STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of General Sessions
Hon. Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2018-002090

THE STATE,

Respondent,

v.

MARY ANN GERMAN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The Fourth Amendment prohibits unreasonable searches. Mary German killed another person by driving while intoxicated. While officers investigated the collision, she was taken to the hospital for emergency medical treatment. One hour and thirty minutes after the collision without first obtaining a warrant, a state trooper arrested German and ordered a nurse to take a sample of her blood for testing, pursuant to statute. Were the test results admissible at trial?

STATEMENT OF THE CASE

A Beaufort County grand jury indicted Mary German for felony DUI resulting in the death of Shermann Palmer. German proceeded to jury trial on November 13–15, 2018, before the Honorable Brooks P. Goldsmith. She was convicted and sentenced to 12 years' incarceration. In this direct appeal, she argues her conviction should be reversed based on the trial court's admission of blood-alcohol test results.

STATEMENT OF FACTS

On the evening of July 9, 2016, Mary and Roger German stopped at Archie's, a small bar along Highway 21 near Beaufort. The Germans testified they were on a camping trip and were travelling from Edisto Beach toward Hunting Island State Park. (Tr.p.393). They arrived at Archie's around 10:00 p.m. to "get a drink" and "figure out what to do next." (Tr.p.368, line 3). After first ordering beers, the Germans decided to take advantage of an "all-you-can-drink" special for $5 each. (Tr.p.370, lines 15–16). Roger testified Mary had four to six liquor drinks. (Tr.p.394). Mary testified she had at least "three or four" vodka drinks, if not more. (Tr.p.442–43). As the evening went on, more patrons arrived for a private party. Archie Wearien, the bar's proprietor, testified the Germans became "vocal" and he asked them to leave. (Tr.p.162).

At almost 12:30 a.m., someone announced over a loudspeaker that "there was a person, or they may have specifically said drunk driver, in the parking lot that was hitting cars, that was attempting to leave." (Tr.p.125–26). Satori Williams testified that she recognized the description of the car that had been struck as belonging to her cousin, whom she accompanied to the party. (Tr.p.126). She went outside to the parking lot and observed Mary German driving a red Dodge Ram truck, attempting to leave. (Tr.p.132). Williams spoke to German and attempted to convince her not to leave because she or someone else "could get hurt." (Tr.p.133). Williams testified German was obviously intoxicated: "her eyes were very glazed over and I remember feeling like she just looked right through me, like right past

me. Just very dazed and just there. There was not really any response with anything that I said. I honestly don't even know if she heard or understood what I was saying, but it was very evident just in the way that she looked." (Tr.p.146–47).

German refused to stay. Williams and her cousin, Alesia Johnson, observed German speed away from the parking lot, leaving skid marks on the pavement. (Tr.p.111; 134–36). German crossed the highway median and turned the wrong way into oncoming traffic. She struck Shermann Palmer's vehicle head-on. Palmer, a musician on his way home from work, was obeying all traffic laws. He suffered a broken neck in the collision and died on scene. (Tr.p.188).

Paramedics, firefighters, and police officers responded to the collision. Paramedics extracted German from her vehicle and took her to the hospital for emergency medical treatment. (Tr.p.193, lines 21–22). Paramedic Jennifer Calcorzi testified German smelled strongly of alcohol, and that her speech was severely slurred. (Tr.p.213–15). Dr. Meghan Cummins treated German at the emergency room. She originally thought German might have had a head injury because she was "laying on a backboard, and not speaking to us, not responding at all." (Tr.p.324). Later, however, German became "belligerent, agitated, trying to bite nurses, spitting at us, cursing at us." (Tr.p.324). Cummins gave her medical opinion that German was intoxicated. (Tr.p.329, lines 1–4). German did not have any serious injuries. (Tr.p.325–26).

State Trooper Jeff Shumaker was among the police officers who responded to the accident. He left the scene and came to the hospital to collect a blood sample.

(Pretrial Tr.p. 14–15). He directed hospital staff to take a sample of German's blood for BAC testing at 2:00 a.m. (Pretrial Tr.p. 32). German's blood-alcohol level was 0.275%. (Tr.p.344–45).

