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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON LEE CORDER,

APPELLANT

APPELLATE CASE NO. 2023-001543

INITIAL BRIEF OF APPELLANT

W. CHANDLER NORVILLE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether re-trial was barred by the Double Jeopardy Clause when Appellant's first trial ended in a mistrial that Appellant was goaded into moving for by the solicitor?

II.

Whether the trial court erred by refusing to exclude Appellant's statements to Officer Creech when those statements were gathered as a result of a custodial interrogation, in violation of *Miranda v. Arizona*[1]?

III.

Whether the trial court erred by refusing to exclude Appellant's statements to Special Agent Beeler when Secret Service policy prohibiting Appellant from having his attorney present during questioning negated the *Miranda* warnings read to Appellant?

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[1] 384 U.S. 436 (1966).

STATEMENT OF THE CASE

At its September 2020 term, the Lexington County grand jury indicted Appellant for murder. R* (Indictment). Appellant was first brought to trial from February 27 to March 2, 2023, before the Honorable Debra McCaslin and a jury. Benjamin Stitely and Anna Yonge represented Appellant; Sutania Fuller and Robert McNair, III, represented the state. Appellant's first trial ended in a mistrial. Tr. Mar. 2: 77, ll. 6-7. Appellant's case was called to trial for a second time, again before Judge McCaslin and a jury, on September 25, 2023. Tr. 1.[2] Appellant was again represented by Stitely, and Fuller and McNair again represented the state. Tr. 1. On September 27, 2023, Appellant was convicted of murder. Tr. 382. Judge McCaslin sentenced him to forty-five (45) years' imprisonment. Tr. 395.

This appeal follows.

[2] Due to complications with the transcription of the first trial, which led to a reconstruction process, there are four (4) different transcripts relevant to this case. The operative trial transcript, which recorded the events of September 26 and 27, 2023, is referred to herein as "Tr." The transcript of the first trial, with the exception of the final day of that trial, is cited to as "Tr. Feb. 27-Mar. 1." The transcript of the final day of the first trial is cited to as "Tr. Mar. 2." There is also a separate transcript of the pre-trial hearings, *voir dire*, opening statements, and first three (3) witnesses of the second trial, which is dated September 25, 2023. That transcript is hereinafter referred to as "Tr. Sept. 25."

STATEMENT OF FACTS

On November 27, 2019, Appellant shot and killed Joanine Youmans. In both trials, Appellant conceded as much but asserted that the shooting was the result of negligence and was not intentional. Appellant's express defense theory was to concede guilt on involuntary manslaughter rather than murder.

First Trial

In the beginning of the first trial, defense counsel conceded Appellant killed Youmans, his on-again-off-again girlfriend, stating, "this isn't going to be a whodunit." Tr. Feb. 27-Mar. 1: 239, l. 21. The state's theory was that Appellant intentionally shot Youmans because he was jealous that she was seeing another man. Tr. Feb. 27-Mar. 1: 222, ll. 17-25.

The state strongly opposed Appellant's request to charge involuntary manslaughter as a lesser-included offense. The state's chief contention was that Appellant was unable to possess a firearm under federal law due to a prior conviction. Tr. Feb. 27-Mar. 1: 177, ll. 14-17. Since Appellant was acting unlawfully by possessing the firearm, according to the state, involuntary manslaughter could not be charged to the jury. Tr. Feb. 27-Mar. 1: 180-81. The state would go on to assert in its closing argument that it was "murder or nothing." Tr. 356, ll. 23-25. The trial court ultimately disagreed and decided that it would charge the jury on involuntary manslaughter. Tr. Mar. 2: 48-49 (trial court's intended charge).

During closing arguments, the state made several comments to the jury that were the subject of objections by Appellant. Most importantly, the state told the jury:

> You heard on some of the audios he says it was an accident, it was an accident. It wasn't an accident, not possible. You heard the SLED expert saying the gun was working just fine. There was no manufacturer malfunction on that gun. So it's not legally an accident it's not a defense *and you'll know that because the Judge is not going to charge you on that.*

Tr. Mar. 2: 63, ll. 13-19 (emphasis added). Appellant objected to this and moved for a mistrial. Tr. Mar. 2: 68, ll. 14-15. Appellant also objected to the solicitor's use of the phrase "make it make sense" on several occasions, arguing that this statement constituted burden-shifting. Tr. Mar. 2: 68, ll. 16-22. Appellant also objected to the solicitor also telling the jury "You have to decipher the law." Tr. Mar. 2: 64, ll. 20-25, 69, ll. 7-9.[3]

The trial court declared a mistrial and stated:

> I hate it, but I'm going to grant your mistrial and this is why, the solicitor's comment of the accident because the judge won't charge it. I feel that it brings the judge right into the jury's deliberations, and it gives them the impression that I made some ruling that I haven't made.
>
> And, you know, it's easy for us lawyers to sit here and talk about accident, but we're talking about the legal sense of accident as to whether he is entitled to a defense or not. They don't know that. They think accident as something totally different. And in this case particularly, I've heard the word accident several times in the defendant's own statement. And I feel like he would be absolutely prejudiced. I don't know how to fix it. I don't know how to unring the bell on that particular thing.
>
> Also there's the other two instances. Even if I could, I'd be fixing this thing three different ways that I think is totally confusing to the jury.
>
> You have to decipher the law. Well, I could probably fix that with a jury instruction if that was the only thing, that would be an easy fix.
>
> But and then I've got to make sense of all the facts, it needs to make sense. I can probably fix that with another jury instruction, but at

[3] The solicitor also stated, "Now we'll [never] know the complete truth, right? *Only two people know.*" Tr. Mar. 2: 62, ll. 10-13 (emphasis added). This could be construed as commenting on Appellant's right not to testify, but it was not the subject of any objection.

> some point, I think it turns on being prejudicial to the defendant. Therefore I don't know how to fix it. I'm sorry.

