

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE NELSON,

APPELLANT

Appellate Case No. 2012-212640

INITIAL BRIEF OF APPELLANT

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RECEIVED
JUL 29 2013
SC COURT OF APPEALS

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT

1.

In violation of Appellant’s rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, the trial court erroneously admitted a statement made by Appellant to police officers where the undisputed evidence demonstrated Appellant lacked the mental capacity to making a knowing waiver of his constitutional rights due to his intellectual disability..... 9

2.

In violation of Appellant’s right to be free from unlawful searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, the trial court erroneously found Appellant knowingly consented to the police taking a DNA sample from him where the undisputed evidence demonstrated Appellant lacked the mental capacity to make a knowing waiver of his rights due to his intellectual disability. 23

3.

In violation of Appellant’s right to present a complete defense and receive due process of law through a fair trial pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the trial judge refused to allow Appellant to present evidence through his expert witness that he was a follower, who was easily influenced by others, which was a consideration for the mental retardation conclusion..... 28

4.

In violation of Appellant’s constitutional rights to present a defense and due process of law pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the trial judge erred in forbidding Appellant from presenting evidence that he refused to take a

polygraph after he gave a second statement to police where the officer testified that he believed Appellant's second statement was true. 34

5.

In violation of Appellant's right to due process of law, the trial judge failed to grant a mistrial when the prosecution's statements to the jury that Appellant was deceiving them through his inconsistent claims concerning his intellectual capacity to knowingly waive his rights to give a statement so infected the trial with unfairness as to make the resulting conviction a denial of due process. 41

CONCLUSION 49

TABLE OF AUTHORITIES

Cases

Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011) 15

Atkins v. Virginia, 536 U.S. 304 (2002)..... 27, 28

Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250 (2010)..... 11

Brady v. Maryland, 373 U.S. 83 (1973) 42

Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)..... 13

Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001)..... 36

Colorado v. Spring, 479 U.S. 564 (1987) 11

Connecticut v. Barrett, 479 U.S. 523 (1987) 11

Darden v. Wainwright, 477 U.S. 168 (1986)..... 42

Dickerson v. United States, 530 U.S. 428 (2000) 12

Donnelly v. DeChristoforo, 416 U.S. 637 (1974)..... 40, 41, 42

Holladay v. Allen, 555 F.3d 1346 (11th Cir. 2009) 15

Jackson v. Denno, 378 U.S. 368 (1964) 10

Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980)..... 12

Katz v. United States, 389 U.S. 347 (1967)..... 23

Lambert v. State, 126 P.3d 646 (Okla. Crim. App. 2005)..... 15, 16

Miller v. Pate, 386 U.S. 1 (1967)..... 41

Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994)..... 42, 43

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

Moran v. Burbine, 475 U.S. 412 (1986) 11

Neal v. State, 451 So.2d 743 (Miss. 1984) 23

<u>People v. Daniels</u> , 908 N.E.2d 1104 (Ill. App. 2009).....	15
<u>People v. Packer</u> , 851 N.Y.S.2d 40 (App. Div. 2008).....	23
<u>Rhode Island v. Innis</u> , 446 U.S. 291 (1980).....	12
<u>Schmerber v. California</u> , 384 U.S. 757 (1966).....	22
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218 (1973).....	13, 23
<u>Simmons v. State</u> , 331 S.C. 333, 503 S.E.2d 164 (1998).....	40, 43, 44
<u>State v. Beam</u> , 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999).....	35
<u>State v. Blackstock</u> , 19 S.W.3d 200 (Tenn. 2000).....	15
<u>State v. Cain</u> , 246 S.C. 536, 144 S.E.2d 905 (1965).....	12
<u>State v. Callahan</u> , 263 S.C. 35, 208 S.E.2d 284 (1974).....	12
<u>State v. Compton</u> , 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005).....	11
<u>State v. Copeland</u> , 321 S.C. 318, 468 S.E.2d 620 (1996).....	40
<u>State v. Council</u> , 335 S.C. 1, 515 S.E.2d 508 (1999).....	35
<u>State v. Crawley</u> , 349 S.C. 459, 562 S.E.2d 683 (Ct. App. 2002).....	11
<u>State v. Davis</u> , 309 S.C. 326, 422 S.E.2d 133 (1992).....	13
<u>State v. Dunlap</u> , 353 S.C. 539, 579 S.E.2d 318 (2003).....	35
<u>State v. Fincher</u> , 309 N.C. 1, 305 S.E.2d 685 (N.C. 1983).....	23
<u>State v. Flower</u> , 539 A.2d 1284 (N.J. Super. L. 1987).....	14
<u>State v. Forrester</u> , 343 S.C. 637, 541 S.E.2d 837 (2001).....	23
<u>State v. Foster</u> , 354 S.C. 614, 582 S.E.2d 426 (2003).....	35
<u>State v. Jackson</u> , 364 S.C. 329, 613 S.E.2d 374 (2005).....	36
<u>State v. Jennings</u> , 280 S.C. 62, 309 S.E.2d 759 (1983).....	14
<u>State v. Johnson</u> , 334 S.C. 78, 512 S.E.2d 795 (1999).....	41

<u>State v. Linder</u> , 276 S.C. 304, 278 S.E.2d 335 (1981)	40
<u>State v. Merriman</u> , 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985).....	43
<u>State v. Middleton</u> , 288 S.C. 21, 339 S.E.2d 692 (1986)	11
<u>State v. Moses</u> , 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010)	12
<u>State v. Robinson</u> , 305 S.C. 469, 409 S.E.2d 404 (1991).....	35
<u>State v. Rossiter</u> , 623 N.E.2d 645 (1993)	15
<u>State v. Simmons</u> , 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).....	22
<u>Schmerber v. California</u> , 384 U.S. 757 (1966)	22
<u>State v. Simpson</u> , 325 S.C. 37, 479 S.E.2d 57 (1996)	40, 41
<u>State v. Stroman</u> , 281 S.C. 508, 316 S.E.2d 395 (1984)	35
<u>State v. Sullivan</u> , 277 S.C. 35, 282 S.E.2d 838 (1981).....	35
<u>State v. Vaughn</u> , 362 S.C. 163, 607 S.E.2d 72 (2004)	40, 44
<u>State v. Von Dohlen</u> , 322 S.C. 234, 471 S.E.2d 689 (1996)	11
<u>State v. Wallace</u> , 269 S.C. 547, 238 S.E.2d 675 (1977).....	23
<u>State v. Willard</u> , 374 S.C. 129, 647 S.E.2d 252 (2007).....	23
<u>Washington v. Texas</u> , 388 U.S. 14 (1967).....	35

Statutes

S.C. Code Ann. § 16-3-20 (C)(b)(10).....	28
S.C. Code Ann. § 44-20-30(12).....	28

Other Authorities

Morgan Cloud, et al., <u>Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects</u> , 69 U. Chi. L. Rev. 495 (Spring 2002).....	17
75A Am.Jur.2d <u>Trial</u> § 502 (1991).....	41
75B Am.Jur.2d <u>Trial</u> § 1284 (1992).....	41
Baker, Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense, <u>Washington Post</u> , Jan. 15, 1994, p. A1.....	29
Everington & Fulero, <u>Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation</u> , 37 Mental Retardation 212 (1999).....	28, 29
Levy-Shiff, Kedem, & Sevilia, <u>Ego Identity in Mentally Retarded Adolescents</u> , 94 Am. J. Mental Retardation 541 (1990).....	28
Michael H. Graham, <u>Handbook of Federal Evidence</u> , § 103.1 (3rd ed. 1981).....	41, 42
Caroline Everington & J. Gregory Olley, <u>Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation</u> , 8(1) J. Forensic Psychol. Practice 1 (2008).....	16
Harvey N. Switzsky, <u>Lessons from the Atkins Decision for the Next AAMR Manual</u>	16
Ellis & Luckasson, <u>Mentally Retarded Criminal Defendants</u> , 53 Geo. Wash. L. Rev. 414 (1985).....	28
John Blume, et al., <u>Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases</u> , 18 Cornell J.L. & Pub. Pol’y 689 (Summer 2009). 16	
Whitman, <u>Self Regulation and Mental Retardation</u> , 94 Am. J. Mental Retardation 347 (1990).....	28

Andrew Guthrie Ferguson, <u>The Dialogue Approach to Miranda Warnings and Waiver</u> , 49 Am. Crim. L. Rev. 1437 (Summer 2012).....	17
Andrew Guthrie Ferguson, <u>Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects</u> , 69 U. Chi. L. Rev. 495 (Spring 2002).....	17

Rules

Rule 103, SCRE.....	41
Rule 702, SCRE.....	35

Constitutional Provisions

S.C. Const. art. I, §3.....	20, 22
S.C. Const. art. I, §10.....	20, 22
U.S. Const. amend. IV	20, 22
U. S. Const. amend. V.....	6, 25, 31
U. S. Const. amend. VI	25, 31
U. S. Const. amend. XIV	6, 20, 25, 31

STATEMENT OF ISSUES ON APPEAL

I. In violation of Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, the trial court erroneously admitted a statement made by Appellant to police officers where the undisputed evidence demonstrated Appellant lacked the mental capacity to making a knowing waiver of his constitutional rights due to his intellectual disability.