The Germans testified and told a very different story. They claimed they were attacked by an angry mob and had no choice but to flee to save their lives. Their testimony conflicted with that of Satori Williams, who denied seeing any fight or altercation that night. (Tr.p.137–38). Williams testified she did not observe anything done by anyone that could have been perceived as a threat to the Germans. (Tr.p.139). The defense did not seriously contest that German was intoxicated, but instead relied solely on a necessity defense. (Tr.p.475).

STANDARD OF REVIEW

On appeal from a motion to suppress on Fourth Amendment grounds, the appellate court applies a deferential standard of review and will reverse only if there is clear error. State v. Counts, 413 S.C. 153, 160, 776 S.E.2d 59, 63 (2015).

ARGUMENT

German's blood-alcohol test results were admissible because the warrantless blood draw was reasonable.

The trial court correctly admitted German's blood-alcohol test results. The warrantless search of her body was reasonable (and therefore constitutional) because: 1) exigent circumstances existed; and 2) the search was permissible incident to arrest for felony DUI. Furthermore, suppression was not justified because police acted in good faith. Finally, any error was harmless because German raised a necessity defense and effectively conceded intoxication. This Court should affirm.

a. The appellate court may affirm on any ground appearing in the record.

In her brief, German places great emphasis on the fact that the State did not rely on the exigent circumstances exception at trial. It doesn't matter. The question is not whether the State made the correct argument below, or even whether the trial court based his ruling on the correct basis. The question is whether the evidence was ultimately properly admitted. The appellate court may affirm on any basis appearing in the record. Rule 220(C), SCACR; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the

judge and ask for a ruling on other arguments to preserve them for appellate review."). This Court should affirm on the following grounds.

b. Exigent circumstances justified the warrantless blood draw.

The facts adduced at trial clearly demonstrate the existence of exigent circumstances. Accordingly, no warrant was required. The Court should affirm on this alternate sustaining ground.

The Fourth Amendment to the federal constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The "ultimate touchstone" of the Fourth Amendment is reasonableness. Riley v. California, 573 U.S. 373, 381 (2014). Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant. Id. In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. Id.

A well-established exception applies "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." Missouri v. McNeely, 569 U.S. 141, 148–49 (2013). Under this exception, law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. Id. Whether an exigency exists is judged objectively under the totality of the

circumstances. Schmerber v. California, 384 U.S. 757, 770 (1966) (explaining exigency existed because officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence").

The exigent circumstances exception has been applied to DUI cases where police officers act without a warrant to secure a blood sample from a DUI suspect to determine his blood-alcohol content. See Missouri v. McNeely, 569 U.S. 141, 148–49 (2013). This is so because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." McNeely, 569 U.S. at 151. A "significant delay in testing will negatively affect the probative value of the results." McNeely, 569 U.S. at 152. While the dissipation of alcohol in the blood does not create a per se exigency in every DUI case, see McNeely, the United States Supreme Court and South Carolina Supreme Court have consistently held the exception applies in cases where events interfere with a law enforcement officer's ability to prioritize the search warrant procedure. See Mitchell v. Wisconsin, 139 S. Ct. 2525. 2537 (2019) (explaining "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application").

Cases involving accidents present such a pressing need. In Schmerber v. California, 384 U.S. 757 (1966), an officer had probable cause to believe the defendant had been driving while intoxicated, causing him to lose control of his

vehicle and strike a tree. The responding officer investigated the accident and later located Schmerber at a hospital where he was receiving medical treatment. Over Schmerber's objection, the officer had a nurse obtain a blood sample. The United States Supreme Court held the delay caused by the accident investigation, combined with the evanescent nature of alcohol in blood, was an exigent circumstance justifying a warrantless blood draw. The Court explained: "Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." Schmerber v. California, 384 U.S. 757, 770–71 (1966). See also State v. McCall, Opinion no. 27943 (S.C. S. Ct. filed February 5, 2020) (holding exigent circumstances existed in case involving "serious accident requiring extensive investigation" because delay made it "impractical" to seek a warrant).