Tr. Mar. 2: 76, l. 6 – 77, l. 3. The trial court went on to state its belief that the improper comments "just happened" and that the solicitor did not act intentionally. Tr. Mar. 2: 77, ll. 4-7.

Second Trial

Motion to dismiss

Appellant's second trial began on September 25, 2023. Tr. Sept. 25: 1. After the jury was selected, Appellant moved to dismiss on double jeopardy grounds. Tr. Sept. 25: 34, ll. 16-18; R* (Motion for Dismissal). Appellant stated that during the previous trial he had moved for a mistrial on three separate grounds. Tr. Sept. 25: 37, l. 25. And "when an action by the state, specifically, a seasoned prosecutor leaves the defense attorney no option but to make a mistrial motion.... That's what *Oregon v. Kennedy*[4] is talking about with goading." Tr. Sept. 25: 37, ll. 11-15. He asserted the state's goading left him with no choice but to move for a mistrial, as failure to do so would have been a violation of his ethical duties. Tr. Sept. 25: 37, ll. 8-15.

The state responded that applicable law required Appellant to show "subjective intent...to intentionally spite this case" by the solicitor, which he could not do. Tr. Sept. 25: 39, ll. 17-20. The state asserted that its comment, "it's not an accident and that's why the judge won't instruct you on accident" was a relatively minor mistake, and they had "rack[ed] their brains" along with the trial court and defense counsel "on how to fix that issue." Tr. Sept. 25: 40, ll. 16-21. Therefore, there "was no bad intent on" the state's part. Tr. Sept. 25: 40, ll. 21-22. The state also continuously repeated that they had made only "one statement in closing argument" that was improper. Tr. Sept. 25: 41, ll. 5-11. Appellant responded that one goading comment by the state was enough to satisfy

[4] 456 U.S. 667 (1982).

the South Carolina Supreme Court's rule in *State v. Parker*, 391 S.C. 606, 707 S.E.2d 799 (2011). Tr. Sept. 25: 42, ll. 4-15.

The trial court denied the motion. Tr. Sept. 25: 43. Supporting its ruling, it stated as follows:

> I'm going to tell you, I remember it specifically, even though we tried this case at end of February this year. And I will say that I spent a lot of time with the lawyers trying to save this case because we had gotten all the way to closing. In fact, I even read my notes on it.
>
> I felt like the judge was placed in the deliberations because I didn't charge something and that's why I granted a mistrial. Was it goading? No, it wasn't goading. Was it intentional? No. I don't believe that it was. I listened to it. I hate that it ended in a mistrial. I know y'all worked hard. We were at it for a week, but it, certainly, wasn't goading and it wasn't intentional. It was just a statement. And if I remember correctly, you can correct me if I'm wrong, but the word accident with involuntary and the charge of accident, I think, is, also, what we talked about that I wasn't -- I can't remember if the court was going to charge accident or not, but I think that I said no. But it was hard to distinguish between the two and that's why I felt the court had been placed in a position that it was a fact finder and the court is not, and I didn't know how to put it all back into the box. I couldn't figure a charge that would not be confusing to the jury, so I declared a mistrial.
>
> So I'm going to deny your motion....

Tr. Sept. 25: 43, ll. 1-25.

Statements to Sergeant Creech

At the beginning of the second day of the second trial, the trial court held a *Jackson v. Denno*[5] hearing to rule on the admissibility of Appellant's statements to Sergeant Anthony Creech. Tr. 5, *et seq*. Appellant testified at this hearing that when the police originally arrived at his home on the day in question, he was on his hands and knees vomiting. Tr. 13, ll. 13-15. The first officer

[5] 378 U.S. 368 (1964).

that he spoke to that day was Detective Sherban. Tr. 12, ll. 22-24. Sherban approached Appellant while he was laying on the ground in front of his front porch. Tr. 13, ll. 13-15. At the time, there were approximately twelve (12) law enforcement personnel at the home. Tr. 13, ll. 16-19.

At some point after Appellant spoke to Sherban, he was approached by Sergeant Creech, who told Appellant he wanted to speak to him inside his patrol vehicle. Tr. 14, ll. 1-2. At no time after police began arriving did Appellant feel he was free to leave, and he was within "an extreme close proximity" to a police officer at all times once the police arrived at his home. Tr. 14, ll. 3-17. When Appellant got into Creech's patrol vehicle, there were other police officers around the vehicle. Tr. 14, ll. 16-17. Creech began questioning Appellant but did not initially read Appellant his *Miranda* rights. Tr. 14, ll. 18-23. Creech would not read *Miranda* to Appellant until some point later in the questioning. Tr. 15, ll. 6-13. On cross-examination, Appellant confirmed that he had prior encounters with law enforcement but stated that he did not fully understand *Miranda* at the time of Creech's questioning. Tr. 17, ll. 1-14.

Sergeant Creech testified next. Tr. 31, l. 15. Creech conceded that, while he had had some insignificant conversation with Appellant, his "questioning in earnest" did not begin until Appellant was in the vehicle. Tr. 34, ll. 7-12. At that point, Creech "ask[ed] [Appellant] several questions or point[ed] out inconsistencies prior to reading *Miranda*…." Tr. 34, ll. 16-18. In fact, one of the first things Sergeant Creech said to Appellant was "I'm just going to rip the band-aid off here," and "I know somebody didn't shoot her from the woods…and I know you own guns, and I know there's guns on the property." R.* (Reconstruction Hearing State's Exhibit 7)(BWC Audio)(on file with this Court).[6] Creech stated that, had Appellant tried to get out of the patrol car

[6] This exhibit was entered at the first trial, but not the second trial. The exhibit was entered at the reconstruction hearing as State's Exhibit 7. R* (Reconstruction Order, at p. 2, ¶ 3).

