitioner's surgery ended at 11:40 PM. (R. 369-70). Following Petitioner's surgery, Nurse Leslie Childers drew a second sample (Sample B) of Petitioner's blood at 12:56 AM and transferred it to Trooper Smith at 1:05 AM. (R. 157, 775-76). Sample B was transported to SLED where it was analyzed and found to contain a blood alcohol level of .096. (R. 902).

At trial, Kelly Anderson of the South Carolina Highway Patrol testified regarding the MAIT team's investigation of the scene of the wreck. Anderson determined that Petitioner's vehicle crossed the center line and hit Cockrell's vehicle in its lane of travel. (R. 414). The MAIT team also determined that Petitioner's vehicle was traveling at approximately 69 miles per hour prior to impact while Cockrell's vehicle was traveling at 41 miles per hour. (R. 475-76).

After the State concluded the presentation of their case, Petitioner called eight witnesses in his defense, including himself. In addition to challenging the admissibility of Sample A and Sample B on chain of custody grounds, Petitioner challenged the accuracy of the results of the two samples. Petitioner called Dr. Jimmie Valentine as an expert in the field of toxicology, pharmacology, and chemistry. (R. 1042). Valentine challenged the results of Sample A by theorizing there may have been a false positive result because of the level of lactic acid that could have been inside Petitioner's body. (R. 1069-83). The trial judge declined to suppress the results of Sample A and found that the State had established the chain of custody as far as practicable and any weaknesses present in the chain would go to the weight of the evidence rather than the admissibility. (R. 638-39).

Valentine admitted that there was nothing wrong with the testing methodology used by SLED for Sample B and he actually praised SLED for using good testing methods, even going as far as calling them "the gold standard to run by." (R. 813; 1067, lines 13-14; 1105). Valentine's only reservation with the results of Sample B was the presence of Benadryl in the sample. (R. 813). Valentine speculated that Petitioner may have received tainted blood from one of the transfusions which would account for the presence of Benadryl. (R. 817). On cross examination, Valentine admitted that a normal person who had a blood alcohol concentration of .18, but did not receive blood transfusions, would be expected to have a blood alcohol level of .13 if a

sample were taken four hours later rather than the .09 level that Petitioner had. (R. 816-18, 1130-31). The trial judge declined to suppress the results of Sample B, because Petitioner's expert did not question the reliability of the methods used by SLED, but rather only questioned the results. (R. 825). At the conclusion of trial, Petitioner was convicted of both counts.

ARGUMENT

I.

The Court of Appeals properly affirmed the trial judge's admission of Sample A into evidence because Sample A was taken for purposes of medical diagnosis, and thus was presumed reliable regardless of chain of custody under this Court's opinion in Jamison v. Morris. However, even if this Court declines to extend its holding in Jamison to Petitioner's case, the Court of Appeals correctly determined that the State established a chain of custody as far as practicable and any gaps in the chain go to the weight and credibility of the evidence and not its admissibility. Even if Sample A was admitted in error, any error is harmless in light of the other evidence of Petitioner's impairment, including the admission of Sample B, whose chain of custody was not challenged by Petitioner.

Petitioner asks this Court to review the decision of the Court of Appeals on certiorari because he argues gaps in the chain of custody rendered Sample A unreliable and therefore inadmissible. Petitioner's argument fails for two reasons. First and foremost, because Sample A was taken for purposes of medical diagnosis, the reliability of the sample is presumed under this Court's opinion in Jamison v. Morris, 385 S.C. 215, 226, 684 S.E.2d 168, 174 (2009). Therefore, the State was not required to establish a chain of custody for Sample A. Second, even if this Court declines to extend its holding in Jamison to Petitioner's case, the Court of Appeals correctly concluded the State established a chain of custody for Sample A as far as practicable. Any gaps in the chain of custody or discrepancies regarding the times when the sample was taken are questions of the weight and credibility to be assigned to the evidence by the jury, not the admissibility of the evidence. The Court of Appeals properly recognized that the trial judge understood this distinction, and therefore did not abuse his discretion in admitting Sample A into evidence.