The need for emergency medical treatment creates another pressing need. In Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019), a DUI suspect became unconscious due to extreme intoxication and was transported to a hospital. The Court explained the exigencies created by a suspect's unconsciousness, most of which apply in equal force when a suspect requires emergency medical treatment: 1) the suspect will have to be rushed to the hospital for urgent medical care; 2) blood may be drawn anyway, for diagnostic purposes; 3) immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value. Mitchell, 139 S. Ct. at 2538. The

Court concluded that in DUI cases where the "driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." Mitchell, 139 S. Ct. at 2539. The Court placed the burden on the defendant to disprove exigency and the inapplicability of the inevitable discovery and third party doctrines: "We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." Mitchell, 139 S. Ct. at 2539. See also State v. Cardwell, 414 S.C. 416, 427, 778 S.E.2d 483, 489 (Ct. App. 2015), aff'd as modified, 425 S.C. 595, 824 S.E.2d 451 (2019) (discussing third party and inevitable discovery doctrines).

The facts of this case fit squarely within the exigent circumstances exception as explained by the preceding cases:

- Police responded to a serious accident resulting in death, requiring investigation, traffic control, and other law enforcement functions. Trooper Jeff Shumaker testified: "At that time there was only a supervisor and two troopers. The two troopers were already tied up, supervisor was tied up. We are very shorthanded down there . . . . We didn't have probably the personnel to [get a warrant] . . . ." (Pretrial Tr.p.41).

- German had to be taken to the hospital for emergency medical treatment. She was given medication, including sedatives. (Pretrial Tr.p.60–61).

- A breath test was not possible. (Pretrial Tr.p.55–56).
- Blood was drawn anyway for medical purposes. (Pretrial Tr.p.53, line 25).

In addition to these factors, officers would have had to take additional time to produce a written warrant affidavit. Unlike other states, electronic or telephonic warrants are not available in South Carolina. S.C. Code § 17-13-140; In re Snyder, 308 S.C. 192, 196, 417 S.E.2d 572, 574 (1992). Seeking out a magistrate at 2:00 a.m., especially with this additional burden, would have been "impractical" in the circumstances. State v. McCall, Opinion no. 27943 (S.C. S. Ct. filed February 5, 2020).

The question is not whether the officer "could have gotten a warrant." Brief of Appellant at 11. The question is whether he might have reasonably believed that doing so would significantly undermine the probative value of the evidence. McNeely, 569 U.S. at 152. The record supports a finding that police could have reasonably believed it was necessary to act immediately—after time had to be taken to deal with a serious accident—to secure a blood sample before it was devalued by the natural dissipation of alcohol or corrupted by the administration of drugs at the hospital. Accordingly, exigent circumstances existed and a search warrant was not required.

c. A blood draw is categorically permissible as a search incident to arrest for felony DUI with death.

The search in this case was also justifiable under the search incident to arrest exception. Although the United States Supreme Court has held this exception does not apply to blood tests in the context of misdemeanor DUI, this Court should hold

that blood draws are categorically permissible incident to arrest for felony DUI with death.

The search incident to arrest exception is a well-established exception to the warrant requirement. Unlike the exigent circumstances exception, which demands a case-by-case, fact-based analysis, the search incident to arrest exception is a "categorical rule" permitting a "full search of the person" incident to a lawful arrest. Birchfield v. North Dakota, 136 S. Ct. 2160, 2176 (2016). Though the exception has an "ancient pedigree," the Court has recognized that changes in technology and society often present "situations that could not have been envisioned when the Fourth Amendment was adopted." Id. In these situations, the Court applies a balancing test to determine "whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" Id.

In Birchfield, the Supreme Court applied this balancing test and held that the search incident to arrest exception does not categorically permit warrantless blood draws from individuals arrested for DUI. Each of the three petitioners in Birchfield was arrested for misdemeanor DUI after a routine traffic stop or minor one-car accident. There were no injuries and no victims. The Court identified the State interest in BAC testing as creating effective "deterrent[s] to drunken driving." Birchfield, 136 S. Ct. at 2179. After balancing the competing individual and State interests, the Court concluded that while the State could compel breath tests

incident to arrest for DUI, it would be unreasonable to allow the State to conduct blood draws pursuant to every DUI arrest.