and run away, the police would not have stopped him because they had no reason at that time to detain him. Tr. 35, ll. 18-22. However, Creech noted that this sort of behavior would be uncommon, as he had never seen that happen in his fourteen (14) years of law enforcement experience. Tr. 36, ll. 1-8. Creech further noted that, while he had previously testified that he was unaware of any officers around his vehicle while he was talking to Appellant, he was familiar with a report prepared by another officer who stated he was instructed to monitor the passenger door of Creech's vehicle while Creech was speaking with Appellant. Tr. 40, ll. 16-25. Creech went on to state that he requested this only after Appellant continued to make statements post-*Miranda*, but there was no timeline in the report to verify that. Tr. 41, ll. 1-13. Creech testified on cross-examination that when he first arrived on scene, police had no reason to believe that Appellant killed Youmans. Tr. 38, ll. 10-13. Creech's testimony was contradicted by the recording of the interview, where Creech immediately began accusing Appellant of being involved in the killing. R.* (State's Exhibit 7)(on file with this Court).

Appellant argued that his statements to Creech should be excluded because the interview was a custodial interrogation once Appellant was placed in Creech's vehicle. Tr. 42, ll. 16-19. Appellant asserted that this was a violation of *Miranda* and *Missouri v. Seibert.*[7] Tr. 43, ll. 4-8. Appellant then clarified that he was not seeking to exclude the statements made after *Miranda* was issued. Tr. 43, ll. 9-12. The state responded that police did not believe at the time that Appellant was a suspect and thus could not have placed him in custody. Tr. 44, ll. 10-25. The state also asserted that the trial court had ruled the statements admissible during the last trial and that nothing had changed to alter that ruling. Tr. 45, ll. 15-20.

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[7] 542 U.S. 600 (2000).

The trial court ruled that the statements were admissible. Tr. 47, l. 6. In support of its ruling, the trial court found that Appellant was not in custody when Sergeant Creech began his questioning. Tr. 47, ll. 7-10. The trial court pointed to the fact that Appellant spoke with three (3) other police officers, was not in handcuffs, and there was no evidence of coercion or misrepresentation. Tr. 47, ll. 10-15. The trial court also found that Appellant was not impaired, was thirty-two (32) years old, a high school graduate, and had prior encounters with law enforcement. Tr. 47, ll. 16-22.

During trial, Appellant testified in his own defense. He testified that on the day of Youman's death, he originally went into his vehicle to search for a pack of cigarettes. Tr. 258, ll. 4-5. While looking in the vehicle, he did not find the cigarettes but did see that he had left his firearm in the vehicle from the night before. Tr. 258, ll. 10-12. The holster for the firearm and the firearm itself were separate, and he removed both from the vehicle. Tr. 258, ll. 12-14. While he was walking away, he attempted to place the firearm in its holster, at which time he accidentally fired it, striking and killing Youmans. Tr. 258, ll. 14-19.

The state called Creech during its reply case, and Creech testified that Appellant told him "the holster story." Tr. 311, ll. 16-19. Appellant informed Creech that he had placed the holster on a specific piece of furniture, but law enforcement never located it, despite searching for it "very thoroughly." Tr. 312, ll. 3-11. During the interview in Creech's vehicle, Appellant also told Creech a substantially similar series of events to what he testified to, that he had accidentally fired his pistol into Youmans while he was attempting to place the pistol in his holster. Tr. 313, ll. 6-15.

Statements to Agent Beeler

Prior to the first trial, Appellant requested a polygraph examination which was performed by Special Agent Brad Beeler of the United States Secret Service. Tr. Feb. 27-Mar. 1: 137-40.

Agent Beeler administered this polygraph at the Lexington County Detention Center and then spoke with Appellant about the results of the examination immediately afterwards. Tr. Feb. 27-Mar. 1: 152, ll. 15-25. Prior to administering the polygraph, Agent Beeler advised Appellant of his *Miranda* rights; he stated that he told Appellant:

> Before I ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court or other proceedings. You have the right to talk to a lawyer for advice before I question you *and have them with you during questioning*. If you cannot afford a lawyer and want one, one will be appointed to you by the court. If you decide to answer questions now without a lawyer present, you will still have the right to stop questioning at any time.

Tr. Feb. 27-Mar. 1: 147, ll. 6-16 (emphasis added). However, Agent Beeler later testified that, in fact, Appellant's attorney would not have been allowed to be present with Appellant while he was questioned. Tr. Feb. 27-Mar. 1: 157, ll. 6-14. And defense counsel was informed that he would not be permitted to be present with Appellant during the questioning. Tr. Feb. 27-Mar. 1: 168, ll. 12-14.

On those grounds, Appellant objected to the introduction of the statement. Tr. Feb. 27-Mar. 1: 168-69. He renewed that objection during the second trial. Tr. Sept. 25: 63, l. 17 – 64, l. 20. The trial court admitted the statements during both trials. Tr. Feb. 27-Mar. 1: 185, l. 8 – 186, l. 18; Tr. Sept. 25: 65, l. 2.

Agent Beeler testified at trial that Appellant admitted to him that his previous statements to law enforcement were untrue. Tr. 171, ll. 1-4. He further testified that Appellant stated he was frustrated with Youmans because she had been seeing another man and that he was "flexing" on her by pointing the firearm at her and then discharged it by accident. Tr. 172, ll. 3-11; 174, ll. 17-21. Appellant denied saying this during his own testimony. Tr. 266, ll. 21-24.

Ultimately, the jury convicted Appellant of murder, and Judge McCaslin sentenced him to forty-five (45) years' imprisonment. Tr. 382; 395.

STANDARDS OF REVIEW

As to Issue I, this Court sits to review errors of law and reviews a trial court's factual findings only for clear error. *State v. Parker*, 391 S.C. 606, 611, 707 S.E.2d 799, 801 (2011). A factual finding is clearly erroneous if there is no evidence to support it. *State v. Provet*, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013).