In Jamison v. Morris, this Court considered whether expert testimony was properly admitted when an expert witness testified regarding a deceased driver's probable level of impairment based on a blood alcohol level test conducted by SLED. Jamison, 385 S.C. at 226,

684 S.E.2d at 174. This Court held the trial judge erred in admitting the expert testimony because the expert's testimony was based on a blood sample analyzed by SLED that did not have an adequate chain of custody. Jamison, 385 S.C. at 227, 684 S.E.2d at 174. Because the sample was drawn for medical purposes but tested for investigative purposes, this Court held the sample was unreliable without a chain of custody. Id. However, citing to Ex parte DHEC[1], this Court ruled the sample would have been admissible had it been drawn and tested for medical purposes. Id. This Court provided the following rationale for its holding: "Here, we have a situation where a sample was drawn at a hospital for medical purposes but never tested. Had the hospital performed Carlos' BAL test as part of its medical treatment of him, the results would have been a part of Carlos' medical record. Under Ex parte DHEC, those results would be presumed reliable as a business record regardless of chain of custody." Id.

While the Court of Appeals declined to extend the holding in Jamison to Petitioner's case, the Court also acknowledged "Sample A was collected for medical purposes to save [Petitioner]'s life and not for any investigative purpose, which makes it unlikely it was tampered with." State v. Rowell, 436 S.C. 54, 64, 870 S.E.2d 175, 180 (Ct. App. 2022). The Court of Appeals' assessment of Sample A's reliability is nearly identical to this Court's stated rationale regarding the trustworthiness of medical records in Ex parte DHEC.[2] Recently, the Court of Appeals cited both Jamison and Ex parte DHEC to uphold the admission of a defendant's medical test for a sexually transmitted disease when the test was taken for medical purposes only. The Court wrote "Healthcare professionals with Lexington Medical Center—as opposed to

[1] Ex parte Dep't of Health & Envtl. Control, 350 S.C. 243, 565 S.E.2d 293 (2002).
[2] In Ex parte DHEC, this Court wrote "the trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment." Ex parte DHEC, 350 S.C. at 250, 565 S.E.2d at 297.

a law enforcement agency—performed the testing and recorded the results. Because law enforcement was not involved in the testing and the sole purpose of the testing was to diagnose and treat the patients, the trustworthiness of the test records is presumed." State v. English, Opinion No. 5904 (S.C. Court App. filed April 6, 2022) (Howard Adv. Sheet No. 12 at 89). Should this Court grant certiorari in Petitioner's case, the State asks this Court to extend its holding in Jamison to the facts in Petitioner's case, because Sample A was taken solely for purposes of medical diagnosis in order to save Petitioner's life. Therefore, reliability of Sample A should be presumed regardless of whether a chain of custody is established.

Should this Court decline to extend the holding in Jamison to Petitioner's case, the Court of Appeals nonetheless properly affirmed the trial court's decision to admit Sample A because the State established a chain of custody as far as practicable. Furthermore, despite a single missing link in the chain of custody and discrepancies in the times recorded for the taking of Sample A, the Court of Appeals correctly held that any discrepancies in times and imperfections in the chain go to the weight and credibility of the evidence and not its admissibility. Rowell, 870 S.E.2d at 180.

"[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). "Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." Sweet, 374 S.C. at 7, 647 S.E.2d at 206. "If the identity of each person in the chain handling the evidence is established, and the

manner of handling is reasonably demonstrated, no abuse of discretion is shown in the admission, absent proof of tampering, bad faith, or ill-motive." State v. Taylor, 360 S.C. 18, 26, 598 S.E.2d 735, 738 (Ct. App. 2004). "In examining issues regarding the chain of custody, a mere suggestion that substitution could possibly have occurred is not enough to establish a break in the chain of custody." Hatcher, 392 S.C. at 94, 708 S.E.2d at 754. "Minor discrepancies in the chain of custody implicates the credibility of the evidence, but does not render the evidence inadmissible." State v. Patterson, 425 S.C. 500, 508, 823 S.E.2d 217, 222 (Ct. App. 2019).

