STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2012-213028

THE STATE,

Respondent,

vs.

JAMES IRBY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The trial judge properly admitted Appellant's statements into evidence after determining Appellant made the statements knowingly and voluntarily under the totality of the circumstances.

STATEMENT OF THE CASE

In January of 2011, a Spartanburg County Grand Jury indicted Appellant for second-degree criminal sexual conduct with a minor. On January 29, 2011, the Honorable J. Derham Cole presided over a Jackson v. Denno[1] hearing. Christopher Brough represented Appellant at the hearing, and Assistant Solicitors Susan Reese and Jennifer Jordan represented the State.

On November 18, 2012, Appellant proceeded to trial. Christopher Brough represented Appellant at trial, and Assistant Solicitor Susan Reese represented the State. On November 19, 2012, the jury found Appellant guilty as charged. Judge Cole sentenced Appellant to eighteen years of imprisonment.

Appellant filed a timely notice of appeal. This brief follows.

[1] Jackson v. Denno, 378 U.S. 368 (1964).

STATEMENT OF FACTS

Jackson v. Denno Hearing

On January 29, 2011, the trial judge held a Jackson v. Denno hearing. The following testimony and evidence was presented:

Testimony of Brenda Azzara

On November 14, 2007, Brenda Azzara, an employee with the Department of Social Services, met with Appellant. (Hearing p. 14.) According to Azzara, Detective Tonya Aldredge and Appellant's wife were both present during the interview. (Hearing p. 15.) Appellant was not under arrest. (Hearing p. 14.) Detective Aldredge read Appellant his rights under Miranda.[2] (Hearing p. 15; Hearing p. 26.) Appellant gave a written statement denying Victim's allegations of sexual abuse. (Hearing p. 17.) Appellant claimed Victim got mad at him when he told her that she could not go on a field trip unless she cleaned her room, and the next thing he knew the police were at his home. (Hearing p. 17.)

Testimony of Detective Aldredge

On November 30, 2007, Detective Aldredge met with Appellant at the detention center. (Hearing p. 24.) Appellant was at the detention center for a family court issue. (Hearing p. 25.) Detective Aldredge read Appellant his rights under Miranda. (Hearing p. 25.) According to Detective Aldredge, Appellant agreed to take a polygraph examination, which was eventually scheduled for December 5, 2007. (Hearing p. 25.) On December 5, 2007, before the polygraph was administered, Detective Aldredge read Appellant his rights under Miranda, and Appellant gave another statement denying the allegations.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

(Hearing pp. 27-28; Hearing p. 36.) Detective Danny Morgan administered the polygraph examination. (Hearing p. 28.) Later that day, Detective Aldredge transported Appellant to the courthouse for a family court hearing. (Hearing pp. 28-29.) After the hearing, which lasted approximately one hour, Detective Aldredge stopped at McDonald's in order to get Appellant something to eat. (Hearing p. 29.) Thereafter, Detective Aldredge took Appellant back to the sheriff's office to see Detective Morgan. (Hearing p. 29.) According to Detective Aldredge, she did not witness any threats or coercion by Detective Morgan. (Hearing p. 30.) Moreover, Appellant never requested an attorney or asked to stop the interview. (Hearing p. 30.) Appellant apologized for not being completely truthful. (Hearing p. 31.) After the interview was over, Detective Aldredge transported Appellant back to the detention center. (Hearing p. 32.) According to Detective Aldredge, Appellant never told her that he was threatened or coerced by Detective Morgan. (Hearing p. 32.)

Testimony of Detective Morgan

On December 5, 2007, Detective Morgan performed a polygraph examination on Appellant. (Hearing p. 46.) Before Detective Morgan began the examination, he read Appellant his rights under Miranda and went over the waiver of rights form with Appellant. (Hearing p. 47.) According to Detective Morgan, Appellant was not under the influence of drugs or alcohol at that time. (Hearing p. 47.) Further, Appellant's speech was coherent, and Appellant seemed to understand Detective Morgan's questions. (Hearing p. 48.) Additionally, Appellant did not appear to have any mental health issues. (Hearing p. 48.)