As to Issues II and III, this Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Medley*, 417 S.C. 18, 24, 787 S.E.2d 847, 850 (Ct. App. 2016). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *Id.* (*quoting State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)). This Court's review of the sufficiency and necessity of *Miranda* warnings is *de novo*. *State v. Lowery*, 443 S.C. 473, 480, 905 S.E.2d 361, 364 (2024).

ARGUMENTS

I.

Re-trial was barred by Double Jeopardy because the state goaded Appellant into moving for a mistrial.

The state wanted to convict Appellant for "murder or nothing." Tr. 356, l. 24. When its own evidence required the trial court to charge involuntary manslaughter, the experienced solicitor made three distinct mistakes that were so elementary as to be suspicious; her closing argument attempted to shift the burden of proof, implied that the judge had already decided critical facts, and told the jury that it had to "decipher the law." The state goaded Appellant into moving for a mistrial, and his subsequent re-trial violated his rights under the Double Jeopardy Clauses of the federal and state constitutions. Appellant's conviction must be vacated.

"No person shall...be subject for the same offence to be twice put in jeopardy of life or limb...." U.S. Const. amend. V; S.C. Const., art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty...."). The Double Jeopardy Clauses of the federal and state constitutions command that "a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." *Parker*, 391 S.C. at 612, 707 S.E.2d at 801 (*quoting State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005)). A salient feature of the Double Jeopardy Clauses' protections is to protect the "valued right to have [a defendant's] trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

Typically, when a *defendant* moves for a mistrial, there is no bar to retrial if that motion is granted. *See, e.g., United States v. Scott*, 437 U.S. 82, 93 (1978) (defendant moving for mistrial himself constitutes "a deliberate election on his part to forgo his valued right to have his guilt or

innocence determined before the first trier of fact"). Under the federal Constitution, there is one exception to this rule: when the government intentionally "goads" the defendant into moving for a mistrial, jeopardy attaches, and retrial is barred. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982).

Here, Appellant's mistrial motion in his first trial was based on three separate and distinct grounds of prosecutorial misconduct. This Court should vacate Appellant's convictions for two reasons. First, the trial court's finding that the solicitor did not intentionally goad Appellant into moving for a mistrial appears to be based solely on the solicitor's unsworn representations to the trial court to that effect. Those representations are not evidence, and the overwhelming weight of the other facts known to the trial court compels a different finding. Therefore, the trial court's factual finding is clearly erroneous and must be reversed. Second, this Court should hold that the South Carolina Constitution's Double Jeopardy Clause bars retrial when the state recklessly causes a defendant to move for a mistrial. The United States Supreme Court has held that the Fifth Amendment Double Jeopardy Clause requires actual intent by the prosecutor to goad the defendant into moving for a mistrial. However, that standard has proven inadequate and unworkable. Therefore, this Court should decline to follow it under the South Carolina Constitution.

A. The trial court's finding that the solicitor did not intentionally goad Appellant into moving for a mistrial was clearly erroneous.

Appellant moved for a mistrial based on three separate and distinct instances of prosecutorial misconduct. The most egregious, and the one that the trial court primarily based its mistrial ruling on, was the solicitor's comment on accident. During its closing argument in the first trial, the solicitor stated:

> You heard on some of the audios he says it was an accident, it was an accident. It wasn't an accident, not possible. You heard the SLED expert say the gun was working just fine, there was no manufacturing malfunction on that gun, so it's not legally an

> accident it's not a defense and you'll know that because the Judge is
> not going to charge you.

Tr. Mar. 2: 63, ll. 13-19. The trial court found that this comment "brings the judge right into the jury's deliberations, and it gives them the impression that I made some ruling that I haven't made." Tr. Mar. 2: 76, l. 6 – 77, l. 3.

The comment was improper because under no circumstances can a solicitor state or imply that the court has already decided questions of fact. Doing so effectively puts before the jury facts that are not in evidence, which the state cannot do. *State v. Robertson*, 26 S.C. 117, 1 S.E. 443, 443-44 (1887) ("It is most certainly proper, especially in criminal cases, that counsel, in addressing the jury, should keep themselves strictly within the record. This rule is essential and must be enforced ....); *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (citations omitted) ("A solicitor may not rely on statements not in evidence during closing argument.").

Further, the "fact" described by the state implicitly came from the highest source of authority in the courtroom: the judge. *Cf. State v. Taylor*, 427 S.C. 208, 215-16, 829 S.E.2d 723, 727 (Ct. App. 2019) ("Because the trial judge is the authority figure in the courtroom, jurors look to the trial judge for guidance not only on the law, but for matters such as courtroom conduct and protocol, even permission for breaks, meals, and telephone calls."). In recognition of "the enormous power such influence can wield and its capacity to compromise impartiality, our constitution forbids the trial judge from commenting on the facts." *Cf. id.* (*quoting* S.C. Const., art. I, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *see State v. Pruitt*, 187 S.C. 58, 196 S.E. 371, 373 (1938) ("[I]it is generally held that in the course of the trial of a criminal case, the trial judge must refrain from all comment which tends to indicate his opinion as to the . . . guilt of the accused, or as to the controverted facts, for the jury are the sole judge of the facts and the credibility of the witnesses, and the Constitution expressly prohibits

the judge from charging them as to the facts." (*citing Sumter Tr. Co. v. Holman*, 134 S.C. 412, 132 S.E. 811, 814-16 (1926)). And the trial court by no means may *decide* questions of fact. *See generally*, 16 Corpus Juris, *Criminal Law* § 2272 (1918) ("Under the English common law, from the earliest times, it was taken for granted that the jury should be the judges only of the issues of fact, and that the court should be the judge of the law....").