II. In violation of Appellant's right to be free from unlawful searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, the trial court erroneously found Appellant knowingly consented to the police taking a DNA sample from him where the undisputed evidence demonstrated Appellant lacked the mental capacity to make a knowing waiver of his rights due to his intellectual disability.

III. In violation of Appellant's right to present a complete defense and receive due process of law through a fair trial pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the trial judge refused to allow Appellant to present evidence through his expert witness that he was a follower, who was easily influenced by others, which was a consideration for the mental retardation conclusion.

IV. In violation of Appellant's constitutional rights to present a defense and due process of law pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the trial judge erred in forbidding Appellant from presenting evidence that he refused to take a polygraph after he gave a second statement to police where the officer testified that he believed Appellant's second statement was true.

V. In violation of Appellant's right to due process of law, the trial judge failed to grant a mistrial when the prosecution's statements to the jury that Appellant was deceiving them

through his inconsistent claims concerning his intellectual capacity to knowingly waive his rights to give a statement so infected the trial with unfairness as to make the resulting conviction a denial of due process.

STATEMENT OF THE CASE

On April 15, 2010, the Dillon County grand jury indicted Appellant for possession of a weapon during a violent crime (2010-GS-17-0244), burglary in the first degree (2010-GS-17-0245), and two counts of armed robbery (2010-GS-17-0246, -0248). On June 17, 2010, the grand jury indicted Appellant for two counts of murder (2010-GS-17-0250, -0251). R. * (Indictments). Initially, the prosecution, represented by Kernard Redmond and Shipp Daniel, sought the death penalty against Appellant. However, on May 24, 2012, the prosecution withdrew its notice to seek the ultimate penalty when the South Carolina Department of Disabilities and Special Needs found Appellant suffered from intellectual deficits, formerly called mental retardation, rendering him ineligible for the death penalty in light of controlling United States Supreme Court precedent. Tr. 13, lines 5-23; R. * (Mental Evaluation Report).

On June 11, 2012, the trial court presided over extensive pre-trial motions concerning the admissibility of evidence. Hrg. Tr. 1. The prosecution called the case for trial on July 23, 2012 before the Honorable Steven John in Dillon County. Casey Secor and William McGuire represented Appellant. Tr. 1. Ultimately, the jury found Appellant guilty of two counts of armed robbery, burglary in the first degree, and possession of a weapon during a violent crime. Tr. 697, line 13 – Tr. 698, line 22. The jury was unable to reach a unanimous decision concerning the murder charges; therefore, Judge John declared a mistrial as to those. Tr. 704, line 9 – Tr. 705, line 22; R. * (Verdict forms); R. * (Court's #7, #9). Judge John sentenced Appellant to forty-seven years' imprisonment for burglary in the first degree and thirty years' imprisonment on each count of armed robbery, which he ordered to be served concurrently. He sentenced Appellant to five years' imprisonment for

the weapons charge, which he ordered to be served consecutively to the burglary sentence. In short, he sentenced Appellant to fifty-two years' imprisonment. Tr. 719, line 4 – Tr. 720, line 1; R. * (Sentence sheets).

Appellant filed a timely notice of appeal concerning his convictions and sentences. This brief follows.¹

¹ All of the issues presented on appeal affect all charges against Appellant. In other words, this Court's determination regarding the admissibility of evidence would affect any subsequent re-trial of Appellant concerning the murder charge.

STATEMENT OF FACTS

On December 21, 2009, the Swaners were found stabbed to death in their home. Tr. 111, line 23 – Tr. 112, line 16; Tr. 113, lines 15-23. Appellant, a mentally retarded teenager, was questioned by police because he occasionally performed yard work for the Swaners. Tr. 116, lines 4-11. On January 5, 2010, when law enforcement had no evidence to arrest anyone, Appellant gave a self-incriminating statement to police. In the statement, he admitted that he had been present when several other men from the neighborhood had robbed and killed the Swaners. He explained his participation was a direct result of one man holding a gun to his head. Tr. 122, line 19 – Tr. 124, line 5; R. *(Statement dated 1/5/2010). Appellant was arrested and jailed following his statement. Tr. 129, lines 18-21.

Upon realizing that the killers would be in the jail with him and he would have no means of escape, Appellant, terrified and suffering from an intellectual disability, gave a subsequent statement to police on January 6, 2010. In the audio recorded statement of January 6th, Appellant claimed the other men were not involved and that he acted alone. Tr. 130, line 8 – Tr. 132, line 25; R. * (Audio statement).

ARGUMENT

I. In violation of Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, the trial court erroneously admitted a statement made by Appellant to police officers where the undisputed evidence demonstrated Appellant lacked the mental capacity to making a knowing waiver of his constitutional rights due to his intellectual disability.

Relevant facts

The prosecution presented evidence that Appellant provided a handwritten statement to police on January 5, 2010. Hrg. Tr. 11, lines 18-21; Hrg. Tr. 12, lines 8-12; Tr. 18, lines 1-2. In the statement, Appellant indicated that he was with several other men on December 20, 2009. One of the men, Antrec Bethea, asked Appellant to get the Swaners to open their door to him. Appellant refused twice. Then Bethea put a gun in Appellant's face and told him to get the Swaners to open the door. At gunpoint, Appellant agreed. Appellant rang the doorbell, and Mr. Swaner opened the door. The other men then pushed by Appellant to enter the residence. Appellant and another man, Elijah Manning, waited in the road, but entered the residence ultimately. He was instructed to go through a pocketbook, which he did. He found four dollars, which he gave to the other men. When Appellant and the others left the Swaners, they returned to Josh Manning's house. The other men would not permit Appellant to sit with them so Appellant sat on the hood of a car. His father picked him up later. R. * (Statement dated 1/5/2010). The trial judge found, and Appellant admitted, Appellant was not in custody at the time; therefore, the police were not obligated to inform him of his rights or to obtain a knowing and voluntary waiver of those rights. In short,

Appellant had no basis to challenge the admissibility of the statement of January 5, 2010. Hrg. Tr. 32, lines 2-22.

The following day, January 6, 2010, Appellant gave a second statement to police. In this statement, Appellant claimed he acted alone. During this statement, Appellant was in custody and officers were interrogating him. Robert Bucy, a detective with the Dillon County Sheriff's Office, testified that he advised Appellant of his rights prior to the custodial interrogation. Hrg. Tr. 33, lines 20-23. This interaction was captured by audio recording. Bucy partially completed the top portion of the advisement of rights form concerning biographical information about Appellant. Bucy then read the advisement of rights to Appellant, asking Appellant to initial where Bucy indicated on the form to show that Bucy "had read the statement" to Appellant. Hrg. Tr. 54, line 17 – Hrg. Tr. 55, line 22; R *(Audio Statement). Bucy candidly admitted that he did not ask Appellant if he understood each of his rights, but relied upon his assumption that Appellant understood the words he was using. Hrg. Tr. 55, lines 10-22.

The audio indicated Appellant's obvious confusion regarding his advisement of rights. Hrg. Tr. 57, line 6 – Hrg. Tr. 59, line 18; R. * (Audio Statement). He asked Bucy who his attorney would be and Bucy advised he would have a "good lawyer" who would be appointed by the court if Appellant could not afford one. Appellant's question indicated a disconnect between the advisement of rights – that he could have a lawyer present for questioning – and his understanding of those rights – his asking for a lawyer in court. Hrg. Tr. 59, line 25 – Hrg. Tr. 61, line 4; R. * (Audio Statement).