The same balancing test yields a different result when DUI results in death. In a misdemeanor DUI, the harm sought to be deterred is hypothetical. It is the prospect that future harm to another will result if the arrestee's drunk driving is not deterred by prosecution. Felony DUIs are categorically different. The death of an innocent victim presents a severe and manifest harm, and a proportionate increase in the State interest in conviction and punishment. Not only is the State interest in deterrence greater, but the State becomes bound to fulfill its more fundamental duty of providing retributive societal justice in the wake of a homicide. The duty is to provide "emotional compensation" to the victim's family and friends, while also dispensing "condemnatory punishment" as a "symbolic statement that the conduct on which the punishment is based is strongly in conflict with societal norms." W. LaFave, Criminal Law 30–31, n.30 and 38 (5th edition 2010).

Simply put, the State interest in BAC testing in a felony DUI with death is exponentially greater than in the run-of-the-mill DUI. This is reflected in the respective punishments for the crimes—maximum 30 days for DUI compared to 25 years for felony DUI with death. S.C. Code § 56-5-2930 & 2945. It is also reflected in the implied consent statute. While motorists have a statutory right to refuse BAC testing in misdemeanor DUI cases, those arrested for felony DUI "must submit" to testing. S.C. Code § 56-5-2946 (A). Through this statute, the legislature has expressed society's judgment that it is reasonable to require BAC testing when

there is probable cause to make a felony DUI arrest. This legislative determination of reasonableness is entitled to a degree of deference from this Court. See United States v. Jones, 565 U.S. 400, 429–30 (2012) (Alito, J., concurring) ("A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."); Carpenter v. United States, 138 S. Ct. 2206, 2233 (2018) (Kennedy, J., dissenting) (emphasizing "where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments"); United States v. Graham, 824 F.3d 421, 439 (4th Cir. 2016) (en banc) (Wilkinson, J., concurring) (explaining "it is appropriate to accord some degree of deference to legislation weighing the utility of a particular investigative method against the degree of intrusion on individuals' privacy interests").

While the State interest is much greater, the individual privacy interest at stake is the same as in a misdemeanor DUI. While every search of the body is a serious matter, the blood test at issue here "would not be considered offensive by even the most delicate." Breithaupt v. Abram, 352 U.S. 432, 436 (1957). Any discomfort German might have experienced as a result of a blood draw must yield to society's interest in prosecuting this most serious type of crime: homicide. In this particular category of case—DUI resulting in death—there will always be a degree of exigency due to the natural dissipation of alcohol, and there will always be an added exigency created by the victim's death, typically in a serious accident. This distinguishes felony DUI from other crimes. A categorical rule is appropriate, and the balancing

of interests weighs in favor of the State. The test results were admissible under the search incident to arrest exception.

d. Suppression was not warranted because the officer acted in good faith.

Even if this Court determines the search in this case does not fit within an exception to the warrant requirement, it should still affirm the trial court's refusal to suppress the test results because police acted pursuant to a reasonable good faith belief that a warrant was not required. Under the good faith doctrine, suppression was not an appropriate remedy.

The South Carolina Supreme Court applied the good faith rule in these exact circumstances in Hamrick v. State, 426 S.C. 638, 654, 828 S.E.2d 596, 604 (2019), reh'g denied (July 1, 2019) (citing Davis v. United States, 564 U.S. 229 (2011)). In that case, Hamrick was arrested for felony DUI and refused to provide a breath sample. Officers took Hamrick to a hospital and ordered a blood draw without first obtaining a warrant. The Court held that, regardless of whether an exception to the warrant requirement applied, suppression was not appropriate because the officer was acting in good faith. The Court explained: "the law appeared to support the existence of exigent circumstances and the validity of statutory implied consent. There is nothing in this record that in any way suggests the officers did not 'act with an objectively reasonable good-faith belief that their conduct is lawful.'" Id.