In *Cone v. State*, 443 S.C. 487, 905 S.E.2d 368 (2024), our Supreme Court addressed a similar question. There, the solicitor argued to the jury:

> Now, there's another section in our law, section 16-3-657, criminal sexual conduct, testimony of a victim need not be corroborated. "The testimony of the victim need not be corroborated in prosecutions under Section 16-3-652 to 658," which are the sections governing criminal sexual conduct. And I've said this before and I'll say it again, *if anything I've misstated, His Honor will correct me.* If I've said something wrong about the law, His Honor will correct me. But if I'm not mistaken, he will make plain to you that you can believe one person over many. You can put whatever weight on any piece of testimony you want to put. That's your prerogative. That's what you're permitted to do as jurors. And that's what we expect you to do.

Id. at 492, 905 S.E.2d at 371 (emphasis added). The Supreme Court reversed and ordered a new trial. *Id.* It held that the jury should never hear about S.C. Code Ann. § 16-3-657, but more importantly, the solicitor's comment "compounded the error" by referring to the trial judge. *Id.* at 495, 905 S.E.2d at 373. "In the face of the trial court's decision not to instruct the jury on the statute, this comment effectively placed the trial court's stamp of approval on the state's argument regarding the statute." *Id.* at 495-96, 905 S.E.2d at 373. In the present case, it was the solicitor's intention to do the same.[8]

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[8] The solicitor's excuse for this comment was that she had "never been told that's inappropriate." Tr. Mar. 2: 70, l. 23 – 71, l. 2. This explanation does not withstand even the barest scrutiny. It is

Moreover, these improper comments were not made by an unseasoned solicitor who did not know better. They were made by an experienced assistant solicitor who has prosecuted many trials, including murder trials. The solicitor was aware that her closing argument was improper, yet she made it anyway. That fact supports the proposition that the goading conduct displayed here was intentional.

In any event, it is clear from the record that the state "tried [its] case very differently" from the first trial. Tr. 192, ll. 20-21. This was intentional; it was to avoid presenting any evidence that would support an involuntary manslaughter instruction. *See* Tr. 193, ll. 4-6. The state did not call Sergeant Creech to testify during its case-in-chief, and therefore the jury did not hear Appellant's statements about holstering the gun. Appellant had to testify in his own defense in order to obtain the involuntary manslaughter charge that was charged during the first trial. After Appellant's testimony, the state then had nothing to lose and was still able to call Sergeant Creech in reply specifically to address the "holster story." Tr. 311, ll. 16-18.

Only the solicitor's own unsworn representations supported the trial court's finding that the state's conduct was not intentional. When attempting to explain how she made such grievous and amateur errors in her closing, the best the solicitor could conjure was that no one had ever told her the arguments were inappropriate. Tr. Mar. 2: 70-71. Because of the state's errors, Appellant was forced to forego his valued right to have his guilt or innocence determined by one single jury. *Scott*, 437 U.S. at 93. The state was given a second bite at the apple, which it took full advantage of and tried its case in a significantly different manner the second time around.

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the solicitor's duty to be aware of the law, which has steadfastly held these sorts of comments improper for at least 138 years. *See State v. Robertson, supra.* The starkness of the impropriety of these comments is further evidence that the solicitor knew better.

Accordingly, the trial court's finding that the state did not intentionally goad Appellant into moving for a mistrial was clearly erroneous. This Court should reverse.

B. Even if the solicitor did not intentionally goad Appellant into moving for a mistrial, she at least recklessly did so. Because the *Oregon v. Kennedy* standard of intentional conduct has proven unworkable, this Court should decline to follow it on state law grounds.

Even if the trial court's findings are not clearly erroneous, the *Oregon v. Kennedy* intent standard has proven entirely unworkable. The state's interest in prosecuting criminal defendants does not outweigh critical Double Jeopardy protections when the state's interests could be completely vindicated by merely being more careful not to make improper and prejudicial arguments. Further, due to *Oregon v. Kennedy*'s requirement of actual intent, and the fact that this Court reviews the trial court's finding only for clear error, goading conduct such as occurred here will often go entirely unremedied since trial courts often defer to a single solicitor's denial of intent, despite the force of the evidence to the contrary. Because of the clear error standard, those decisions are essentially unreviewable, allowing the sort of abuse that permeated this case to evade scrutiny by this state's appellate courts. The South Carolina Constitution demands more from its government.

The South Carolina Constitution provides, "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall any person be compelled in any criminal case to be a witness against himself." S.C. Const., art. I, § 12. This provision existed in the state Constitution since its original inception, but the drafters of the current Constitution "consider[ed] this provision" so "essential to the protection of individual liberty" they rewrote the provision into a standalone section of the Declaration of Rights, rather than leaving it "included with the section on grand jury indictments" where it had been. Committee to Study the South Carolina Constitution of 1895, *SCCRC 1966-1969 Document 35: Working Draft, showing semi-final revisions by Editing*

Committee at 6 (1968-1969).[9] The ultimate purpose of the Clause is "finality for the defendant's benefit." *Kennedy*, 456 U.S. at 682 (Stevens, J., concurring in the judgment). The Double Jeopardy Clause "protects defendants from the dread, anxiety, and financial cost of enduring the gauntlet of criminal prosecution and punishment more than once for the same offense." *State v. Benton*, 443 S.C. 1, 7, 901 S.E.2d 701, 704 (2024). The right is so highly valued because "a second prosecution...increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Id.* (*quoting Arizona v. Washington*, 434 U.S. 497, 503-05 (1978)).

Kennedy requires that a mistrial, when moved for by the defendant, only acts as a bar to retrial when the prosecution acts with specific intent to "subvert the protections of the Double Jeopardy Clause." 456 U.S. at 675-76. This standard is nigh impossible for criminal defendants to meet, as "It is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant." *Id.* at 688 (Stevens, J., concurring in the judgment). In the lone recent case where one of this state's appellate courts found intentional goading by a solicitor, the Supreme Court recognized that "it is almost unimaginable that a solicitor would admit he or she took certain actions in an effort to cause the defendant to move for a mistrial." *Parker*, 391 S.C. at 613, 707 S.E.2d at 802. "[I]t will be rare that the solicitor actually intends to cause the defendant to move for a mistrial." *Id.*

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[9] Available at https://scholarcommons.sc.edu/scconstitutionalcommittee1966-69/34/ (last accessed Dec. 4, 2025).

