STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

PETITIONER

APPELLATE CASE NO. 2014-000120

APPENDIX

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

BRENDAN J. MCDONALD
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Oran Smith, Appellant.

Appellate Case No. 2009-148486

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2013-UP-428
Heard October 9, 2013 – Filed November 20, 2013

AFFIRMED

LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: After the jury was unable to reach a verdict in his first trial, Oran Smith was convicted of murder in his second trial and sentenced to thirty years'

imprisonment. On appeal, Smith argues the judge presiding over his second trial erred in denying his request for a *Jackson v. Denno*[1] hearing on the voluntariness of his statement, relying instead on the *Jackson v. Denno* hearing held in the first trial. We affirm.

In June 2009, Smith first stood trial for the June 2007 murder of Cheryl Snow before Judge Harrington. After the jury was selected in that trial, but prior to the jury being sworn, the trial court held a *Jackson v. Denno* hearing, at which time Smith sought to exclude one of his statements to police wherein he admitted he strangled Snow. In considering the totality of the circumstances, the trial court found Smith freely and voluntarily gave his statement to police, and this statement was thereafter admitted into evidence over Smith's objection. The jury was unable to reach a verdict in Smith's first trial, resulting in a mistrial. In December 2009, Smith was retried for Snow's murder with the same two attorneys representing Smith and the same two solicitors presenting the State's case. However, Judge Dennis presided over the retrial. After the jury was chosen, but again prior to being sworn, trial counsel sought a *Jackson v. Denno* hearing. Finding Judge Harrington had already ruled on the admissibility of the statement in a *Jackson v. Denno* hearing prior to the first trial, Judge Dennis declined to hold another hearing on the matter.

On appeal, Smith contends Judge Dennis erred in denying his request for a second *Jackson v. Denno* hearing at his December 7, 2009 trial, after his first trial ended in a mistrial. We find no reversible error.

A defendant in a criminal case is entitled to a reliable determination as to the voluntariness of his statement in an independent evidentiary hearing, by a tribunal other than the jury charged with deciding his guilt or innocence, prior to the submission of such statement to the jury. *State v. Parker*, 381 S.C. 68, 84, 671 S.E.2d 619, 627 (Ct. App. 2008); *State v. Creech*, 314 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct. App. 1994). This evidentiary hearing must be conducted outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. *State v. Simmons*, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009). Upon examining the totality of circumstances surrounding the statement, the circuit court must determine whether the State has

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[1] 378 U.S. 368 (1964).

carried its burden of proving the statement was given voluntarily. *Id.* Here, a lengthy, independent evidentiary hearing was conducted by Judge Harrington, a tribunal other than the jury charged with deciding Smith's guilt or innocence, and it was conducted outside the presence of the jury. After considering the totality of the circumstances, Judge Harrington determined the statement in question was freely and voluntarily given by Smith. Further, the law is clear that the proper remedy for the denial of a *Jackson v. Denno* hearing on the voluntariness of a statement is not a new trial, but is a remand for a *Jackson v. Denno* hearing on the voluntariness of the statement. *See State v. Primus*, 312 S.C. 256, 258, 440 S.E.2d 128, 129 (1994) (remanding the matter to the circuit court for a *Jackson v. Denno* hearing since determination of whether appellant was "in custody" presents a factual issue); *Creech*, 314 S.C. at 86-87, 441 S.E.2d at 640-41 (holding, when the trial court failed to hold a *Jackson v. Denno* hearing to determine the voluntariness of a statement, neither the Constitution nor the *Jackson v. Denno* decision mandated a new trial, if, in a soundly conducted collateral proceeding, the appellant's confession was determined to be voluntary; the appropriate remedy was not a new trial, but to remand the matter for a suppression hearing); *State v. Fortner*, 266 S.C. 223, 227, 222 S.E.2d 508, 510 (1976) (holding, where the judge declined to hear any evidence on behalf of appellant concerning circumstances surrounding his confession, appellant was denied a reliable determination of the voluntariness of his confession and was entitled to a new hearing on the issue of voluntariness, and therefore remanding the case "to the Court of General Sessions [for that county] to hold a hearing *before any judge having jurisdiction in that circuit* for a determination of the voluntariness of appellant's confession") (emphasis added); *see also State v. Miller*, 367 S.C. 329, 337-38, 626 S.E.2d 328, 332 (2006) (holding, where the trial court improperly denied Miller an *in camera* identification hearing, this court properly determined Miller was not entitled to a new trial, but was entitled to a remand for the purpose of conducting an in camera hearing on the identification). Here, Smith has already received a proper hearing on the matter, and there is no assertion by him that any new circumstances warranted a new hearing or that he would have presented any different evidence in a new hearing. Because he would only be entitled to a remand for a *Jackson v. Denno* hearing, to be heard by any judge having jurisdiction in that circuit, and he has already received the same, we find no prejudicial error. *See State v. Black*, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012) ("To warrant reversal, an error must result in prejudice to the appealing party.").