Again, very candidly, Bucy admitted that his description of the waiver indicated that it was a mere "formality" and did not impress upon Appellant the serious nature of waiving

his constitutional rights. Hrg. Tr. 61, line 14 – Hrg. Tr. 62, line 3. For example, Bucy explained that in order for him and Appellant to talk, his “boss” required him to get Appellant to sign one of those forms every time they talked. It said the form was “just for your protection and mine. That way if something, you know, you say, ‘Well, you know Robbie Bucy, you know he did read me my rights, you know. But I was straight with him after he read them, you know. I got right and I did the right thing.’” R. *(Audio statement). He again told Appellant that for them “to talk, share information,” his “boss” required him to fill out the form. R. * (Audio statement).

Bucy never received formal training regarding interrogation techniques or in taking statements from suspects. “Everything [he] learned [has] been on the job.” Not only had he been a police officer for seventeen-years, he was in the Marine Corps as well. Hrg. Tr. 48, line 15 – Hrg. Tr. 49, line 2; R. * (Audio statement). He developed his own style for interrogating suspects and relied upon his instinct for determining if a person understood their rights and knowingly and voluntarily waived those rights. Hrg. Tr. 50, line 2 – Hrg. Tr. 52, line 16. Nevertheless, Bucy opined that Appellant understood his rights and the implications of waiving those rights. He additionally testified that Appellant did not request to speak to a lawyer that day despite Appellant asking about a lawyer on the audio recording. Hrg. Tr. 38, lines 12-25; R. * (Audio Statement).

Bucy admitted that Appellant had a stutter and had to be asked questions. He further admitted that he suggested details to Appellant, who would simply respond affirmatively or negatively. Hrg. Tr. 66, line 14 – Hrg. Tr. 67, line 21. Bucy testified that Appellant did not “strike [him] as a real wizard.” Hrg. Tr. 70, lines 23-25. Despite Appellant’s obvious intellectual deficits, Bucy made no efforts to ensure Appellant understood his rights or the

implications of waiver, such as reading the rights out loud or explaining the rights in his own words. Hrg. Tr. 68, lines 8-22.

Appellant submitted a copy of the state's report regarding mental retardation to support his position that his intellectual disability prevented him from making a knowing and voluntary waiver of his rights. Hrg. Tr. 75, lines 1-3; R. * (Mental Eval Report). Appellant argued his statement given on January 6, 2010 was inadmissible as it was the product of an unknowing and involuntary waiver of his constitutional rights due in large part to Appellant's intellectual disability. Hrg. Tr. 76, line 23 – Hrg. Tr. 84, line 6.

Judge John ruled Appellant's January 6, 2010 statement admissible. He compared Appellant to a "youthful offender" who had been "waived up for trial." Judge John determined Appellant understood his constitutional rights and the questions asked of him. In fact, Judge John used Appellant's question to law enforcement about who his lawyer would be as indicative that Appellant understood his ability to have a lawyer. He found Appellant was "determined that he wanted to give up those rights and make a statement." This was based upon Appellant stating "his consc[ience] was bothering him." Hrg. Tr. 87, line 12 – Hrg. Tr. 89, line 22.

The court elaborated on this point, stating that Appellant's statement showed he had "an appreciation for what he had done and a knowledge of right and wrong." He then used Appellant's alleged post-crime conduct to determine Appellant understood his rights and made a knowing and voluntary waiver. He was persuaded by Appellant allegedly wiping his fingerprints at the scene, hitting Mrs. Swaner so she could not call police, and burning his clothes, which showed "more than basic understanding for someone who [has] certainly a more than basic intellectual capacity." Hrg. Tr. 90, lines 3-24.

During the trial, Bucy testified similarly to his pretrial testimony regarding his interactions with Appellant. However, unlike his testimony during the pre-trial hearing and the clear evidence on the audio tape, Bucy testified that he asked Appellant if he “understood” each of the rights and then asked Appellant to initial the form. As explained, the audio is clear that Bucy never asked Appellant if he understood; rather, Bucy instructed Appellant to initial to indicate that Bucy had read the statement on the paper to Appellant. The prosecution published Appellant’s statement to the jury during Bucy’s testimony. Tr. 211, line 7 – Tr. 218, line 14.

At trial, Appellant presented testimony of Ginger Calloway, a forensic psychologist, who testified as an expert in the fields of forensic psychology and developmental disabilities. She explained Appellant suffered from mental retardation. Tr. 458, lines 15-22; Tr. 459, lines 6-9. Calloway testified that Appellant did not understand the Miranda warnings he received. Tr. 466, lines 15-22. In her review of the audio recorded statement, in which Appellant was advised of his rights by Bucy, Calloway noted Appellant “hesitated,” “said things like, yeah, I think so, you know.” Appellant was unsure about dates that he had signed prior documents and did not “grasp fully what was being explained to him and read to him.” When Bucy was explaining numbers five and six on the advisement form, he “went through those two fairly quickly” and it was “more complicated than [Appellant] could understand.” Tr. 466, line 24 – Tr. 467, line 10.

Discussion

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that “a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth

or falsity of the confession.” To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver has two distinct dimensions. It must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and it must be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250 (2010)(citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

It is not enough for an officer simply to read the words on the rights form, hoping the words convey the intended meaning. Berghuis, 130 S.Ct. at 2261. The state must make an additional showing of understanding. There must be both a factual understanding and a contextual understanding. In other words, the state must show the defendant understood the relevance of the rights at the time of the interrogation. Id.

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

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

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of “totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.” Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted). Consideration of a person's mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974)(citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)).² In determining the voluntariness of a confession, the court must consider “a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will.” Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980). A defendant's low

² Similarly, when a court examines whether police were interrogating a suspect, the unusual susceptibility of a suspect to persuasion is an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 302 n.8 (1980).

intelligence is a necessary factor for consideration. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), the South Carolina Supreme Court held that although Davis suffered from mild mental retardation with an IQ of 66, he had the capacity to make a knowing waiver of his constitutional rights to silence and counsel. After Davis's arrest, an officer read the standard Miranda warnings to Davis from a card. The officer testified he "read slowly, paused after each sentence, looked at Davis, and asked him to verbally indicate whether he understood what had been read to him." Davis responded affirmatively that he understood each of his rights. When asked if he wanted a lawyer present, Davis stated he did not need a lawyer. The officer also "explained" that Davis could end the interrogation at any time. Davis indicated he understood this and agreed to give a taped statement. Due to a problem with the audio equipment, the officer asked Davis for a second statement. Again, the officers explained to Davis his constitutional rights and Davis waived those rights and provided a statement. Id. at 336, 422 S.E.2d at 140.

A forensic psychiatrist testified that he interviewed Davis in detail regarding his understanding each of the rights afforded to him pursuant to Miranda. Id. at 336-337, 422 S.E.2d at 140. The psychiatrist admitted Davis's understanding "would be on a different, less abstract, level from a person of average intelligence, but Davis's comprehension was adequate to enable Davis to knowingly and intelligently waive those rights." On the other hand, Davis presented experts who testified he lacked the mental ability to understand the implications of Miranda. Id. at 337, 422 S.E.2d at 140. The Supreme Court held "there was

sufficient evidence on the record, both lay and expert, to support the trial judge's determination that Davis was competent to waive his Miranda rights." Id.

In striking contrast to the instant matter, the officers in State v. Jennings, 280 S.C. 62, 63-64, 309 S.E.2d 759, 760 (1983) were aware of the defendant's low intellectual functioning and exercised caution to be sure he understood their communications with him. Based upon law enforcement's careful questioning and the remaining circumstances, the Court found Jennings's statement was admissible.

Numerous courts throughout the country have found statements to police inadmissible where the defendants lacked the ability to understand their rights and the implications of waiving such rights. In State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987), the New Jersey court found a defendant's statement was inadmissible based on the testimony of three teachers who taught the defendant seven years earlier. The teachers testified the defendant had a second or third grade level vocabulary and required instructions in very basic terms. Due to his low level of functioning, he was unable to grasp abstract concepts. The teachers opined that he would not understand his Miranda rights even if explained to him.

Similarly, a psychiatrist and a psychologist testified that the defendant had a mental age of ten or eleven, required instructions to be given in a very slow and deliberate manner, and would not have been able to understand his rights unless they were very carefully explained to him. The defendant would do what he perceived an authority figure wanted him to do. The court held the statement was inadmissible because the warnings had not been given slowly and carefully enough or with any consideration of the defendant's intellectual functioning, thereby preventing the defendant from making a knowing waiver.