The *Parker* Court is correct—it is rare that the solicitor *intends* to cause a mistrial. A solicitor in the midst of a trial gone wrong is not likely to provoke a mistrial; "He redoubles his efforts to obtain a conviction" by, for example "engag[ing] in overzealous—possibly unethical—attacks on defendants, defense witnesses, and even defense counsel" or "do[ing] little—possibly less than is necessary—to disclose and investigate material exculpatory information" or using "the considerable power of his office to strengthen the case against the accused, to vouch for the credibility of the state's evidence, and to impugn the legitimacy of the defense." Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 895-96 (1998). "In short, he does everything he can to obtain a conviction—not to provoke a mistrial." *Id.* It will rarely be the case that prosecutorial misconduct is intended to cause a mistrial, but that does not mean it is not misconduct. The "goading exception" is "justified by the intolerance of intentional manipulation of the defendant's double jeopardy interests." *Kennedy*, 456 U.S. at 690 (Stevens, J., concurring in the judgment). But by requiring courts to attempt to determine the *specific* rationale for a solicitor's misconduct—the only evidence of which will invariably lie within that solicitor's brain—the rule no longer has any bearing on its justification.

For that reason, several state courts—including the Oregon Supreme Court on remand in *Kennedy*—have rejected *Kennedy*'s standard under state law. *See, e.g., State v. Kennedy*, 295 Or. 260, 275-76, 666 P.2d 1316, 1325-1326 (1983); *People v. Dawson*, 154 Mich. App. 260, 270, 397 N.W.2d 277, 282 (1986); *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992); *State v. Rogan*, 91 Hawai'i 405, 984 P.2d 1231 (1999); *State v. Breit*, 122 N.M. 655, 930 P.2d 792 (1996); *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984).

As recognized by these states, *Kennedy*'s subjective test is unworkable, and furthermore inappropriate for the ultimate Double Jeopardy inquiry. "The prosecutor's subjective intent is irrelevant for purposes of determining a defendant's constitutional double jeopardy rights." *Rogan*, 91 Hawai'i at 421, 984 P.2d at 1248. "Regardless of the prosecutorial motive, the defendant suffers a severe deprivation of rights." *Id.* (*quoting* James F. Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause after* Oregon v. Kennedy, 69 CORNELL L. REV. 76, 98 (1983)). "The state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty." Rosenthal, *supra*, 71 TEMP. L. REV. at 897 (*quoting Green v. United States*, 355 U.S. 184, 187-88 (1957)).

A far more workable standard is the one adopted by the *en banc* Arizona Supreme Court in *Pool*. 139 Ariz. at 108-09, 677 P. 2d at 271-72; *see also*, *Dawson*, 154 Mich. App. at 272-73, 397 N.W.2d at 284 (adopting *Pool* standard under Michigan Constitution). Arizona's standard employs a three-part test barring retrial when: (1) the mistrial was granted because of prosecutorial impropriety; (2) the conduct was not merely negligence, but "amounts to intentional conduct" which the prosecutor knows or should know to be improper, and which he pursues for "any improper purpose with indifference to a significant resulting danger of mistrial or reversal;" and (3) the conduct causes prejudice to the defendant which cannot be cured short of a mistrial. *Pool*, 139 Ariz. at 108-09 & n. 9, 677 P.2d at 271-72 & n. 9.

Applying the *Pool* test to the facts here, double jeopardy should bar retrial. First, the mistrial was granted because of prosecutorial impropriety. As the trial court recognized, the

solicitor's comment "brings the judge right into the jury's deliberations." Second, the solicitor made the comment on purpose, which is shown by her comments that she did not know the comment was improper instead of claiming she misspoke. This was in addition to the solicitor's other comments, including attempted burden-shifting, telling the jury they must "decipher the law," and commenting on Appellant's right to remain silent. The combination of these comments shows recklessness, not mere negligence. Further, because of well-settled law requiring attorneys to avoid making arguments that imply judges have made some decision as to the facts, the solicitor should have known the comment was improper. Finally, as the trial court recognized, the damage done by this comment could not be cured short of a mistrial. Therefore, Appellant's double jeopardy rights have been violated.

For these reasons, the standard adopted by the United States Supreme Court in *Kennedy* is unworkable and does not adequately protect the fundamental constitutional protection against multiple prosecutions for the same offense. This Court does not have to accept such an unworkable standard. It is incumbent upon this Court to vindicate double jeopardy rights under the South Carolina Constitution. Accordingly, this Court should adopt a lesser standard than *Kennedy*'s subjective intent standard, apply it to the facts of this case, and reverse.

II.

The trial court erred by refusing to exclude Appellant's statements to Sergeant Creech because those statements were gathered during a custodial interrogation in violation of *Miranda.*

The trial court found that Appellant was not in custody at the time of his statements to Sergeant Creech, and thus, *Miranda* did not apply. That was error.

The state may not use statements elicited during a custodial interrogation unless the state demonstrates that certain procedural safeguards were used to secure the Fifth Amendment right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "*Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Missouri v. Seibert*, 542 U.S. 600, 608 (2004). There are two components to the *Miranda* analysis: (1) custody, and (2) interrogation. Only the former is disputed in this case.

Whether a person was in "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.'" *State v. Williams*, 405 S.C. 263, 273, 747 S.E.2d 194, 199 (Ct. App. 2013) (*quoting State v. Ledford*, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002), *quoting State v. Easler*, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997)). A person is "in custody" when their freedom has been restricted. *Id.* (*citing State v. Caulder*, 287 S.C. 507, 515, 339 S.E.2d 876, 881 (Ct. App. 1986)). This is an objective determination: "would a reasonable person have believed he was in custody." *State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010); *see Michigan v. Chesternut*, 486 U.S. 567, 576 (1988) (inquiry is whether suspect "could reasonably have believed that he was not free to disregard the police presence and go about his business").