AFFIRMED.

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

APPELLANT

APPELLATE CASE NO. 2009-148486

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2013-UP-428

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence for murder November 20, 2013. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Appellant Smith argued on appeal that the trial judge erred in denying Smith's request for a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) at his December 7, 2009 trial after his first trial ended in a mistrial and a Jackson v. Denno hearing was held in the first trial.

The Court of Appeals affirmed the trial court by holding that Smith had already received a hearing pursuant to Jackson v. Denno , and since Smith did not claim there was any new circumstance, he would be entitled only to a remand for a new hearing by any judge having jurisdiction in that error. Because he had already received that hearing, the Court found no prejudicial error which was needed for reversal.

The Court of Appeals misapprehended the issue.

ISSUE: Cheryl Snow lived in a halfway house in North Charleston. R. 822, ll. 9-17; R. 824, ll. 8 – 23. On June 4, 2007, her body was found in her apartment. She had been murdered evidenced by the pajama bottoms wrapped around her neck. R. 810, ll. 8 – 24. Fingerprints from the apartment indicated that three men had visited her over the weekend she died; Oran Smith was one of them. R. 1014, ll. 2 – 24; R. 1026, ll. 1 - After Smith's DNA was found on the ligature of the pajama pants, he was arrested. R. 66, ll. 16 – 25; R. 67, ll. 1 – 25; R. 1027, ll. 2 – 14.

Smith provided two statements to police. The first statement was the day after the victim's death in June. R. 1020, ll. 1 – 25; R. 1021, ll. 1 – 25; R. 1022, ll. 1 -5; R. 786, ll. 4 – 9. He was not arrested after that statement. In the second statement in July, he told the police voices told him to kill Cheryl after they had consensual sex. R. 1042, ll. 2 – 25; R. 1043, ll. 1 – 25.

On June 15 through 18, 2009, Oran Smith stood trial in Charleston County, before Judge Kristi L. Harrington and a jury, on an indictment charging him with the strangulation murder of Cheryl Snow. Appellant Smith, who was one of several possible suspects, had been shot in the head in 1994 and lost an eye and some additional cognitive ability as a result. (He was already slow.) He admitted to the police that he had sex with Snow – this was not unusual, as they had dated – but insisted that he had returned to his mother's residence before Snow was murdered. Eventually, an

expert police interrogator got Smith to admit that "voices" told him to kill Snow. Smith's jury could not reach a verdict, and the judge declared a mistrial.

On December 7 through 9, 2009, Smith again stood trial for Snow's murder, Judge R. Markley Dennis, Jr. presiding. Once again, the State's case hinged upon Smith's purported confession. Although he submitted the case to the jury, the judge first offered this frank assessment of the State's evidence:

> [W]ithout the statement ... I can tell you what this judge would have done. It would have directed a verdict. It's not there. It's just not overwhelming. There's some circumstantial evidence, but it's not substantial. There's no question the statement is a critical factor.

R. 1136, ll. 3-13.

Oran Smith did not testify at either of his two trials. R. A hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) was held in a pretrial hearing during the first trial. The judge found that his confession statement was voluntary, and therefore was admissible. R. 45, ll. 1 – R. 155, ll. 16.

At the close of the state's case in the first trial, defense counsel renewed their motion to exclude Smith's second statement. R. 641, ll. 1 -25. Judge Harrington again ruled the statement was given voluntarily and was admissible. R. 660, ll. 24-25; R. 661, ll. 1 – 25; R. 662, ll. 1 -2.

The jury was deadlocked so the judge in the first trial declared a mistrial. R. 725 ll. 1 – R. 733, ll. 8.