Here, the State identified each person who handled Sample A, produced testimony from each person in the chain except one, and provided documentary evidence confirming the testimony of each witness. The State established the beginning of the chain of custody with testimony from Angela Waites and Amanda Baker. Waites testified that she believed she saw Amanda Baker draw Sample A from Appellant. (R. 650-51). Baker did not remember drawing the sample from Appellant, but recognized her hospital identification number on the laboratory audit trail for Sample A. (R. 662, 1453). Sample A, like all samples taken at the hospital, received a unique bar code that allows the hospital to track the sample (Tr. 567-68, 1453). Baker testified that if her number appeared on an audit trail, her typical practice would be to take the blood sample and deliver it to the hospital lab. (R. 661-68). Baker did not remember taking Sample A to the hospital lab, but testified that she or technician Bill Evans would have been the one to take it to the lab. (R. 671-72). Evans did not testify. Laboratory technician Robert Smith did not remember receiving Sample A because he handles numerous samples on a daily basis. (R. 678). However, Smith was able to identify his hospital identification number on the laboratory audit trail which indicated he received Sample A. (R. 675-77, 1453). Smith explained that when he gets a blood sample from the emergency room, he makes sure the sample is

properly labeled and then places the sample in a machine to be analyzed. (R. 680-81). The machine produced a result approximately 15 minutes after it was received by Smith. (R. 682, 738).

Accordingly, the State established a complete chain of custody for Sample A. The State established who took the sample, who transported the sample to the hospital lab, and who analyzed the sample. (R. 662, 665-67, 680-81). Furthermore, the State provided documentary evidence to corroborate the testimony of the chain of custody witnesses. (Tr. 1453). The only possible witness in the chain who did not testify was Bill Evans. Despite the absence of a single link of the chain, the Court of Appeals correctly held: "although Evans did not testify and most of the witnesses in the chain did not recall these specifics, the State established through testimony and documentation Sample A's chain of custody as far as practicable given the circumstances." Rowell, 436 S.C. at 64, 870 S.E.2d at 180.

Finally, although not specifically addressed by the Court of Appeals, even if the trial judge erred in admitting Sample A, any error in its admission was harmless. Sample A was cumulative to other evidence regarding Petitioner's impairment. Three witnesses testified that the odor of an alcoholic beverage was emanating from Petitioner. (R. 138, 292, 316-17). Trooper Smith testified that he saw at least one open alcoholic beverage inside Petitioner's vehicle. (R. 139). Sample B, taken approximately six hours after the wreck, yielded a blood alcohol level of .096. Petitioner never challenged the chain of custody for Sample B. (Final Brief of Respondent 17, Petition for Cert. 19-20). Therefore, even if the trial judge erred by admitting Sample A, Sample B proved that Petitioner was still impaired six hours after the wreck even after a blood transfusion. Accordingly, any error in admitting Sample A is harmless in light of the admission

of Sample B and the rest of the evidence presented against Petitioner regarding his impairment. Petitioner's petition for a writ of certiorari should be denied.

II.

The Court of Appeals did not err in holding that the issue of the reliability of Sample A in light of Petitioner receiving life-saving blood transfusions before the sample was taken was unpreserved for appellate review. While Petitioner extensively challenged the admissibility of Sample A on chain of custody grounds, Petitioner never raised the issue of Sample A's reliability to the trial judge. However, even if preserved, the trial judge did not err in admitting Sample A because Petitioner offered no credible evidence that Sample A was unreliable, but rather merely proposed alternative theories to account for the presence of alcohol in Petitioner's blood sample that were only relevant to the weight and credibility of the evidence, not its admissibility.

Petitioner next argues the Court of Appeals erred in its determination that any challenges to the admissibility of Sample A on the ground that it was unreliable was not preserved for appeal. Petitioner argues that not only was the issue of reliability preserved, but asks this Court to rule on the merits of his complaint and hold Sample A was unreliable and thus improperly admitted by the trial judge. Petitioner's argument fails for two reasons. First and foremost, the Court of Appeals correctly concluded that this issue is unpreserved for appellate review. Petitioner extensively objected to the admission of Sample A on chain of custody grounds but did not object on the ground that it was unreliable. Second, even if preserved, the trial judge did not abuse his discretion in admitting Sample A because Petitioner never offered any credible evidence that Sample A was unreliable. On the contrary, Petitioner's expert, Dr. Jimmie Valentine, testified there was nothing wrong[3] with the machine used by the hospital for its analysis of Sample A. (R. 1066-68). Rather, Petitioner posed alternative theories to explain why Petitioner's blood alcohol level was elevated, such as Petitioner having a high level of lactic acid. (R. 1071-72). The trial judge properly recognized such alternative theories were relevant to

[3] In his petition to this Court, Petitioner acknowledged "even the defense expert agreed the machine used by the Greenville Hospital was excellent." (Petition for Cert. 17).

the weight and credibility to be assigned to Sample A by the jury and not its admissibility. Therefore, the trial judge did not abuse his discretion in admitting Sample A.