To determine whether a suspect was in custody for *Miranda* purposes, courts consider the totality of the circumstances, including factors such as "the place, purpose, and length of the interrogation, as well as whether the suspect was free to leave the place of questioning." *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). One factor that our appellate courts have considered frequently is whether the police challenge the suspect on the answers he gives to their questions. *See Williams*, 405 S.C. at 277-78, 747 S.E.2d at 202 (*discussing Evans*, 354 S.C. at 581, 582 S.E.2d at 410, and *Navy*, 386 S.C. at 297, 688 S.E.2d at 839, 842). Another relevant factor is whether the suspect was "upset." *See id.*

Here, Appellant was placed inside a police car to speak with Sergeant Creech. Another officer stood guard at the door where Appellant sat. Sergeant Creech challenged Appellant on his story on multiple occasions prior to issuing *Miranda* warnings. Therefore, Appellant was in custody and should have been provided *Miranda* warnings.

Appellant was placed in Sergeant Creech's vehicle. It is true he was not placed in handcuffs, but he was still in an enclosed, official police space with an officer who was questioning him. A reasonable person would not have felt free to leave the police car. *Navy*, 386 S.C. at 301, 688 S.E.2d at 841. Creech testified that it would be highly unusual for a person to attempt to get out of the police car and that no one had ever attempted to do so in Creech's law enforcement career. Appellant was surrounded by police officers at all times after he called 9-1-1. He was then placed inside a vehicle with an officer that grilled him regarding a traumatic event that had just recently occurred. No reasonable person would have felt free to open the door to the police car, ignore the posted guard, and blithely saunter past the several other officers to go about his day.

A police car can have special significance in the mind of a reasonable person in determining whether they are free to terminate a police encounter. *Cf., e.g., Commonwealth v. Livingston*, 644

Pa. 27, 53-54, 174 A.3d 609, 624-25 (2017) (collecting cases from fourteen states holding a seizure occurs "when a police officer pulls his police vehicle, with its emergency lights activated, behind a parked or stopped vehicle"); *cf., Ferris v. State*, 355 Md. 356, 377, 735 A.2d 491, 502 (1999) (holding a reasonable person would not have felt free to leave an encounter when a state trooper asked him to step to the back of his vehicle during a traffic stop). It is also significant that, by moving Appellant from the front of his home to a police car and closing him inside the car with only himself and Creech, Creech "removed [Appellant] to a different location [and] isolated him…from others." *Ferris*, 355 Md. at 377, 735 A.2d at 502 (citing, *inter alia*, *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989)).

In *State v. Snell*, 142 N.M. 452, 166 P.3d 1106 (N.M. Ct. App. 2007), the New Mexico Court of Appeals encountered a similar problem. After a severe traffic accident, police officers questioned witnesses about what had happened. *Id.* at 455, 166 P.3d at 1109. The defendant continuously interjected into the officers' questioning of other witnesses, and so, the officers decided to place the defendant in the back of a police car. *Id.* There, he was questioned about the accident but never given *Miranda* warnings. *Id.* The New Mexico court suppressed the statements made during this interview. *Id.* That Court first recognized that *Miranda* warnings were not required during a traffic stop; however, it distinguished the facts of that case from a mere traffic stop because "a reasonable motorist detained during a traffic stop believes that his detention will be brief and open to public view." *Id.* at 457, 166 P.3d at 1111. But in *Snell*, the placing of the defendant into a locked police vehicle meant he was not subjected to a brief, public detention. *Id.* at 458, 166 P.3d at 1111-12. Therefore, he was in custody, and *Miranda* warnings should have been given. *Id.* The reasoning in *Snell* applies with more force here, because the police were not investigating a traffic accident, but the death of a person by a gunshot wound.

Further contributing to the fact that Appellant would not have felt free to end the encounter was the fact that he was, at all times, in close proximity to one of no less than twelve (12) uniformed police officers. *See State v. Marciano*, 231 Conn. App. 348, 368, 332 A.3d 1046, 1060 (2025) ("Factors to be considered in determining whether police conduct projects coercion include...the number of officers and vehicles involved....").

In any event, it is clear from the record that Sergeant Creech knew that *Miranda* warnings should have been given. Creech began the interview by making both direct and indirect accusations that Appellant was involved in the shooting. Creech challenged Appellant on multiple facets of his story. Once he began receiving the answers he desired, he read Appellant *Miranda* warnings. Nothing about Appellant's custodial situation had changed, other than the fact that Creech received answers that were helpful to his investigation. This supports the fact that Appellant was in custody.[10]

No one, including Appellant, in Creech's entire law enforcement career felt free to leave his car. A reasonable person, when placed into a police car with the express purpose of being questioned, would not feel that they were free to leave. Appellant was in custody and *Miranda* warnings were required. The trial court erred in finding otherwise, and this Court should reverse.

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[10] Appellant did not raise a challenge to Appellant's statements made after *Miranda* was given under *Missouri v. Seibert*, 542 U.S. 600 (2004) in the second trial, but did so in the first. The record does support the idea that Creech was employing some sort of investigative tactic which contributed to Appellant's feeling that he was in custody.

III.

The trial court erred in not suppressing Appellant's statements to Agent Beeler when Secret Service policy prohibited defense counsel from being present and where the *Miranda* warnings given to Appellant were negated because they contained a falsehood.

Finally, Agent Beeler's *Miranda* warnings to Appellant informed him that he had a right to an attorney and to have the attorney present during questioning. However, due to Secret Service policy, Appellant did not, in fact, have the ability to have an attorney present during questioning. This falsehood had the effect of negating the *Miranda* warnings read to Appellant. Accordingly, the statements were gathered in violation of *Miranda* and should have been excluded by the trial court.