The same rationale applies in this case. The officer who ordered the blood draw testified he was trained that he did not need a warrant in a felony DUI because that

is what the "law states." (Pretrial Tr.p.42). He cited the implied consent statute, S.C. Code section 56-5-2946, which was—and remains—good law. He testified he believed "based on the law" that he did not need a warrant. (Pretrial Tr.p.46). His testimony establishes his reasonable good faith belief that he did not need a warrant. Accordingly, suppression was not appropriate.

German attempts to distinguish this case from Hamrick on the ground that the United States Supreme Court had not issued its opinion in Missouri v. McNeely at the time of Hamrick's arrest. Brief of Appellant at 11. While this is true, it is also irrelevant. McNeely did not change the law. It merely rejected the State of Missouri's bid to expand the holding of Schmerber to create a per se exigency in every DUI case, including misdemeanor DUIs. Likewise, Birchfield rejected a per se rule allowing warrantless blood draws in all DUI cases, but has not been held to preclude warrantless blood draws incident to arrest in felony DUI cases. Besides, the officer's reliance in this case was not on case law, but on the implied consent statute, S.C. Code section 56-5-2946. This statute was in effect during Hamrick's arrest, and was cited in the Hamrick opinion as supporting the officer's good faith belief that a warrant was not necessary. It remains good law, and it justified the officer's good faith belief in the legality of his conduct in this case. Clearly, the officer did not violate German's rights "deliberately, recklessly, or with gross negligence." Davis v. United States, 564 U.S. 229, 240 (2011). The good faith exception applies.

e. German would have been convicted without admission of the test results.

Even if the Court finds the test results should have been suppressed, the error was harmless. Of course, the test results were extremely probative and damning to German. But German did not contest intoxication as a part of her defense. Rather, she admitted that she had a beer and "three or four" vodka drinks, if not more. (Tr.p.442–43). Roger German testified Mary consumed "four to six" liquor drinks. (Tr.p.394). This was in addition to a doctor's expert opinion that German was intoxicated, and the testimony of several eye witnesses that German was obviously intoxicated.[1] (Tr.p.328–29; Tr.p.213–15; Tr.p.146–47).

German claimed she had no choice but to drive while intoxicated because she and her husband were being attacked by an angry mob. Intoxication was effectively conceded. Accordingly, her conviction did not hinge on the test results, but depended on the jury accepting her necessity defense.[2] Accordingly, any error in the admission of the test results was harmless because it did not change the result of trial. State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. Prejudice occurs when there is reasonable probability the

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[1] Satori Williams spoke with German before the crash and testified German was extremely drunk. She described "her eyes were very glazed over and I remember feeling like she just looked right through me, like right past me. Just very dazed and just there. There was not really any response with anything that I said. I honestly don't even know if she heard or understood what I was saying, but it was very evident just in the way that she looked." (Tr.p.146–47).

[2] The Germans apparently committed themselves to this defense the day after the collision, as evidenced by a jail call from Mary to Roger wherein they discuss being threatened with a gun. Mary tells Roger she doesn't remember anything about a gun. State's Exhibit #48.

wrongly admitted evidence influenced the jury's verdict.") (internal citations omitted). This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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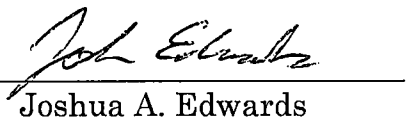
BY: 
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February 20, 2020

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Honorable Brooks P. Goldsmith, Circuit Court Judge

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THE STATE, Respondent,

v.

MARY ANN GERMAN, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by delivering two copies of the same addressed to his counsel of record, David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 20th day of February, 2020.

Anne Mueller

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February 20, 2020

David Alexander, Esquire
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RE: State v. Mary Ann German
Appellate Case No. 2018-002090

Dear Mr. Alexander:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
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JAE/aam
Enclosures

cc: Honorable Jenny A. Kitchings (original and 1 enclosed)
Victim Advocacy Division