During pretrial motions in the second trial on December 7-9, 2009, defense counsel moved for Smith's second statement in July be suppressed. Counsel said she assumed the court would redo the entire trial but she understood that the judge would not relitigate the statement issue again. R. 735; R. 786, ll. 2 – 24. The judge asked if the hearing was conducted prior to the jury being sworn to which the state responded that it was since it was a pretrial hearing. The judge

asked if the evidence was fully heard. The state explained that it was, and that it was ruled on again at the closing of the state's case. R. 787, ll. 1 – 25.

The judge stated that he understood that a mistrial did not have any binding effect on either side. However, he said the Jackson v. Denno hearing was conducted specifically on a motion and did not occur during the trial of the case. He said he did not have the authority to overrule a prior decision of a circuit court judge. Therefore, he ruled that the ruling of the first trial judge, Judge Harrington, stood. He declined to have a second Jackson v. Denno hearing. R. 788, ll. 1 – 25; R. 789, ll. 1 – 15.

In State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009), the Supreme Court held that a mistrial was the equivalent of no trial and left the cause pending in the circuit court. The Court also held that a court ruling as to the admissibility and competency of testimony during a trial which is later declared a mistrial results in no binding adjudication of the rights of the parties.

In State v. Woods, id, Woods was charged with murder, burglary and criminal sexual conduct (CSC). Woods requested a transfer of venue due to extensive pre-trial publicity. The state consented, and the transfer was granted to another county, Marion. The first trial ended in a mistrial. When the case was called for the second trial, the state withdrew its consent to transfer of venue. The judge ruled that the trial would be held in Clarendon County, and Woods was convicted. The Supreme Court affirmed the convictions and wrote that since the first trial resulted in a mistrial, it was a nullity and began anew when called again for trial. The motion for a transfer of venue was held in a pretrial hearing before the first trial as the jurors were selected in Marion County and transferred to Clarendon County. The Supreme Court still found the rulings from the first trial were a nullity as shown by their affirming Woods' convictions.

The Supreme Court cited the case of Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) which held that rulings of the trial judge in a proceeding ending in a mistrial represented no binding adjudication upon the parties as the mistrial left the parties in status quo ante.

The Court of Appeals misapprehended the issue because their ruling focused on the voluntariness of the statement and that a remand would be all that was required, thus since Smith already had a hearing, a remand was not necessary because he suffered no prejudice. The Court failed to address the trial judge's ruling that pretrial motions were not part of the trial and therefore he did not have the authority to overrule the first trial judge's ruling that the statement was admissible. This was in error because the trial judge acknowledged that a mistrial had no binding effect on either side.

This ruling by the trial judge that pretrial motions were not part of the trial was in error as demonstrated by the Supreme Court's ruling in State v. Woods, Id. where the Court affirmed the conviction where the trial court changed the pretrial ruling on venue.

The Supreme Court's ruling in Grooms v. Zander, *supra,* that a mistrial left the parties in status quo ante, clarifies that pretrial motions and rulings have to be part of the trial or else the parties would not be in the same position as before because the pretrial rulings determine what evidence is admitted at trial.

In State v. Victor, 300 S.C. 220, 387 S.E.2d 248 (1989), the case rested almost entirely on the testimony of a witness. The Supreme Court ruled that "because of the egregious error in the trial judge's failure to hold a suppression hearing or to submit the issue of voluntariness to the jury of Victor's statement, which conflicted with the witness's testimony, we reverse appellant's convictions and remand the case for a new trial." The court wrote that a suppression hearing alone was not sufficient because the jury never considered the issue of voluntariness.

A remand for a hearing only would not be sufficient and would be prejudicial to Smith because Smith already had a mistrial where the jury could not decide even when the statement was admitted. As the trial judge stated, the case hinged on this second statement by Smith. His statement was the only evidence against him and there were two other potential suspects. Smith had cognitive impairments which was even more reason to insure the voluntariness of the statement.

The trial court should have granted Smith's request for a new hearing pursuant to Jackson v. Denno, *supra*. Denying the request for this hearing was not harmless error based on the judge's remarks, as previously cited, and based on the solicitor's extensive arguments in his closing argument of Smith's two statements. R. 1161, ll. 21 – 25; R. 1162, ll. 1 -9; R. 1165, ll. 1 – R. 1168, ll. 25.

WHEREFORE, we respectfully request the Court of Appeals to reconsider its decision

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

This 4th day of December, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, and Mr. Oran Smith, #338325, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of December, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day
of December, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The South Carolina Court of Appeals

The State, Respondent,

v.