Error Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). A motion for a new trial may not be used to raise an evidentiary issue for the first time. State v. Holmes, 320 S.C. 259, 266, 464 S.E.2d 334, 338 (1995).

In his petition to this Court, Petitioner asserts the issue of error preservation was not raised by the State on appeal. Yet, Petitioner also writes "The comment as to reliability by the State in its brief was, 'Here Appellant never challenged the reliability of the methods used to test Sample A by Greenville Hospital.'. **This is a correct statement** as even the defense expert agreed the machine used by the Greenville Hospital was excellent." (Petition for Cert. 16-17)(emphasis added). Because Petitioner admits he did not challenge the reliability of the methods used to test Sample A, Petitioner is conceding that this issue is not preserved for appeal. Indeed, just as the State argued to the Court of Appeals that Petitioner never challenged the reliability of the methods used to test Sample A, the State now reiterates that argument to this Court to show why this issue is not preserved for appeal.

The trial judge heard testimony from four witnesses *in camera* to determine the admissibility of Sample A on chain of custody grounds. (R. 574-638). At the conclusion of the *in camera* hearing, the trial judge ruled that a chain of custody had been established. (R. 638). In

responding to the trial judge's ruling, Petitioner asserted that he would still challenge the results of Sample A, although he did not specify on what grounds he would challenge the results. (R. 640). Petitioner then clarified that he planned to challenge the reliability of Sample A through his expert witness and through cross examination of the State's witnesses. (R. 644-45). However, when the State called Dr. John Reddic to describe how Sample A was tested, Petitioner did not object to the admissibility of Sample A on grounds of reliability. (R. 733-39). Instead, Petitioner cross examined Reddic about whether lactic acid could cause a false positive alcohol result, but Petitioner did not question whether the machine used by the hospital was reliable. (R. 742-61). In fact, Petitioner's expert, Dr. Valentine, acknowledged the hospital used a different test than SLED because it was a quicker test and was better suited for a doctor's needs in providing quick care for a patient in an emergency situation. (R. 1067). Valentine did not, however, question the fundamental reliability of the hospital's test for obtaining an alcohol concentration. Valentine merely presented an alternative hypothesis that could account for Petitioner's elevated blood alcohol reading. (R. 1065-84). Furthermore, despite Petitioner's persistence that he raised the issue in his motion for a new trial, a defendant cannot use a motion for a new trial to raise an issue for the first time. See State v. King, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999).

Merits

The decision as to whether to admit or exclude expert testimony rests within the trial court's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). In order to admit scientific evidence under rule 702 SCRE, the trial court must find: (1) the testimony will assist the trier of fact, (2) the witness is qualified, (3) the underlying science is reliable, and (4) the

testimony's probative value is not outweighed by its prejudicial effect. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

Even if preserved, Petitioner's argument fails on the merits. Petitioner argues Sample A is unreliable because more than 50%[4] of Petitioner's blood volume has been replaced. Specifically, Petitioner asserts "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 are in fact accurate as to the blood of the defendant." (Petition for Cert. 18-19). Petitioner's argument confuses the trial judge's role in assessing the reliability of a test with the jury's role in determining the weight and credibility of the results of that test. Petitioner never challenged the reliability of either the machine used by the hospital to test Sample A or the machine used by SLED to test Sample B. Rather, Petitioner merely sought to cast doubt on the results of the tests because each test revealed that Petitioner was highly intoxicated. Thus, while Petitioner made an excellent argument to the jury as to why they should harbor reasonable doubt about the test results, the argument is irrelevant to the trial judge's consideration of the reliability of the tests. Here, the trial judge astutely recognized this distinction when he rendered the following ruling:[5]

> The Court: Well, what I'm finding is that you're wanting me to suppress the results simply because your expert disagrees with the validity of the results. But

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[4] The assertion that Petitioner had 50% of his blood volume is not supported by the record. Petitioner's expert, Dr. Valentine, could not offer an opinion on a specific percentage of Petitioner's blood that was replaced and explained that some of the fluid being transfused into Petitioner was simultaneously being expelled via a catheter. (R. 819-20, 1094, 1096). Furthermore, Dr. Bradley Snow could not provide a specific estimation either. Dr. Snow initially estimated that 1/3 of Petitioner's blood volume had been replaced but later revised his estimate to 52 percent. (R. 375-76).