State v. Rossiter, 623 N.E.2d 645 (Ohio App. 1993). A court found a defendant's statement inadmissible because she lacked the ability to comprehend her rights where she suffered from mild mental retardation and she functioned on the equivalent of an eight-year old child. People v. Daniels, 908 N.E.2d 1104 (Ill. App. 2009). Although the defendant understood some of his rights and he was the manager of a local restaurant, a trial court properly excluded a statement by a mentally impaired individual, whose IQ was 71, where the expert testified the individual suffered from depression, which would affect his IQ. Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011).

In a case very similar to Appellant's, the Tennessee Supreme Court held a defendant did not knowingly and intelligently waive his rights before police interrogation, even though he appeared to understand his rights and was later found competent to stand trial because evidence showed that he was mentally retarded, with an IQ of 55, and functioned on the level of a child from six to nine years old. State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000).

"Individuals with mental retardation have strengths and weaknesses, like all individuals." Holladay v. Allen, 555 F.3d 1346, 1363 (11th Cir. 2009). The Eleventh Circuit rejected an expert's opinion that Holladay was not mentally retarded where the expert's predominant focus was on Holladay's actions surrounding the crime. Id. The Oklahoma Court of Criminal Appeals held that evidence of criminal activity was irrelevant concerning a finding of mental retardation unless the evidence directly contradicted the adaptive deficits claimed by the defendant. Lambert v. State, 126 P.3d 646, 655 (Okla. Crim. App. 2005). The alleged facts of a mentally retarded person's criminal conduct were not relevant because "[m]entally retarded people can and do commit crimes." Evidence of criminal activity was not relevant unless evidence of particular limitations is negated by

such evidence. Id. at 656. Without question, “mentally retarded persons can ... commit crimes which do not require abstract thinking.” Specifically, the court held that although the defendant committed a horrible crime, “[t]hat crime, and others he committed, should not have been the focus of the mental retardation proceedings. The prosecution’s use of this evidence shifted the focus away from [the defendant]’s mental capabilities to his criminal actions.” Regarding the playing of the defendant’s videotaped confession, the prosecution argued it was relevant to show the defendant “could talk with police, relate events, answer questions, and did not appear mentally retarded.” The court was unpersuaded that the video supported the state’s contentions as such did not refute mental retardation: “[A] mildly mentally retarded person can remember events and is capable of carrying on conversations on specific topics.” Id. at 657.

Using evidence of the crime itself to rebut a diagnosis of mental retardation fails to provide an accurate assessment of adaptive functioning. Usually, “not enough information is typically available (on a precise microlevel) regarding the exact situational demands and the level of cognitive skills required to navigate those demands.” Stephen Greenspan & Harvey N. Switzsky, Lessons from the Atkins Decision for the Next AAMR Manual, in What is Mental Retardation? Ideas for an Evolving Disability in the 21st Century 283, 291; see also, Caroline Everington & J. Gregory Olley, Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation, 8(1) J. Forensic Psychol. Practice 1, 11 (2008). Evidence of the crime is relevant to the mental retardation diagnosis only if it corresponds to a skill measured for determining adaptive skills deficits. John Blume, et al., Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases, 18 Cornell J.L. & Pub. Pol’y 689, 724 (Summer 2009).

According to empirical research, “mental retardation makes some people incapable of understanding either the text of the Miranda rights or the consequences of forsaking them. For these people, the words of the warnings latterly have no useful meaning.” Morgan Cloud, et al., Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 499 (Spring 2002). The results of the authors’ study revealed

mentally retarded people simply do not understand the Miranda warnings [because v]irtually all of the disabled subjects failed to understand the context in which interrogation occurs, the legal consequences embedded in the rules or the significance of confessing, the meaning of the sentences that comprise the warnings or even the individual operative words used to construct the warnings.

Id. at 501. Notably, the research showed that not only did people suffering from severe mental retardation not comprehend the warnings, but those classified as mildly mentally retarded failed to understand the warnings as well. Id.

Research continues to demonstrate that individuals with intellectual disabilities lack the ability to understand the meaning of the Miranda warnings, lack the capacity to weigh the consequences of a waiver, and are more susceptible to waiving their rights in order to comply with an authority figure. Andrew Guthrie Ferguson, The Dialogue Approach to Miranda Warnings and Waiver, 49 Am. Crim. L. Rev. 1437, 1458 (Summer 2012). “The results indicate that mentally retarded people simply do not understand the Miranda warnings.” The individuals “failed to understand the context in which interrogation occurs, the legal consequences embedded in the rules or the significance of confessing, the meaning of the sentences that comprise the warnings, or even the individual operative words.” Id. at 1459-1460. Compounding the problem is the fact that studies show that intellectually disabled people are more likely to waive their rights. Id. at 1461. “The clear and

uncontested conclusion is that suspects who are developmentally cognitively impaired are vulnerable to unknowing and especially unintelligent Miranda waivers.” Id.

Appellant’s statement was the product of an unknowing and involuntary waiver of his rights. The trial judge erred in admitting Appellant’s statement to police officers where the record evidence demonstrated Appellant lacked the requisite mental ability to waive his Miranda rights due to his intellectual disability. The issues are whether Appellant understood abstract concepts, such as rights, whether Appellant understood the words used in the warnings and waiver request, and whether he understood the implications of waiving his rights. The undisputed evidence was that Appellant had an IQ in the 60s,³ that he was interrogated by multiple officers, and that officers’ interrogation technique suggested the answers to Appellant. The recorded statement illustrated that although Appellant provided some narrative, he primarily responded to leading questions by the officers. At least one of the officers realized Appellant’s intellectual functioning was below average, but took no precautionary measures concerning Appellant’s ability to comprehend his rights and the implications of waiving those rights. Hrg. Tr. 70, lines 23-25 (Bucy testified that Appellant did not “strike [him] as a real wizard.”).

As an additional matter, the trial judge erred in focusing his analysis on Appellant’s statement concerning the alleged crime and measures he allegedly took to evade detection, such as burning clothes and hitting Mrs. Swaner to prevent her from calling the police. The record lacks any evidence that the statement contained any truth to it at all. Further, these answers were suggested generally to Appellant by the police. The officers’ finding of

³ Calloway testified Appellant’s IQ was in 66; his father’s IQ was between 62 and 66 and his mother’s IQ was 49 when she entered school and was 61 when she was a teenager. Tr. 461, lines 1-20.

Appellant's fingerprints and DNA at the scene certainly undermined any confidence that Appellant took affirmative steps to avoid detection.

II. In violation of Appellant's right to be free from unlawful searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 10 of the South Carolina Constitution, the trial court erroneously found Appellant knowingly consented to the police taking a DNA sample from him where the undisputed evidence demonstrated Appellant lacked the mental capacity to make a knowing waiver of his rights due to his intellectual disability.

Relevant facts

Appellant filed a motion to suppress DNA evidence obtained from him based upon his inability to provide knowing consent to search his person due to his mental retardation. R. * (Motion). During a pre-trial hearing, SLED agent Glenn McLellan testified that he was present when Appellant signed the voluntary consent to search form. Hrg. Tr. 112, lines 19-25; R. * (Consent form). The so-called signature was in "manuscript," or "printed," not in cursive. Hrg. Tr. 114, lines 12-22. According to McLellan, Appellant was read the form in its entirety. Hrg. Tr. 115, lines 3-5. McLellan testified Deputy John Willie Brown actually took the buccal swabs. Hrg. Tr. 114, lines 23-25.

On cross-examination, McLellan testified that Appellant was not under arrest, but was transported to the police station because officers were more comfortable interrogating suspects in that location. McLellan can control distractions and control the suspect's environment at the police station, which he preferred. Hrg. Tr. 118, line 13 – Hrg. Tr. 119, line 25. McLellan claimed Appellant was asked for a swab from his mouth for a DNA sample to be used for investigative purposes. He assumed Appellant understood what DNA meant. Hrg. Tr. 121, lines 5-20. McLellan was forced to admit that the form used to obtain Appellant's alleged consent only used the term "swabs," and failed to alert an individual that

the swabs were being used to collect DNA. Hrg. Tr. 126, lines 4-8; R. *(Consent form). McLellan was unable to say how Appellant consented, but he testified that Appellant consented. Remarkably, despite McLellan's lack of memory regarding the specifics of Appellant's consent, he testified that Appellant had no hesitation or doubt about consenting. Hrg. Tr. 124, lines 4-10.