Oran Smith, Appellant.

Appellate Case No. 2009-148486

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Jr. J.

John C. Hall J.

James E. Lockemy J.

Columbia, South Carolina

cc:
LaNelle Cantey DuRant, Esquire
Brendan Jackson McDonald, Esquire

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

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BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Smith's request for a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) at his December 7, 2009 trial after his first trial ended in a mistrial and a Jackson v. Denno hearing was held in the first trial ?

STATEMENT OF THE CASE

On June 15 through 18, 2009, Oran Smith stood trial in Charleston County, before Judge Kristi L. Harrington and a jury, on an indictment charging him with the strangulation murder of Cheryl Snow. Smith was represented by Donna Taylor and William H. Nixon, Jr. The state was represented by Gregory K. Voight and Chad Simpson. Smith, who was one of several possible suspects, had been shot in the head in 1994 and lost an eye and some additional cognitive ability as a result. (He was already slow.) He admitted to the police that he had sex with Snow – this was not unusual, as they had dated – but insisted that he had returned to his mother's residence before Snow was murdered. Eventually, an expert police interrogator got Smith to admit that "voices" told him to kill Snow. Smith's jury could not reach a verdict, and the judge declared a mistrial.

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> [W]ithout the statement ... I can tell you what this judge would have done. It would have directed a verdict. It's not there. It's just not overwhelming. There's some circumstantial evidence, but it's not substantial. There's no question the statement is a critical factor.

R. 1136, ll. 3-13.

The jury found Smith guilty as charged, and the judge sentenced him to imprisonment for thirty years. R. 1232, ll. 17 – 25.

Smith's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in denying Smith's request for a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) at his December 7, 2009 trial after his first trial ended in a mistrial and a Jackson v. Denno hearing was held in the first trial?

Cheryl Snow lived in a halfway house in North Charleston. R. 822, ll. 9-17; R. 824, ll. 8 – 23. On June 4, 2007, her body was found in her apartment. She had been murdered evidenced by the pajama bottoms wrapped around her neck. R. 810, ll. 8 – 24. Fingerprints from the apartment indicated that three men visited her over the weekend she died; Oran Smith was one of them. R. 1014, ll. 2 – 24; R. 1026, ll. 1 - After Smith's DNA was found on the ligature of the pajama pants, he was arrested. R. 66, ll. 16 – 25; R. 67, ll. 1 – 25; R. 1027, ll. 2 – 14.

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the statement was given voluntarily and was admissible. R. 660, ll. 24-25; R. 661, ll. 1 – 25; R. 662, ll. 1 -2.

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The judge stated that he understood that a mistrial did not have any binding effect on either side. However, he said the Jackson v. Denno hearing was conducted specifically on a motion and did not occur during the trial of the case. He said he did not have the authority to overrule a prior decision of a circuit court judge. Therefore, he ruled that the ruling of the first trial judge, Judge Harrington, stood. He declined to have a second Jackson v. Denno hearing. R. 788, ll. 1 – 25; R. 789, ll. 1 – 15.

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The trial court should have granted Smith's request for a new hearing pursuant to Jackson v. Denno, *supra.* Denying the request for this hearing was not harmless error based on the judge's remarks, as previously cited, and based on the solicitor's extensive arguments in his closing argument of Smith's two statements. R. 1161, ll. 21 – 25; R. 1162, ll. 1 -9; R. 1165, ll. 1 – R. 1168, ll. 25.

CONCLUSION

Based on the above, the conviction should be reversed, and the case remanded for a new trial with a full suppression hearing.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of September, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 7th, 2012

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of September, 2012.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of September, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2009-148486

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

APPELLANT

BRIEF OF RESPONDENTS

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

SCARLET ANNE WILSON
Solicitor, Ninth Judicial Circuit

P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

ATTORNEY(S) FOR RESPONDENTS

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TABLE OF AUTHORITIES

Cases

Rule(s)

QUESTIONS PRESENTED

I. Whether the trial court committed reversible error in declining Appellant's request for a second pre-trial *Jackson v. Denno* hearing where Appellant's first *Jackson v. Denno* hearing was conducted prior to the jury being sworn in Appellant's first trial which ended in a mistrial?