[5] The trial judge was ruling on the admissibility of Sample B, but his stated rationale is applicable to Sample A as well. The trial judge did not make a similarly detailed ruling regarding Sample A, because Petitioner did not object to the admission of Sample A on the ground that it was unreliable.

> what I have to look at is, assuming the SLED toxicologist has the proper credentials to be declared and expert in that field of toxicology, and the method that she used, that's what I have to determine is reliable, nor did I make a finding that the results from the hospital test was reliable. The methodology and the procedure I found to be reliable.

(R. 826, lines 5-15). Because Petitioner did not challenge the reliability of the test used by the hospital, but merely differed with the result, the trial judge did not abuse his discretion in admitting the results of Sample A.

Even if this Court were to find that the trial judge erred in not evaluating the validity of the blood test results, Petitioner's argument still fails because Petitioner provided no credible evidence that the results of Sample A were invalid. Petitioner claims the State has the burden of proving "that the numbers in a test result are in fact accurate as to the blood of the defendant." (Petition for Cert. 19). Yet, Petitioner's own expert admitted his opinion was not supported by any scientific evidence. Regarding his conclusions, Dr. Valentine conceded "There's been no scientific studies. And if you stop and think about it, you just can't do this ethically, because when you've got a person that's near death you can't start drawing blood samples from them to test for alcohol. You know, you'd have to do a whole bunch of them and you can't do that. It's just unethical." (R. 1097, lines 22-25—R. 1098, lines 1-2). Dr. Valentine's concession explains why he was unable to estimate a specific percentage of Petitioner's blood that was being analyzed. (R. 1094). Furthermore, Dr. Valentine conceded a possible effect of a blood transfusions would be a dilution of a patient's blood and such a dilution would explain why Petitioner's second blood sample (Sample B) contained less alcohol than would normally be expected based on the time it was taken. (R. 816-18). Because Petitioner's expert merely speculated as to other possible causes of Petitioner's elevated blood alcohol content and admitted

his conclusions were not supported by scientific evidence, the trial judge did not abuse his discretion in admitting Sample A into evidence.

III.

The Court of Appeals did not err in holding the admission of Sample B was harmless error because Sample B was properly admitted by the trial judge, and even if admitted in error, any error was harmless in light of the overwhelming evidence against Petitioner.

Petitioner argues that the Court of Appeals holding that the admission of Sample B was harmless error implied Sample B was unreliable. Specifically, Petitioner writes "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%[6] of his blood had been replaced, the reading was not reliable." (Petitioner for Cert. 16). On the contrary, the Court of Appeals opinion did not say, either explicitly or implicitly, whether Sample B was reliable. The Court of Appeals merely wrote "even if the admission of Sample B was so unreliable that its admission was error, this error was harmless." Rowell, 436 S.C. at 66, 870 S.E.2d at 181. Petitioner's argument fails because Sample B was properly admitted by the trial judge and even if it was admitted in error, any error was harmless because of the overwhelming evidence against Petitioner.

The Reliability of Sample B

Although the Court of Appeals declined to render an opinion on the reliability of Sample B, the trial judge's decision to admit Sample B was nonetheless correct for the same reasons he

[6] Just as the record does not support Petitioner's contention that 50% of his blood was replaced prior to Sample A, the record also doesn't support Petitioner's claim that 150% of his blood volume was replaced. Petitioner's expert could not place a number on how much of Petitioner's blood was being analyzed and explained that fluids were simultaneously being expelled from Petitioner's body at the same they were being transfused. (R. 819-20, 1094, 1096). Furthermore, Dr. Snow testified that while the human body loses blood in its whole form, blood is transfused into the human body in the form of different components such as plasma, red blood cells, and various IV fluids. Therefore, the total amount of blood components transfused does not necessarily equal an equivalent amount of whole blood. (R. 343-44, 352, 370-71).

correctly admitted Sample A. Like Sample A, Petitioner's expert took no issue with the testing methods used by SLED to test Sample B. In fact, Dr. Valentine praised the test as "the gold standard" to use when testing for alcohol. (R. 813, 1067, 1100, 1105). The trial judge astutely recognized that Petitioner was not challenging the reliability of the test used, but merely casting doubt on its results when he made the following ruling:

> The Court: In light of the fact that Dr. Valentine is not attacking the reliability of the methodology and science behind the SLED testing and the procedures that they use, he's only attacking the reliability of the results itself, I am not going to suppress the result at this time, assuming that everything else comes into play properly to get the results in. And certainly in the Defense case and chief they can put up Dr. Valentine to offer that same line of testimony. And this is in no way an indication that I don't believe that Dr. Valentine's expert opinion and his testimony was not a good sound basis. I'm sure it is. But again, he's not attacking the methodology of the test, just the results, and that would go to the weight.