John Willie Brown, a Dillon County Sheriff's Deputy, testified that he was present when McLellan sought Appellant's consent for a buccal swab. Hrg. Tr. 127, lines 12-18. Brown opined that Appellant willingly consented to the buccal swabs. Brown actually took the swabs. Hrg. Tr. 128, lines 5-9.

The wording of the "voluntary consent to search" form was quite complex. It provided that Appellant "freely, voluntarily, and without threats, pressure, or coercion of any kind" consented "to a warrantless search of" his person/body by the police. It allowed the police to "seize any items, materials, or other property" that officers "deem[ed] to be of evidentiary value." Then, the form provided – in almost illegible handwriting – that the location and description of the premises to be searched were "mouth swabs" from Appellant. R. * (Consent form). Notably, neither the form nor the officers advised Appellant of his right to refuse consent. R. * (Consent form).

Appellant relied upon the clear and undisputed reports by multiple experts that Appellant suffered from an intellectual disability to support his position that Appellant's waiver of his right to be free from warrantless search of his person was not knowingly and voluntarily given. Hrg. Tr. 129, lines 22-24; Hrg. Tr. 130, lines 3-9. Despite Appellant's obvious intellectual deficits, Judge John found Appellant voluntarily waived his rights to be free from warrantless searches. Hrg. Tr. 130, line 18 – Hrg. Tr. 131, line 8.

During the trial, Brown testified differently regarding how consent was obtained from Appellant. The pre-trial proceedings indicated that McLellan sought Appellant's consent and that Brown simply swabbed Appellant's cheek. However, Brown testified at trial that after Appellant signed the form, he asked Appellant if he "mind[ed] opening his mouth to let [Brown] get a swab from the inside of his jaw to get slobber on it." Tr. 121, lines 8-14. On cross-examination, Brown claimed "we" explained to Appellant why swabs were being taken from him – a sample of his DNA. Tr. 139, lines 6-8. When questioned more about what DNA meant and whether this was explained to Appellant, Brown claimed McLellan explained it to him and "did the consent form for it." Tr. 139, line 15 – Tr. 140, line 3.

McLellan's direct examination testimony at trial regarding the DNA sample was very limited. He testified that he was present when Brown took the buccal swab and present when Appellant signed the voluntary consent form. McLellan testified he had no doubt Appellant understood his rights and willfully and voluntarily gave a sample. Tr. 190, line 1 – Tr. 191, line 4. Notably, McLellan did not testify at trial that he explained the purpose of the search or that Appellant had the right to refuse the search.

Discussion

The United States Constitution and South Carolina's Constitution protects individuals from unreasonable and warrantless searches and seizures. U.S. Const. amend. IV; S.C. Const. Art. I, §§ 3, 10. Taking evidence from an individual's body constitutes a search and seizure under the Fourth Amendment. State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 35 (Ct. App. 2009); Schmerber v. California, 384 U.S. 757 (1966). "A warrantless search generally offends the Fourth Amendment." State v. Willard, 374 S.C.

129, 134, 647 S.E.2d 252, 255 (2007). “[A] search conducted without a warrant issued upon probable cause is ‘per se unreasonable ... subject only to a few specifically established and well-delineated exceptions.’” Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)(quoting Katz v. United States, 389 U.S. 347, 357 (1967)). “Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the ‘totality of the circumstances.’” State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977). Failure to give Miranda warnings is a factor “to be considered in determining the voluntary nature of the consent.” State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

“Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle.” People v. Packer, 851 N.Y.S.2d 40, 42 (App. Div. 2008). The State bears the burden of showing a defendant’s consent was voluntary. Wallace, 269 S.C. at 550, 238 S.E.2d at 676. Although a waiver of Miranda rights is different, “the controlling legal principles are equally apposite to situations where the voluntariness of a consent to search is at issue.” State v. Fincher, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (N.C. 1983)(citing Schneckloth, 412 U.S. at 223-227). Thus, among the relevant factors for consideration are the accused’s age, poor education or low intelligence, lack of advice concerning his constitutional rights, the length of the detention before consent was given, the repeated and prolonged nature of the questioning and the use of physical punishment. Schneckloth, 412 U.S. at 226. In fact, in Mississippi, “[a] per se involuntariness finding may be appropriate in case of moderate or severe retardation.” Neal v. State, 451 So.2d 743, 756 n.8 (Miss. 1984).

Appellant incorporates the legal arguments and analysis presented in Issue I, supra. Appellant lacked the ability to understand his rights and waive those rights to submit to

giving a saliva sample to be used for DNA testing and investigative purposes. In light of the procedures used for obtaining the samples, Appellant was never even advised of his rights regarding freedom from warrantless searches and never informed that he could refuse. At the time officer's obtained Appellant's DNA, Appellant was a mere nineteen-years old with an undisputed IQ of 66. He was in an inherently coercive environment as he had been transported from his home to the police department. The officers admitted the transport was intentional so that the officers would feel comfortable and in control. The obvious implication is that Appellant would feel uncomfortable and that he lacked control. The trial judge erred in finding Appellant voluntarily and knowingly consented to the warrantless search of his person.

III. In violation of Appellant's right to present a complete defense and receive due process of law through a fair trial pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the trial judge refused to allow Appellant to present evidence through his expert witness that he was a follower, who was easily influenced by others, which was a consideration for the mental retardation conclusion.

Relevant facts

Calloway, Appellant's expert witness in forensic psychology and developmental disabilities, testified regarding the definitions of mental retardation according to South Carolina statutory law and the Diagnostical and Statistical Manual of Mental Disorders. Both required sub-average intellectual functioning coupled with adaptive deficits. Tr. 459, line 10 – Tr. 460, line 15. For testing of adaptive deficits, experts in the field rely upon collateral information or substantiating information from other people who know the person being evaluated because mentally retarded people “tend to inflate what they can do.” Tr. 462, line 15 – Tr. 463, line 7. On the adaptive deficits test, Appellant scored “in the under one percentile.” Tr. 464, lines 11-16. When examining Appellant's adaptive deficits, Calloway examined “things like daily living, self help, areas of self care, self direction, so forth and so on, communication, social.” Essentially, she examined three major areas: functional academics, practical skills, and social relationships. Tr. 465, lines 1-21.

To evaluate someone to determine if the person has an intellectual disability, an examiner relies upon information from school records, family members, people who observed the person growing up. Calloway stated that she wanted as many sources as she could find to give her details of Appellant's activities of daily living. Tr. 480, lines 4-15. When Appellant questioned whether Calloway found evidence that he was “easily

influenced by others, and would do what other boys told him, even if it got him in trouble,” the prosecutor objected. The judge sustained the objection finding no relevance and lack of foundation. Tr. 480, lines 16-25.

The following exchange then occurred:

Q. Dr. Calloway, in conducting an evaluation on a person to determine if [he] do[es] have intellectual disability, a significant one, is it relevant to know about their social skills?

A. Yes. Uh huh (indicating positive)

Q. And with regard to those social skills, is it relevant to your diagnosis to know if they are leaders or followers?

A. Yes. It’s relevant to know what they are like in their social relationships, and that would be one - - one aspect - -

Q. Okay.

A. --- of social relationships.

Tr. 481, lines 3-13. When Appellant asked if it would be relevant if a person were easily led or manipulated by other people, the prosecution objected. Tr. 481, lines 14-19. The state objected on the basis that Appellant was attempting to introduce evidence of third party guilt. Tr. 482, lines 7-12. The judge ruled Appellant could ask questions regarding whether he was a follower, but could not ask “do other boys lead him to get him in trouble” because that introduced third party guilt. Tr. 482, lines 13-18.

Appellant explained the defense was duress, not third party guilt. Tr. 482, line 19 – Tr. 483, line 14. Concerning the questions of Calloway, Appellant explained that he needed to show the jury that Appellant’s mental state and mental capacity was consistent with an intellectual disability for the jury to evaluate whether Appellant’s statement was made following a knowing, intelligent, and voluntary waiver. Appellant explained that social

skills comprised “part of the diagnosis and evaluation of an intellectual disability.” Tr. 483, lines 15-25.