INTRODUCTION

Cheryl Snow ("Victim") was found dead in her North Charleston apartment on June 4, 2007. (R. 825-26). The subsequent investigation resulted in the arrest, indictment, trial and conviction of Oran Smith ("Appellant"). (R. 1045, 1235-36, 735, 1213).

STATEMENT OF THE CASE

Appellant first stood trial before the Honorable Kristi L. Harrington and a jury on June 15-19, 2009 in Charleston. (R. 1). He was represented by Donna Taylor and William H. Nixon, Jr. while the State was represented by Gregory K. Voight and Chad Simpson. (R. 1). After the jury failed to agree on a verdict, Judge Harrington declared a mistrial. (R. 731).

Subsequently, Appellant was retried on December 7-9, 2009 before the Honorable R. Markley Dennis, Jr. and a jury, again in Charleston. (R. 735). Appellant remained represented by Taylor and Nixon while the State remained represented by Voight and Simpson. (R. 735). At the conclusion of trial, Appellant was found guilty as charged and received a sentence of thirty (30) years imprisonment. (R. 1213, 1232).

STATEMENT OF THE FACTS

On June 4, 2007, Officer Scott Hille was dispatched to Victim's North Charleston residence. (R. 823-24). Upon arriving on the scene, Hille entered Snow's apartment where he discovered her body cold and unresponsive. (R. 826-27). A pair of pajama pants were tied tightly around her neck. (R. 826-27). According to forensic pathologist, Dr. Erin Presnell, Victim was strangled with the pajama pants. (R. 963, 969-70, 976). There was no sign of forced entry. (R. 1053).

During the ensuing investigation, authorities discovered Appellant's fingerprints, along with two other individuals, Leonard McKelvey and Leonard Geddis, inside of Victim's

residence.[1] (R. 886, 885,). As a result, Appellant was initially interviewed and gave a statement explaining he had sexual relations with Victim over the course of the weekend before leaving on Sunday afternoon. (R. 1021-22, 1062). In his first statement, Appellant claimed Victim was alive when he left her residence. (R. 1062).

After interviewing Appellant, McKelvey and Geddis, investigators sent the pajama pants used to strangle Victim to SLED in order to test them for DNA evidence. (R. 1027-28). The results of the DNA testing showed Appellant's semen was on the pajama pants. (R. 996-97). Additionally, touch DNA tests conducted on the pajama pants revealed Appellant could not be excluded as minor contributor to the mixed DNA profile found on the pajama pants.[2] (R. 1001-02). Geddis' DNA was not found on the pajama pants. (R. 994-95).

Once investigators received the results of the DNA tests conducted on the pajama pants, they decided to interview Appellant a second time. (R. 1027). Prior to the interview, Appellant received his Miranda rights after which he executed an advice of rights form stating he had been advised of, and wished to waive his Miranda rights in order to speak with authorities. (R. 1031, 1032-33). In the interview, Appellant initially denied killing Victim, however, after he was confronted with the fact his DNA was found on the item used to strangle Victim, admitted killing her. (R. 1041-42). Specifically, Appellant explained he killed Victim by strangling her first with his arms and then with a pair of pajama pants he found on top of her dresser. (R. 1042-43).

PRESENTATION OF ISSUE AT TRIAL

A. The Jackson v. Denno Hearing

[1] Investigators also took statements from both McKelvey and Geddis. (R. 1026-27, 1048). McKelvey, admitted he had been with Victim on Friday, June 1, while Geddis, initially denied he was with Victim before giving a detailed statement explaining he had sexual relations with her in the early morning hours of Friday before leaving Victim's residence at approximately 5:45 AM. (R. 1048-49, 1050).

[2] Understandably, Victim was the major contributor to the mixed DNA profiles found on the pajama pants. (R. 1001-02).

Prior to the jury being sworn in Appellant's first trial, defense counsel moved for a Jackson v. Denno, 378 U.S. 368 (1964) hearing to determine whether Appellant's statements were freely and voluntarily tendered. (R. 45). Accordingly, Judge Harrington heard testimony from Detective Shawn Patrick (R. 46-90); Detective James Hill (R. 91-106); Appellant (R. 106-126); and Detective Keith Elmore (R. 126-49). Thereafter, defense counsel argued that when reviewing a totality of the circumstances, Appellant's second statement "was against his will in that he did not voluntarily waive his right to have counsel." (R. 151). In so arguing, defense counsel relied upon testimony regarding Appellant's intellectual capacity (R. 150), his education (R. 150) and claims of police coercion. (R. 150-51). In response, the State argued that when reviewing the totality of the circumstances, the evidence from the Denno hearing established, by a preponderance of the evidence, that Appellant was apprised of his Miranda rights after which he waived those rights and knowingly, freely and voluntarily gave a statement. (R. 152-53). Ruling on the issue, Judge Harrington agreed with the State and looking at the totality of the circumstances, found Appellant was advised of his rights, waived them and freely and voluntarily gave both of his statements. (R. 154-55). Following its ruling on the issue, other pre-trial matters were discussed. (R. 155-63). Thereafter, the jury was sworn. (R. 163).