After Appellant completed the polygraph examination, Appellant went to a family court hearing. (Hearing p. 51.) After the family court hearing, Appellant returned to the

sheriff's office in order to discuss the results of his polygraph examination. (Hearing pp. 52-53.) Detective Morgan testified that he did not threaten Appellant, coerce Appellant, or promise Appellant anything. (Hearing p. 48; Hearing pp. 53-54; Hearing p. 60.) In addition, Detective Morgan offered Appellant breaks throughout the course of the interview. (Hearing p. 56.) Detective Morgan also testified that he never offered Appellant four years if Appellant would just confess to the crime. (Hearing p. 61.) In fact, Detective Morgan told Appellant that he did not have the power to make any deals. (Hearing p. 73.) In addition, Detective Morgan told Appellant that he was not making Appellant any promises and not threatening Appellant. (Hearing p. 73.)

Testimony of Appellant

During the hearing, Appellant testified on his own behalf. (Hearing p. 74.) Appellant claimed that he was not advised of his rights under Miranda when Detective Aldredge picked him up from the detention center on December 5, 2007. (Hearing p. 76.) Appellant claimed he "felt threatened" during his interview with Detective Morgan. (Hearing p. 77.) Appellant claimed that he felt threatened because Detective Morgan allegedly said to him that "if [Appellant] didn't tell [Detective Morgan] something they would give [him] so many years, and if [he] did tell [Detective Morgan] something, then they would only give [him] like five or four years." [3] (Hearing p. 77.) Further, Appellant claimed he felt threatened when Detective Morgan stated that he did not want to see Appellant thrown to the wolves. (Hearing p. 77.) But when defense counsel asked Appellant why he felt threatened by Detective Morgan's wolves comment, Appellant stated: "Well, I mean, in the video, I mean, he told me about, you know, if I told him something he would give me five years, but if I didn't tell him something he would give

[3] Nowhere in the video does Detective Morgan tell Appellant that he would get four or five years if he confessed. In fact, Detective Morgan denied making that statement. (Hearing p. 61.)

me 20 years." (Hearing p. 77.) Further, Appellant admitted that one of the officers got him lunch. (Hearing p. 78.)

On cross-examination, the solicitor asked Appellant what Detective Morgan said to make Appellant feel threatened. (Hearing p. 82.) In response, Appellant stated: "I believe he told me if I tell him something they would give me only five years or four years, but if I didn't tell him something, then they was going to give me the maximum." (Hearing p. 82.) Appellant did not mention the wolves comment. (Hearing p. 82.) Appellant admitted that Detective Morgan read him his rights under Miranda, and Appellant knew he had the right to an attorney and could stop the interview. (Hearing pp. 84-85.) In addition, Appellant admitted that he signed a form waiving his rights. (Hearing p. 85.)

Notably, after Appellant gave the five page statement, Detective Morgan questioned Appellant regarding another allegation involving a different minor ["Victim 2"]. (Hearing p. 87.) Appellant refused to make any admissions regarding the allegations made by Victim 2. (Hearing pp. 87-88.) In fact, Appellant stated: "If [Detective Morgan] asked me anything about [Victim 2], nothing happened with [Victim 2], so I had no reason to, you know, go into that." (Hearing p. 88.)

State's Exhibits 2 & 3

During the Jackson v. Denno hearing, the State introduced a video of the polygraph examination and a video of the interview that occurred on December 5, 2007. (State's Exh. 2 from Hearing (DVD); State's Exh. 3 from Hearing (DVD).)

Before the polygraph examination began, Appellant told Detective Morgan that he was not under the influence of drugs or alcohol and was in good mental health.

Approximately two hours and thirty minutes later, Appellant had to take a break in order to go to family court. (State's Exh. 2 from Hearing (DVD).)

After Appellant returned from family court, Detective Morgan told Appellant that he failed the polygraph examination. Thereafter, Appellant implied that Victim was involved in sexual activities with someone else. Approximately twenty-five minutes into the second video, Detective Morgan told Appellant that Victim probably turned to Appellant because she either liked him and wanted to feel that way with him or Victim turned to Appellant because she is devious and wanted to have something over Appellant to hang him. A few seconds later, Detective Morgan stated: "James, there has been sexual contact between you and [Victim]. You have been involved in having sex with her. The thing is I don't want to just see you being thrown to the wolves on this . . . I think it needs to be clear what she was doing – how she did this. . . ." (State's Exh. 3 from Hearing (DVD).)