Appellant further explained that at least three family members reported that Appellant “was easily influenced by other boys, and he would do what they told him to do even if it got him into trouble.” This evidence demonstrated “a real weakness in [Appellant’s] ability to thrive, and interact in a social environment.” This fact was part of the diagnosis of mental retardation and was a vital factor for diagnosis. Tr. 484, lines 7-19. In response to the judge’s statement that whether Appellant was led around by other boys to commit a crime had nothing to do with whether he understood his rights, Appellant responded that it was “perfectly in line with him pleasing authority, and going along with the officers.” Tr. 485, line 22 – Tr. 486, line 3.

Judge John then countered that the court did not know whether “these stories” were true or not. Tr. 486, lines 4-19. Ultimately, he ruled that Appellant would be unable “to elicit from this particular witness that he, as a factual occurrence, that this actually occurred, that he followed other boys, and got into trouble.” Tr. 488, lines 3-8; Tr. 488, lines 20-25.

Discussion

The United States Supreme Court held that mentally retarded persons “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.” Atkins v. Virginia, 536 U.S. 304, 306 (2002). “Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direct that became

manifest before age 18.” *Id.* at 317.⁴ Although mentally retarded persons may be competent to stand trial, they “by definition ... have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Id.* at 318. The United States Supreme Court explained that mentally retarded persons “in group settings ... are followers rather than leaders.” *Id.* (citing Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 *Geo. Wash. L. Rev.* 414, 429 (1985); Levy-Shiff, Kedem, & Sevilla, Ego Identity in Mentally Retarded Adolescents, 94 *Am. J. Mental Retardation* 541, 547 (1990); Whitman, Self Regulation and Mental Retardation, 94 *Am. J. Mental Retardation* 347, 360 (1990); Everington & Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation, 37 *Mental Retardation* 212, 212-213, 535 (1999)).

In holding that mentally retarded individuals were ineligible for the death penalty, the Court found no deterrent effect of executing mentally retarded people because they are “at the opposite end of the spectrum from” people who engage in cold, calculated conduct. Due to a mentally retarded person’s “diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses,” he is “less morally culpable” and “less likely [to have the capacity] to process the information of the possibility of execution as a penalty.” *Id.* at 319-320. The Court

⁴ South Carolina defines mental retardation as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” S.C. Code Ann. § 16-3-20 (C)(b)(10); see also, S.C. Code Ann. § 44-20-30(12)(defining intellectual disability as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.”

recognized that mentally retarded individuals are more likely to give false confessions due to their disability. Id. at 320 (citing Everington & Fulero 212-213). The Court also recognized the “disturbing number” of death row exonerations in recent years, which included “at least one mentally retarded person who unwittingly confessed to a crime that he did not commit. Id. at 320 n.25 (citing Baker, Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense, Washington Post, Jan. 15, 1994, p. A1).

As recognized by the Supreme Court, mentally retarded individuals are followers, not leaders. Obviously, a follower is led by others, but almost all humans follow some leader. Simply being a follower does not equate to being mentally retarded. What separates a person of average intelligence from a person with mental retardation is how easily the person is led, by whom the person is led, and the ability to evaluate the consequences of being led. Without question, whether Appellant was easily led by other boys, even when such would get him into trouble was directly relevant to Calloway’s diagnosis as it concerned his adaptive functioning and to Appellant’s ability to understand and waive his Miranda rights.

The question and answer demonstrated that Appellant followed the instructions of individuals, even those younger than he – an indication that his ability to function socially was diminished. This demonstrated his desire to acquiesce, especially with authority figures, such as police officers. The question and answer demonstrated that Appellant lacked the ability to think critically regarding the consequences of his conduct – an indication that his ability to function socially was diminished. This demonstrated his inability to critically consider abstract concepts, such as rights, and evaluate the consequences of waiving those rights. The state’s argument, and the trial court’s ruling, was

clearly erroneous as Appellant did not attempt to elicit any evidence of third party guilt; he simply attempted to demonstrate that he met the criteria for mental retardation concerning this adaptive skills deficit and this particular characteristic created an extremely high likelihood that he was unable to knowingly and voluntarily waive his rights prior to interrogation.

IV. In violation of Appellant's constitutional rights to present a defense and due process of law pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the trial judge erred in forbidding Appellant from presenting evidence that he refused to take a polygraph after he gave a second statement to police where the officer testified that he believed Appellant's second statement was true.

Relevant facts

The theories posited by the state and defense were clear from the opening statements. The prosecution informed the jury that the facts of the crimes were known because Appellant had confessed on tape. Then, the prosecutor informed the jury that Appellant gave a statement to police prior to the taped confession. In this statement, according to the prosecutor, Appellant attempted to lessen his guilt by implicating others. Concerning these statements, the prosecutor argued the jury was “not going to believe that statement. You're going to believe this statement, the second one.” Tr. 62, line 19 – Tr. 63, line 8.

On the other hand, the defense's theory was that the first statement to police was true and the second statement was given by Appellant because he was afraid of the real killers. Tr. 63, lines 16-24. In opening, Appellant explained that after he gave the first statement, he was arrested. Upon realizing that he would be locked in jail with the real killers, Appellant went to the police and denied anyone was with him. He did so out of fear of the real killers. Tr. 72, lines 1-25. Appellant argued the jury would disbelieve the second statement based upon the audio recording and the statements by police made on the audio recording indicating the police did not believe the second statement. Tr. 73, lines 8-22.

Appellant maintained a consistent defense strategy throughout the trial – that Appellant’s first statement was true and the other men were the real killers. In questioning the pathologist, Appellant demonstrated that the results of the autopsy supported the first statement, not the second. The pathologist testified there was no indication, such as marks on wrists or ankles, Mrs. Swaner had been dragged as stated in Appellant’s second statement. Tr. 283, lines 1-12. Further, the pathologist testified the circular wound to chest of Mrs. Swaner was not caused by the knives, which Appellant’s second statement described. Rather, the wound was caused by a blunt, pointed object. Tr. 280, lines 16-25; Tr. 284, lines 2-23.

Jeffrey Crooks, a SLED agent, testified that he processed the crime scene. He developed a fingerprint from a piece of glass found at the scene that he was unable to identify to anyone. Tr. 324, lines 4-6. A knife handle, which the state argued was the handle of the murder weapon used to kill Mr. Swaner, was not tested for DNA or prints. Crooks testified that the handle was not unlikely to yield results if tested for latent prints. He determined “the best avenue for [the handle] would have been touch DNA.” However, the handle was released to the sheriff’s department, where it remained until the day of trial, with no tests conducted. Tr. 325, line 23 – Tr. 326, line 25; Tr. 367, line 3 – Tr. 370, line 24.

Lindsay Thompson, a SLED DNA analyst, testified that she tested multiple samples from the crime scene. Thompson found Appellant’s DNA present at the scene, which was not surprising given his admission to being present. More importantly, Thompson found DNA that was not attributable to Appellant or the Swaners. Fingernail scrapings of Mrs. Swaner revealed DNA not belonging to Appellant or the Swaners. Tr. 406, line 15 – Tr. 407, line 18. Thompson tested a swab from a knife blade, which revealed DNA from at

least two individuals. She was unable to exclude the Swaners as possible contributors, but excluded Appellant completely. Tr. 410, lines 7-14. She also found a mixture of DNA under Mr. Swaner's fingernails. She excluded Appellant from the mixture, but could not exclude the Swaners from the mixture. Tr. 403, lines 2-25.

When Deputy Brown testified, Appellant sought permission to ask Brown about Appellant's refusal to take a polygraph regarding the substance of his second statement. Appellant proffered the testimony he sought to introduce. Specifically, Appellant wanted Brown to testify that Appellant refused to take a polygraph regarding the information contained within the audio recorded second statement. Tr. 173, line 8 – Tr. 178, line 25.

Judge John ruled the testimony was inadmissible because the question “inherently suggest[ed] that polygraphs [were] reliable” and “accepted in the scientific community.” Tr. 179, lines 3-17. Appellant explained the testimony was not sought to show that polygraphs were reliable, but to show that the police did not believe Appellant's statement and Appellant was aware that his statement was untrue. Appellant argued the testimony was appropriate response to the state's theory. “[T]he state has thrown down the gauntlet saying the jury is to decide which statement is true,” and the state argued the second statement was true. However, the evidence regarding Appellant's unwillingness to take a polygraph undermined the state's theory and provided Appellant with evidence to support his defense – the first statement was true. Tr. 179, line 18 – Tr. 180, line 15. The judge found a clear implication in the testimony that the machine was reliable. Tr. 180, lines 16-22.