B. Appellant's Request for a Second Jackson v. Denno Hearing

After Appellant's first trial ended in a mistrial, defense counsel, prior to the jury being sworn in the retrial, moved for a second Denno hearing stating:

> There is another matter, Your Honor, that we spoke about briefly. There is in this case two statements which were taken from Oran Smith, one in June taken by the police, and one in July which led to his subsequent arrest. We had argued previously that the second statement was coereced. Mr. Smith has brain damage from a prior injury. He's deaf in one ear, blind in one eye. The circumstances overall, we felt, were coercive and I have requested at that time that that statement be suppressed.

> Quite frankly, this is the first case that I've had to retry involving a confession. I did not research that issue. I, of course, assumed the Court essentially will redo the entire trial. But it's my understanding from the Court that that is *res judicata* and will not be litigated again. I did want to just create a continuing objection to that with the determination by the prior Court.

(R. 786). The trial court then confirmed that: (a) the Denno hearing was conducted prior to the jury being sworn in Appellant's first trial; and (b) Judge Harrington had heard all of the evidence regarding the admissibility of the statement. (R. 786-87, 787).

Next, the trial court determined that while a mistrial does not have a binding effect on either side, a motion for a pre-trial Denno hearing, which did not occur during the trial of the case, stands. (R. 788). Continuing, the trial court noted that if it were to rule otherwise it would be overruling another circuit court judge which the trial court explained, it did not have the authority to do. (R. 788). Specifically, the trial court reasoned, "the decision as to whether or not, by the preponderance of the evidence, the requisite standard was established . . . was made by Judge Harrington prior to the trial." (R. 788). Nevertheless, the trial court informed both parties it would still "entertain any objections" on the admissibility of Appellant's statement adding "if at lunch, you all think we have to have it, let me know and we'll do it at some point in time." (R. 789). After lunch, defense counsel failed to present the trial court with any additional authority supporting its position requesting a second Denno hearing.

Defense counsel subsequently renewed its request regarding the Denno hearing after the State rested arguing the statement was inadmissible based upon the totality of the circumstances because they essentially took him in under false pretenses and allegedly subjected Appellant to coercive interrogation methods. (R. 1129-33). After explaining it was standing by its previous ruling, the trial court added that after hearing the testimony "I understand why it would really be impractical and impossible for another circuit judge to hear this and have a ruling that would be

inconsistent. You couldn't do that." (R. 1133-34). Continuing, the trial court said "[g]iven the testimony I've heard today, it doesn't affect [the trial court's ruling] stating "I would have done the same thing, by the preponderance of the evidence." (R. 1134-35).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010).

ARGUMENT

I. The trial court did not commit reversible error in declining to conduct a second, pre-trial *Jackson v. Denno* hearing as the motion had already been fully litigated prior to Appellant's first trial, Appellant admitted there were no additional facts in evidence to change the trial judge's pre-trial ruling and circuit court judges do not possess the authority to overrule one another in pre-trial rulings.

Appellant maintains the trial court erred in denying his request for a second Jackson v. Denno, hearing arguing that because the effect of a mistrial is no trial, the trial court was required to conduct a second Denno hearing. In support of this proposition, Appellant cites to State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009) and Grooms v. Zander, 246 S.C. 512, 144 S.E.2d 909 (1965).

While the State agrees with the proposition set forth in both Woods and Grooms, namely that the effect of a mistrial is *no trial*, the State submits this holding does not extend to the *pre-trial rulings* in the present case. Specifically, because Judge Harrington previously ruled on the same set of facts prior to the jury being sworn thereby making Judge Harrington's ruling a *pre-trial ruling*, as opposed to an *in trial ruling*, the State submits Judge Harrington's ruling is law of the case. See Rule 4(b), SCRCrimP. (West 2012) ("If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same set

of facts shall be made to any other judge in that action. If upon such subsequent motion any order be made, it shall be void."); Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) (citing Circuit Court Rule 60 [now Rule 4(b), SCRCrimP] ("One Circuit Court Judge does not have the authority to set aside the order of another.")).