(R. 825, lines 6-18). As the trial judge suggested in his ruling, Petitioner tried to attack the reliability of the results of Sample B through Valentine's testimony. Valentine suggested that Sample B may have been contaminated by alcohol contained in the foreign blood that had been transfused into Petitioner's body. However, Valentine could not offer any scientific studies to substantiate his theory because no studies have been done on the subject because of the unethical nature of such a test. (R. 1097-98). Valentine also offered the alternative hypothesis that the blood from the donor bank could have been contaminated with various drugs, such as Benadryl. (R. 1101-04). However, Valentine also acknowledged that any theory about Petitioner receiving contaminated blood would be mere speculation. (R. 1103-04). Furthermore, Valentine admitted the blood alcohol reading in Sample B was consistent with Petitioner's blood being diluted from so many transfusions. (R. 816-18, 1130-31). Therefore, the trial judge properly admitted Sample B because Petitioner only questioned the validity of the results and not the methods used to test

it. Accordingly, like Sample A, the validity of the results were questions of the weight and credibility to be assigned the evidence and not its admissibility.

Harmless Error

Even if Sample B was admitted in error, the Court of Appeals correctly found any error was harmless. Petitioner asserts the error was not harmless because the trial judge used Sample B to instruct the jury on the inference of intoxication. (Petition for Cert. 19). Petitioner's argument ignores the fact that Sample A could likewise have been used to instruct the jury on the inference of intoxication. Petitioner also asserts "while neither [blood sample] alone would have convicted [Petitioner], both together did convince the jury. (Petitioner for Cert. 20). The jury absolutely could have convicted Petitioner on either sample. Petitioner's blood alcohol level was .1897 merely 90 minutes after the wreck occurred and .096 more than five hours after the wreck. (R. 738, 902). Each blood sample proved Petitioner was highly impaired at the time of the wreck and were sufficient to convict Petitioner for felony driving under the influence with great bodily injury and death. The Court of Appeals properly recognized that the evidence of Petitioner's intoxication from Sample A when combined with "the evidence of open containers in [Petitioner's] truck, the alcohol spilled on the floor of his truck, and testimony that [Petitioner's] breath smelled of alcohol at the accident scene" rendered any possible error in the admission of Sample B harmless. Rowell, 436 S.C. at 66, 870 S.E.2d at 181. Because the evidence of Petitioner's intoxication was overwhelming, regardless of which sample was admitted, this Court should deny Petitioner's petition for writ of certiorari and affirm the opinion of the Court of Appeals.

IV.

The Court of Appeals did not err in holding the trial judge was not required to conduct an evidentiary hearing when Petitioner did not preserve this issue for appellate review because he failed to even attempt to secure Juror #164's attendance for his new trial hearing on November 27, 2017. Even if preserved, the trial judge properly concluded based on his review of the record that Juror #164's concealment was unintentional which rendered any additional testimony by Juror #164 unnecessary.

Petitioner argues the Court of Appeals erred by affirming the trial judge's decision to not conduct an evidentiary hearing regarding Juror 164's failure to disclose a prior arrest. Petitioner asserts "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." (Petition for Cert. 21). Petitioner's argument ignores his failure to properly preserve this issue for appeal and the relevant question the trial judge was asked to consider. First, although an evidentiary hearing was convened by the trial judge on November 27, 2017 to address Petitioner's motion for a new trial, Petitioner did not even attempt to secure Juror #164's attendance with a subpoena. Therefore, Petitioner did not preserve this issue for appeal. Second, even if preserved, the relevant question to be considered by the trial judge was not whether Juror 164 was truthful, but whether his concealment was intentional. The trial court answered this question based on his review of the voir dire. The trial judge's review allowed him to conclude Juror 164's concealment was unintentional based on the confusing way the questions were presented. Therefore, any additional testimony by Juror 164 was unnecessary and the trial judge did not abuse his discretion in denying Petitioner's motion for a new trial without a second evidentiary hearing.