With full knowledge of this exchange and the defense's theory, the state presented the testimony of SLED agent John Follin, who was present for the second statement. Tr.

262, lines 8-13. The prosecutor inquired as to Follin's opinion of Appellant's truthfulness in the second statement.

Q. There was a lot of conversation towards the end of the interview about whether [Appellant] was telling you the truth, the truth needed to come out, tell us the truth. After you - - given your years of experience interviewing suspects in that - - in similar situations, did you have any hesitation as to the truthfulness of [Appellant]'s conversation with you?

A. At the end of our interview I was very confident that he had been truthful and that he had told us the truth at the end of that statement.

Tr. 265, line 20 – Tr. 266, line 4.

In response, Appellant moved again to present testimony that he refused to submit to a polygraph examination after the second statement. The judge refused, but stated that he expected an objection to the testimony because it was an improper question asked by the prosecutor. He remained steadfast that unless Appellant could present evidence regarding “a scientific found regarding the polygraph,” Appellant could present no evidence at all regarding a polygraph. Tr. 266, line 24 – Tr. 269, line 21.

Appellant's closing argument returned to his theory and noted the evidence supported the first statement, not the second statement. Appellant argued that his print on the glass bowl was not in blood as it would need to be if the murders occurred as the state's theorized – a single person stabbed Mr. Swaner and then grabbed the glass bowl to hit Mrs. Swaner. Tr. 591, line 5 – Tr. 592, line 5; Tr. 593, lines 13-16. The police found unknown DNA in the house, and were unable to check it against any of the real killers as the police did not obtain samples from them. Tr. 596, lines 15-22. Particularly damaging to the state's theory was that unknown DNA was on the alleged murder weapon itself. Tr. 598, lines 5-11. DNA found under Mrs. Swaner's fingernails was also unidentified. Tr. 598, lines 12-

13. The pathologist's testimony concerning the number of weapons used contradicted Appellant's second statement. Tr. 599, lines 15-25.

Discussion

“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.” Washington v. Texas, 388 U.S. 14, 19 (1967). “This right is a fundamental element of due process of law.” Id. When the state introduces evidence concerning a particular matter, the defendant is entitled to explain or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. See e.g., State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003); State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999).

South Carolina law provides for the admission of the results of polygraph examinations if the evidence passes the test announced in Rule 702 of the South Carolina Rules of Evidence. In other words, the evidence is admissible based a finding that the evidence will assist the jury, the expert witness is qualified, and the underlying science is reliable. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)(citing Rule 702, SCRE). Even when South Carolina law provided that evidence of polygraph examinations was generally inadmissible, the Supreme Court found trial counsel's failure to object to the mention of a state's witness taking a polygraph was not prejudicial to the defendant. The Court reasoned the evidence was simply that the witness “took a polygraph test” and the

results were not admitted. The evidence in the record did not lend itself to whether the witness passed the test; rather, “[w]hile the jury could have inferred [the witness] passed the polygraph, an equally plausible inference is that [the witness] did not pass the polygraph.” Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001).

In State v. Jackson, 364 S.C. 329, 613 S.E.2d 374 (2005), the state introduced a taped conversation between the defendant and a witness. The witness asked the defendant if he would be willing to take a polygraph and the defendant responded he would be willing to do so. The defendant then sought to introduce the results of the polygraph, arguing the state had opened the door. Id. at 335, 613 S.E.2d at 377. At the time of trial, Appellant was not prepared for a hearing concerning the scientific reliability of the test and asked to think about it overnight. The next day, Appellant informed the court that he had decided to ask the witness only whether the defendant had agreed to take a polygraph and whether one was administered. On appeal, the defendant argued that while the issue concerning scientific reliability was waived, the issue of rebuttal was preserved. The Court disagreed, finding Appellant’s acquiescence the next morning waived any issue concerning introducing evidence of the polygraph test results in rebuttal. Id. at 335-336, 613 S.E.2d at 377.

Appellant did not seek to introduce the results of a polygraph examination. In fact, Appellant sought to introduce evidence that he refused to take a polygraph concerning his second statement to rebut the state’s argument that the second statement was true and the state’s intentional, although improper, eliciting of testimony that an officer believed Appellant was telling the truth when he gave the second statement. Therefore, it was unnecessary for Appellant to pass the Rule 702 test in light of the specific evidence he sought to introduce. The South Carolina Supreme Court’s decision in Jackson, *supra*, is

instructive to Appellant's issue as it demonstrates that even the results of polygraph examinations may be admissible to rebut the state's evidence without passing the Rule 702 test. If results are admissible, then certainly the defendant's desire to introduce evidence indicating he refused to take a polygraph is admissible to rebut the state's direct evidence that Appellant was telling the truth during his second statement.

V. In violation of Appellant's right to due process of law, the trial judge failed to grant a mistrial when the prosecution's statements to the jury that Appellant was deceiving them through his inconsistent claims concerning his intellectual capacity to knowingly waive his rights to give a statement so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Relevant facts

As explained, Appellant's theory at trial was that his first statement to police was truthful and his second statement was not only untruthful, but was the product of an unknowing and involuntary waiver of his rights. The state's theory, on the other hand, was that the second statement was the truth. During closing argument, the state argued the jury should discredit Appellant's argument that Appellant did not knowingly and voluntarily waive his rights prior to the second statement because Appellant had not argued the same concerning the first statement. The state made this argument despite clear knowledge that the first statement was not subject to attack as it was not given during custodial interrogation.

But here's the thing that's curious that I think cancelled out the whole Miranda Waiver understanding argument. They stand here and tell you, oh yeah, what's he saying is true. We want you to adopt this argument. They don't say - - I didn't hear it in his argument, well, all of his statement should be disqualified because he doesn't understand Miranda.

No, we want you to believe this first on the 5th of January. Yes, he was there, but these other guys were doing it. We want you to believe this, but the next day when he is given the exact same rights, all of a sudden he takes leave of his senses and cannot understand his Miranda Rights. That's the first thing I would submit to you, totally understands their - - undermines their argument that he was unable to understand his Miranda Rights.

Tr. 620, lines 5-19. Appellant promptly objected and moved for a mistrial based upon the prosecutor's false and misleading argument. Tr. 620, lines 20-24; Tr. 625, lines 2-9.

Appellant explained the state's argument implied tactical deceit by the defense. Challenging the first statement based upon a violation of Miranda was not a legal option for Appellant because Appellant was not in custody. Tr. 621, line 20 – Tr. 622, line 12; Tr. 622, lines 16-22. The pretrial hearings made this absolutely clear. The trial judge found, and Appellant admitted, Appellant was not in custody at the time; therefore, the police were not obligated to inform him of his rights or to obtain a knowing and voluntary waiver of those rights. In short, Appellant had no basis to challenge the admissibility of the statement of January 5, 2010. Hrg. Tr. 32, lines 2-22.

Specifically, Appellant noted the prosecutor's "direct implication" was that the defendant was attempting to mislead the jury by selectively challenging one statement over another. The argument was that the defense was inconsistent in its logic and argument because of an equal opportunity to challenge both statements. The implication was "They are selectively challenging this one because they liked the first statement, and in reality, all of the evidence indicates that the first statement was completely voluntary, was not a custodial interrogation." The state told the jury to disregard the defense's reasoning because it was "illogical, irrational, and inconsistent." Tr. 629, lines 9-25.

Judge John determined a curative instruction was necessary and issued one. Tr. 631, line 2 – Tr. 633, line 16. Appellant objected to the sufficiency of the instruction. Tr. 626, lines 1-4; Tr. 633, lines 20-23. However, the judge denied Appellant's motion for mistrial. Ironically, he said he was uncertain whether there was any error, but determined that any error would be cured by his instruction. He further found nothing prejudicial in the statements made by the prosecutor. Tr. 627, lines 3-16; Tr. 630, lines 2-8; Tr. 633, line 24.

During the jury deliberations, the jury requested to re-hear the audio CD of Appellant's second statement. Tr. 686, lines 9-11. The statement was played for the jurors. Tr. 687, line 16.