A. The Trial Court was Correct in Declining to Conduct a second Jackson v. Denno Hearing

As detailed above, the State does not dispute that when the jury fails to reach a verdict and a mistrial is subsequently declared, the effect of the mistrial "is the equivalent of *no trial* and leaves the cause pending in the circuit court." Woods, 382 S.C. at 158, 676 S.E.2d at 131 (emphasis added) (citing State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999)). Similarly, the State does not dispute that a trial judge's rulings as to admissibility and competence of testimony *made during trial*, which later ends in a mistrial, represents no binding adjudication upon the parties. Woods, 382 S.C. at 158, 676 S.E.2d at 131 (emphasis added) (citing Grooms, 246 S.C. at 514, 144 S.E.2d at 910; Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948)).

However, as is the case here, where a trial court issues a *pre-trial* ruling after which a mistrial is subsequently declared for failing to reach a verdict, the pre-trial ruling should not be disturbed where the evidence supporting the pre-trial ruling *has not changed.* This is so because South Carolina's Circuit Courts lack the authority to overrule one another on the same facts, in the same case, presumably in an effort to limit judge-shopping. See Rule 4(b), SCRCrimP. (explaining that once a motion has been denied a party shall not make an additional motion based upon the same set of facts); Enoree Baptist Church, 287 S.C. at 604, 340 S.E.2d at 547 ("One Circuit Court Judge does not have the authority to set aside the order of another."); Rule 43(l), SCRCP (West 2012) ("If any motion be made to any judge and be denied, whole or in part, or be

granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in the action."). This is not to say that trial courts which retry a case after a mistrial are *always* bound by the first trial judge's *pre-trial* rulings. Indeed, the State agrees that where the evidence supporting a second trial judge's pre-trial ruling *is different* from that which supported the initial judge's pre-trial ruling (i.e. the underlying facts supporting the pre-trial motion have changed) the second trial judge, while normally bound by the pre-trial ruling, may in his discretion, come to his own conclusion on the pre-trial motion. See e.g. Smith v. Breedlove, 377 S.C. 415, 421, 661 S.E.2d 67, 70 (2008) (explaining that while a pre-trial motion may not be reasserted using the same facts, the motion can be renewed once new evidence is gathered).

Understanding this, the State submits Appellant's assertion that Woods governs this matter is simply incorrect as Woods is the exception to the general rule. Specifically, while Woods admittedly deals with a *pre-trial motion* following a mistrial—an issue by which a second trial judge would *normally be bound* since a mistrial does not disturb pre-trial rulings, the State notes the facts supporting the first trial judge's ruling in Woods, extensive pre-trial publicity and the State's consent to a change of venue, were no longer present when the second trial judge in Woods was presented with the same motion. See Woods, 382 S.C. at 157, 676 S.E.2d at 130 ("Prior to Woods' first trial in 2006, he requested a change of venue due to extensive pre-trial publicity and the fact that the Victim was a well-known teacher who had taught in Clarendon County public schools. With the state's consent, the trial judge granted the motion[.]"). As such, the second trial judge in Woods was free to revisit the first trial judge's ruling on the motion for change of venue since the underlying facts had changed. Therefore, Woods does not apply to the facts of this case since it is the exception rather than the rule.

Furthermore, any contention that Grooms, Keels, or Smith govern this case are at odds with the facts. Specifically, neither Grooms, Keels or Smith, all cases cited to by the Supreme Court of South Carolina in Woods, stand for the proposition that *pre-trial rulings*, made by the trial court on the same set of facts, are subsequently vacated by a mistrial. To the contrary, Grooms, Keels and Smith each deal with rulings made by the trial judge *during trial*, after which a mistrial was declared. See Grooms, 246 S.C. at 514, 144 S.E.2d at 910 (explaining the ruling at issue was the first trial judge's directed verdict ruling); Keels, 213 S.C. at 572, 50 S.E.2d at 705 (detailing the ruling at issue was the first trial judge's ruling on a directed verdict motion); Smith, 336 S.C. at 42, 518 S.E.2d at 296 (highlighting that the ruling at issue was an *in camera* hearing occurring *at trial*) (emphasis added). Accordingly, the State submits this case is controlled by Enoree Baptist Church which explains a previous trial judge's pre-trial rulings cannot be revisited where the same facts support the first judge's rulings.