To be effective, *Miranda* warnings must "reasonably convey to a suspect his rights." *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). "[I]f a person in custody is to be subjected to interrogation, he must first be informed in *clear and unequivocal terms* that he has the right to remain silent." *Miranda*, 384 U.S. at 467-68 (emphasis added). A police officer's use of words or actions that have the effect of downplaying the significance of the warnings can render the *Miranda* warnings ineffective. *See generally, Doody v. Ryan*, 649 F.3d 986, 1003 (9th Cir. 2011) (*en banc*); *see also, State v. O.D.A.-C.*, 250 N.J. 408, 423, 273 A.3d 413, 422 (2022) ("Comments that contradict and hollow out *Miranda* warnings can negative their effectiveness and cast doubt on whether a defendant fully understood and knowingly waived his rights."). Among the most important of the *Miranda* rights is the right to have counsel present during an interrogation. *Miranda*, 384 U.S. at 470. The presence of counsel serves several key purposes, including "mitigat[ing] the dangers of untrustworthiness," and reducing "the likelihood the police will practice coercion." *Id.*

"[L]aw enforcement is under no obligation to advise a suspect on the law, but having undertaken the task of doing so, law enforcement *may not mislead a suspect about the law, particularly as to his critical, constitutional rights*." *State v. Collins*, 442 S.C. 444, 459, 900 S.E.2d 426, 434 (2024) (emphasis added). Generally, the police may use psychological tactics, such as lying about the strength of evidence against a defendant, in an effort to elicit confessions from suspects. *State v. Parker*, 381 S.C. 68, 89, 671 S.E.2d 619, 630 (Ct. App. 2008). This license, however, is not unlimited: "[c]ertain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause…." *Collins*, 442 S.C. at 456, 900 S.E.2d at 432 (*quoting State v. Miller*, 441 S.C. 106, 120, 893 S.E.2d 306, 313 (2023)) (alteration in *Collins*). When it comes to misrepresentations by law enforcement, where this line is drawn will often depend on the subject of the misrepresentation. While misrepresentations about *"the facts* of an investigation" are generally acceptable, misrepresentations about *the law* are not. *Id.* at 454-55, 900 S.E.2d at 432 (emphasis in original).

Collins involved a very similar misrepresentation about the law. During an interrogation of an arson suspect, after reading the suspect *Miranda*, police officers told the suspect that "the interview was confidential," and anything that he said "ain't gonna leave this room." *Id.* at 451, 900 S.E.2d at 429-30 (emphasis deleted). Our Supreme Court held that the statements must be excluded, as this sort of false assurance of confidentiality was misleading about the law and had the effect of negating the *Miranda* warnings read to the suspect. *Id.* In so holding, the Court stated unequivocally "officers may not mislead a suspect about the law, particularly their constitutional rights." *Id.* at 461, 900 S.E.2d at 435.

In this case, Agent Beeler told Appellant that he had "the right to talk to a lawyer for advice before I question you and have them with you during questioning." This was not true—Secret Service policy prohibited Appellant's attorney from being in the room with him, a fact that was confirmed to Appellant's attorney.[11]

There are numerous potential problems with the inaccuracy in Agent Beeler's *Miranda* warning. Most importantly, the fact that Appellant was aware he could not, in fact, have his attorney present may have led him to question the accuracy of the *Miranda* warning *as a whole*. He may have believed that he did not actually have the right to remain silent or terminate the interview at any point because of the special and unique nature of the polygraph examination. The fruits of this polygraph examination and the subsequent interview, in which Beeler testified that Appellant stated he pointed the gun at Youmans intentionally to intimidate her, were devastating to Appellant's case. These likely contributed greatly to his conviction for murder rather than involuntary manslaughter since they represented the only direct evidence that Appellant had not shot Youmans unintentionally. Agent Beeler's *Miranda* warning was inaccurate and misleading. The misleading *Miranda* warning "undermine[d] the fundamental fairness that every defendant is entitled to under the law...." *Collins*, 442 S.C. at 459, 900 S.E.2d at 434.

Further, the actual amount of influence that this inaccuracy had on Appellant is immaterial to this case. If there is *any* influence on Appellant, the statement must be excluded. *Collins,* 442 S.C. at 459, 900 S.E.2d at 434 (*quoting Grades v. Boles*, 398 F.2d 409, 412 (4th Cir. 1968), *quoting Bram v. United States*, 168 U.S. 532, 543 (1897)). It is also immaterial that Appellant himself

[11] While the state is not likely to make this argument, it should be noted that the fact this interrogation was a polygraph examination does not obviate the need for *Miranda* warnings. *Cf., e.g., State v. DeWeese*, 213 W.Va. 339, 348, 582 S.E.2d 786, 795 (2003) (suspect's attorney being present for polygraph examination does not obviate the need for *Miranda* warnings).

requested the polygraph examination; the examination here was still a custodial interrogation subject to *Miranda*, and thus, the *Miranda* warnings must still be effective. *See State v. DeWeese*, 213 W.Va. 339, 348, 582 S.E.2d 786, 795 (2003); *State v. Faller*, 88 S.D. 685, 227 N.W.2d 443 (1975) (*Miranda* applicable to polygraph examinations).

For these reasons, Agent Beeler's inaccurate statement that Appellant had the right to have counsel present with him during the polygraph examination had the effect of negating the *Miranda* warning. Further, because Agent Beeler's testimony had the effect of discrediting Appellant's testimony in its entirety, the error was not harmless. Since these statements were therefore obtained in violation of *Miranda* and were admitted against Appellant at trial, his conviction must be reversed.

<u>**CONCLUSION**</u>

For the foregoing reasons, this Court should reverse Appellant's convictions and sentences. In the alternative, this Court should reverse and remand for a new trial.

RECEIVED
Dec 15 2025
SC Court of Appeals

W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of December, 2025.