Discussion

Although a solicitor should prosecute vigorously, he is a minister of justice. Thus, his job is not to convict a defendant, but to see justice done. A prosecutor's argument must be based upon that basic principle of the criminal justice system. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). The prosecutor's closing argument "must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence." State v. Vaughn, 362 S.C. 163, 607 S.E.2d 72 (2004)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Where a prosecutor makes an improper argument, the question is whether "the remark ... so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

The South Carolina Supreme Court explained an appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57

(1996).⁵ The South Carolina Rules of Evidence provide that an “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of party is affected....” Rule 103, SCRE.⁶ “The vital inquiry usually is whether or not the verdict was substantially influenced by the impropriety.” 75A Am.Jur.2d Trial § 502 (1991) (footnotes omitted). Thus, to warrant reversal, “the errors must adversely affect [the defendant’s] right to a fair trial.” State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

In Donnelly, 416 U.S. at 643-644, the United States Supreme Court held the prosecutor’s improper comments were not so egregious such that they infected the trial with unfairness making the resulting conviction a denial of due process in light of the trial judge’s “special pains” to cure the error and the ambiguous nature of the argument. Although the Donnelly Court afforded no relief to the defendant, the Court reaffirmed the long-standing legal principle that the “Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.” Id., at 646 (citing Miller v. Pate, 386 U.S. 1, 7 (1967)). The Donnelly Court distinguished the facts before it from Miller, where the prosecutor repeatedly showed the jury a pair of stained undershorts allegedly belonging to the defendant, which the prosecutor described as stained with blood. The undershorts were actually stained with paint. The Donnelly Court explained that “[t]he ‘consistent and repeated misrepresentation’ of a dramatic exhibit in evidence may profoundly impress a jury

⁵ See 75B Am.Jur.2d Trial § 1284 (1992) (“Error is not always rendered harmless by instructions to the jury to disregard it or to give it only a limited effect. The test is one of prejudice.”) (footnotes omitted).

⁶ Notes to Rule 103, SCRE (citing Michael H. Graham, Handbook of Federal Evidence, § 103.1 (3rd ed. 1981)). “[E]rror which is harmless does not affect a substantial right.” Id.

and may have a significant impact on the jury's deliberations." On the contrary, "[i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion, not evidence, do not reach the same proportions." Id. Likewise, the Court distinguished Donnelly from Brady v. Maryland, 373 U.S. 83 (1973). As explained by the Court, in Brady, the prosecutor withheld evidence that was directly relevant to the defendant's involvement in the crime. The Court expressed that "manipulation by the prosecution was likely to have an important effect on the jury's determination." Id., at 647.

In Darden v. Wainwright, 477 U.S. 168, 179-182 (1986), the Court held the prosecutor's argument deserved the condemnation it had received; however, the Supreme Court ultimately determined the argument had not so infected the trial with unfairness as to make the resulting conviction a denial of due process. Although the comments were improper, they did not deprive the defendant of a fair trial because the argument did not manipulate or misstate the evidence and did not implicate other specific rights of the defendant, such as the right to counsel or the right to remain silent. Id. at 181-182. Importantly, the Court explained first, "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." Id. at 182. Second, the Court noted the trial court instructed the jury numerous times that their decision must be based on the evidence and the arguments of counsel were not evidence. Third, the Court explained the evidence against the defendant was "heavy." Id.

The South Carolina Supreme Court addressed this issue in Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). In Elijah Mincey's drug distribution trial, two witnesses testified that Mincey had not participated in the drug transaction. Those witnesses were present for the drug transaction and had entered guilty pleas to distribution for their

involvement. Id. at 357, 444 S.E.2d at 511. In his closing argument, the prosecutor called Mincey “a pretty intimidating man.” He further argued Mincey “must be pretty intimidating for these guys to come before Judge Connor, tell her, yes, we’re guilty of this.” Id. (emphasis in original). Concerning the confidential informant in the case, the prosecutor stated “Maybe she’s intimidated by Elijah. She’s got children. She lives down there too.” Id. at 358, 444 S.E.2d at 511 (emphasis in original). The Court held the prosecutor’s argument was improper and trial counsel was ineffective for failing to object. “References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats.” Id. (citing State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985)). As explained by the Court, Mincey’s defense was that he was not involved in the drug transaction. The prosecutor’s implication that the two witnesses gave false testimony due to intimidation or threats contradicted this defense. The prosecutor’s argument was improper because “[t]here was, in fact, no evidence that Mincey intimidated any of the witnesses.” Id. at 358, 444 S.E.2d at 511.

The South Carolina Supreme Court granted a defendant a new trial where a prosecutor’s closing argument, which “misstated the law by improperly injecting parole considerations into the jury’s sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence of an acquittal.” Simmons, 331 S.C. at 338-339, 503 S.E.2d at 167. Although the trial judge informed the jury that the responsibility of sentencing the defendant was for the judge alone, the judge did not explain the sentencing consequences of the verdicts available to the jury. Id. at 339, 503 S.E.2d at 167. Therefore, the instructions did not cure the improper argument. Additionally, the Court was not persuaded by the overwhelming evidence of the defendant’s guilt because the

prosecutor's argument prevented the jury from fairly considering a verdict of guilty with a recommendation of mercy. Id. at 340, 503 S.E.2d at 167.

In Vaughn, 362 S.C. at 171, 607 S.E.2d at 76, the South Carolina Supreme Court held a defendant was entitled to a new trial based upon the solicitor's improper closing argument. The defendant's attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id. at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors' time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant's attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said "the very same thing" that the officer presented said. Id. at 168, 607 S.E.2d at 74.

The Court recognized that improper argument includes vouching for a witnesses and initiating argument about the testimony of absent witnesses. Id. at 169, 607 S.E.2d at 75. Additionally, the Court recognized that the defendant "'opened the door' to some response from the solicitor" based on his closing argument concerning the absence of witnesses. Id. at 170, 607 S.E.2d at 75. The Court held that the solicitor's response was unfair and prejudicial in light of the lack of evidence of the defendant's guilt. Id. at 170, 607 S.E.2d at 75-76.

The prosecutor's clearly improper argument prejudiced Appellant. During the pre-trial proceedings, the parties agreed the first statement by Appellant to police did not occur

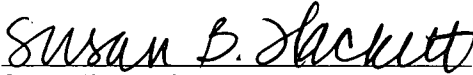
while Appellant was in custody. Therefore, the police were not required to advise Appellant of his Miranda rights or to obtain a knowing and voluntary waiver of those rights. The statement was admissible without any showing by the prosecution concerning its knowing and voluntary nature. Not only were the facts clear on this point, but the judge's ruling was clear as well. Appellant's entire defense strategy was built around challenging the second statement due in large part to Appellant's mental retardation and admitting the veracity of the first statement. Not only was the first statement the truth of what occurred, but the defense strategy was based also upon the fact that no legal challenge to exclude the first statement existed. However, a strong and overwhelming legal argument existed to challenge the second statement as a matter of law and, if necessary, as a matter of fact before the jury.

The prosecutor's closing argument was not a mere slip of the tongue, but was an intentional deprivation of Appellant's rights. The prosecutor was well aware of the ability, and lack of ability, by Appellant to challenge the statements based upon their differing legal status. The statements were the linchpin of the case in light of the underwhelming evidence to support the state's theory that Appellant acted alone. The jury's request to hear the second statement again during deliberations demonstrated the significance of the statements to resolution of the matters. Further, the jury's guilty verdicts on the non-murder charges, but its inability to reach a unanimous decision on the murder charge illustrated the prejudice of the prosecutor's improper closing argument. His comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand the case for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE NELSON,

APPELLANT

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Sentence sheets;
- (3) Verdict forms for two murder charges;
- (4) Hearing transcript dated June 11, 2012 pages: 1; 11-92; 110-131;
- (5) Exhibits from Hearing on June 11, 2012: Defense's #1
- (6) Trial Transcript dated May 24; July 23-27, 2012 pages: 1; 13; 16; 48-49; 61-74; 108-158; 171-200; 283-286; 299-374; 376-416; 434; 457-519; 585-673; 686-687; 690-698; 705; 719-720
- (7) State's exhibits from trial: #25; #26; #27; #29; #30; #31; #40; #43
- (8) Court's exhibits from trial: #3, #4, #5, #7, #9
- (9) Defendant's exhibits from trial: #12
- (10) Defendant's Motion to Suppress DNA Evidence

I certify that this designation contains no matter which is irrelevant to this appeal.

July 29th, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

Appeal from Dillon County

JUL 29 2013

Steven H. John, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT LEE NELSON,

APPELLANT

Appellate Case No. 2012-212640

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Robert Lee Nelson, # 351744, Lee Correctional Institution 990 Wisacky Highway, Bishopville, SC 29010, this 29th day of July, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of July, 2013.

[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.