Error Preservation

"An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review." Ligon v. Norris, 371 S.C. 625, 634, 640 S.E.2d 469,

472 (Ct. App. 2006). "A proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been. State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006). The burden is on an Appellant to provide a sufficient record for review. State v. Hutto, 279 S.C. 131, 303 S.E. 2d 90 (1983).

As an initial matter, Petitioner failed to preserve this issue for appellate review because Petitioner never attempted to subpoena Juror 164 for the hearing that took place on November 27, 2017. Petitioner complains that the Court of Appeals erred in holding the trial judge did not need to conduct an evidentiary hearing. However, the trial judge convened an evidentiary hearing on November 27, 2017 to evaluate the claims made in Petitioner's motion for a new trial. One of the claims made in Petitioner's motion for a new trial was that Juror 164 failed to disclose a prior arrest. (R. 1363-364). And yet, Petitioner not only did not secure Juror 164's appearance for the post-trial hearing to present testimony about his failure to disclose the prior arrest, but Petitioner appeared to make little to no effort to do so. When asked if he wanted to be heard on this issue, counsel for Petitioner stated:

> Mr. Henderson: Your honor, as it relates to this juror – and – and again, nothing has been produced to us indicating that he was a confidential informant. And because he does have a lawyer, Ms. Nelson with the public defender's office, we ethically thought that we can't directly contact him. Even on an unrelated matter, we don't think we're – it's – proper to contact him. But we've contacted Ms. Nelson, and she's made it very clear to us, he has no interest in talking to us.

(R. 1406, lines 5-13). While counsel for Petitioner expressed ethical reservations about speaking with Juror 164, he nonetheless did not issue a subpoena to require Juror 164's attendance at the hearing or ask the trial judge to require his attendance. Juror 164 may very well have invoked his Fifth Amendment privilege against self-incrimination at such a hearing, but there is no way to

know for sure because Petitioner did not attempt to secure his attendance at the hearing. Because Petitioner did not present testimony from Juror 164 about the answers he gave during voir dire or his ability to render a fair verdict, this issue was not raised to and ruled upon by the trial court, and it is not properly preserved for appeal.

Merits

"When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). An "intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." Woods, 345 S.C. at 588, 550 S.E.2d at 284. An unintentional concealment "occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Id. "If a juror's nondisclosure is unintentional, the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014).

Here, the manner in which the trial judge presented the questions to the jury panel was ambiguous and confusing. The trial judge gave the following instruction that is relevant to Juror 164:

> The Court: Now, these next questions – and I'm going to number them right before I read the questions. These next questions, if you need to respond just keep

> a good mental note of the question and your response and you'll speak with me privately. I don't even need for you to stand, okay? But I do need for you to keep a good mental note so you can speak with me privately. I'm going to go ahead and tell you there will be one, two, three, four, five, six, seven, eight, nine – there's going to be eleven questions. Okay? So, you're going to have to pay really good attention and keep good memory, okay?
>
> Question one, any member of the jury panel or any member of your immediate family members or close personal friends ever been arrested and charged with any criminal offense through whatever state, local, or federal law enforcement agency? It's actually ten questions. I misspoke.

(R. 56, lines 5-21). After asking the aforementioned question, the trial judge asked nine additional questions before the jury panel was allowed to come forward. Neither Petitioner nor the State objected to the manner of the questioning.

The manner of questioning utilized by the trial judge was ambiguous and could be confusing to the average juror. Even if Juror 164 had understood and comprehended the first question asked by the trial judge, he was forced to listen to and process nine additional questions before he had a chance to answer. In the trial judge's post-trial order, he conceded that this method of questioning could be confusing to the average juror. (R. 1426). The trial judge also acknowledged that since presiding over Petitioner's trial, he has changed his method of questioning potential jurors. (R. 1426). Because the method of questioning used by the trial judge was confusing to the average juror the trial judge appropriately concluded Juror 164's failure to disclose his recent arrest was unintentional. After concluding the concealment was unintentional, the trial judge did not require any additional testimony from Juror 164 to deny Petitioner's motion for a new trial. Therefore, the trial judge did not abuse his discretion in refusing to conduct a second evidentiary hearing.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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