In Enoree Baptist Church, the Supreme Court of South Carolina, over a dissenting opinion by Chief Justice Ness, explained a second trial judge erred when, after a mistrial was declared in the first trial, the second trial judge overruled the first trial judge's decision to permit the plaintiff to file an amended complaint. 287 S.C. at 603-04, 340 S.E.2d at 547. In reversing the second trial judge's decision, the Court found the second trial judge's pre-trial ruling that "if the case was mistried, then you're back to ground zero" was error because the second trial judge lacked the authority to overrule the first judge's pre-trial ruling. Id.

Keeping these propositions in mind, the State submits the trial court was correct in determining it was bound by Judge Harrington's pre-trial ruling. Indeed, as detailed above, Appellant's position—that Woods applies to this case—is incorrect since defense counsel actually agreed the facts supporting its second motion for a Jackson v. Denno hearing were based

on the same facts which supported its first motion. As such, a redetermination on this pre-trial issue is barred under Rule 4(b), SCRCrimP. Indeed, as discussed above, since Enoree Baptist Church explains that a first judge's pre-trial ruling, when premised upon the same facts, should not be revisited by a second trial judge after a mistrial is declared, the trial court was clearly correct when it denied Appellant's motion for a second Jackson v. Denno hearing. Accordingly, the State submits the trial court's ruling is correct.

B. Even if the Trial Court Erred, the error is not Prejudicial

The State further submits that even if the trial court erred in declining to conduct a second Jackson v. Denno hearing, Appellant was not prejudiced by such an error. Indeed, the record before this Court established that Appellant received a complete Jackson v. Denno hearing in his first trial and defense counsel admitted it would have made the exact same argument in his second trial had it received an opportunity to do so. With this in mind, because the trial court, after considering the admissibility of the statement at the conclusion of the State's case-in-chief ultimately determined that based upon a preponderance of the evidence it would have issued the same ruling as Judge Harrington did in a Jackson v. Denno hearing, Appellant was not prejudiced by the failure to receive a second Denno hearing. Finally, as the jury was charged that it had to find Appellant's statement was voluntary beyond a reasonable doubt in order to consider it and Appellant was ultimately convicted of Victim's murder, any error in failing to conduct the Denno hearing did not prejudice Appellant since the jury clearly found Appellant's statement was voluntary beyond a reasonable doubt. See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (holding that once a court has determined a defendant received and understood his Miranda rights, the court should allow the statement into evidence and let the jury determine, based upon the totality of the circumstances, whether the statement

statement was voluntary beyond a reasonable doubt. See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (holding that once a court has determined a defendant received and understood his Miranda rights, the court should allow the statement into evidence and let the jury determine, based upon the totality of the circumstances, whether the statement was freely and voluntarily given which the State must prove beyond a reasonable doubt). (R. 1197-99). Accordingly, the State asks this Court to affirm Appellant's conviction and sentence.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court affirm the judgment and sentence imposed by the trial court.

Respectfully Submitted,

ALAN WILSON
Attorney General

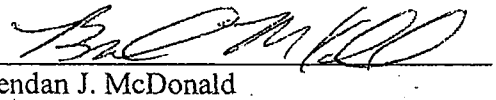
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

SCARLETT ANNE WILSON
Solicitor, Ninth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188



Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

January 8, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2009-148486

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

APPELLANT.

PROOF OF SERVICE

I, Brendan J. McDonald, counsel for the Respondent, certify that I have served the within Brief of Respondent on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, LaNelle Cantey DuRant, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, SC 29201.

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

This 8th day of January, 2013.

BRENDAN J. McDONALD

Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEY FOR RESPONDENT

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

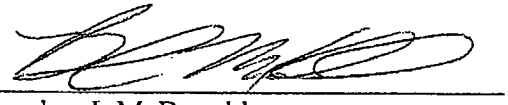
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

P.O. Box 11549

Columbia, SC 29211-1549
(803) 734-3188

SCARLETT ANNE WILSON
Solicitor, Ninth Judicial Circuit



Brendan J. McDonald

ATTORNEY(S) FOR RESPONDENTS

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