Around twenty-eight minutes into the interview, Appellant stated that he and Victim never had sex. However, Appellant claimed Victim came into the living room where Appellant was sleeping. Appellant's penis was exposed. When Appellant woke up, Victim had her mouth on his penis. Appellant told Victim to go to her room. Appellant claimed he did not tell anyone of this event because he wanted to protect his family. (State's Exh. 3 from Hearing (DVD).)

Detective Morgan told Appellant that it was important to be honest. Around thirty-one minutes into the second video, Detective Morgan told Appellant that this alleged living room incident could have caused Appellant to fail the polygraph examination. However, it was unlikely. Detective Morgan reminded Appellant that the question Appellant failed on the polygraph examination was "did you put your penis in

[Victim's] vagina." And the second question was "did you put your penis in [Victim's] vagina in her bedroom." Thus, according to Detective Morgan, Appellant's living room story did not explain why Appellant failed the polygraph examination considering the question was so specific. (State's Exh. 3 from Hearing (DVD).)

Around thirty-two into the second interview, Detective Morgan reminded Appellant that it was important for Appellant to be completely honest. "I'm not telling you that if you do this then you're going to get this kind of deal . . . I do not have any kind of power at all to make deals." Detective Morgan explained that he was going to tell Appellant about things he had seen in his experience. Detective Morgan stated: "None of this is designed to tell you that you should do this or you should do that. Those are choices you are going to have to make." Thereafter, Detective Morgan told Appellant that he believed that more sexual activity occurred between Victim and Appellant. (State's Exh. 3 from Hearing (DVD).)

Approximately thirty-nine minutes into the second interview, Detective Morgan told Appellant he "really [does not] believe that [Appellant] would have done these things without [Victim] initiating it. But the fact is there has been a lot more happened between you." Thereafter, Detective Morgan urged Appellant to tell the truth. Approximately forty-one minutes into the second interview, Detective Morgan told Appellant about a defendant who eventually told the truth. However, that defendant molested children that were six and seven years old. That defendant ultimately got the maximum sentence for each child, and the sentences ran consecutively. (State's Exh. 3 from Hearing (DVD).)

Thereafter, Appellant denied committing the alleged acts while blaming Victim for any inappropriate behavior. Appellant did not confess to any involvement on his part.

In response, Detective Morgan told Appellant that there was more sexual contact between Appellant and Victim than what Appellant claimed occurred. Detective Morgan stated: "I know you had sex with her. I know your penis has been inside her vagina." (State's Exh. 3 from Hearing (DVD).)

Around forty-four minutes into the second interview, Appellant told Detective Morgan that he was going to tell Detective Morgan what really happened. Appellant claimed that he was sleeping naked in the living room. He claimed he had a "hard on." When Appellant woke up, Victim was on top of Appellant, and his penis was on the lips of her vagina. Appellant claimed he whipped Victim and sent her to her room. (State's Exh. 3 from Hearing (DVD).)

Approximately fifty-eight minutes into the second interview, Detective Morgan stated: "I believe that there's been an ongoing sexual relationship here." Detective Morgan told Appellant that he believed there has been more sexual activity that occurred than what Appellant described. However, Detective Morgan explained that Appellant's best bet was to tell the truth about everything and get everything out in the open. Once again, Appellant blamed Victim. Appellant did not admit to any culpability on his part. Appellant stated that he never had "full force vaginal sex with [Victim]." (State's Exh. 3 from Hearing (DVD).)

Around one hour and eight minutes into the second interview, Detective Morgan offered Appellant water. Approximately one hour and twenty-four minutes into the interview, Detective Morgan asked Appellant if he wanted to provide a corrected statement. Appellant stated that he did want to provide a corrected statement, and that he was "not trying to do no 30 or 60 years. . . ." Detective Morgan told Appellant that he was not threatening Appellant with 30 or 60 years. The case he described earlier involved

younger girls. Appellant indicated that he understood and asked what the sentence for what he was charged with carried. Appellant stated that he was "going to get pinned with this anyway." (State's Exh. 3 from Hearing (DVD).)

Before Appellant gave a written statement, approximately one hour and twenty-seven minutes into the second interview, Detective Morgan offered Appellant water, but Appellant refused. Detective Morgan left the room to get himself some water for a few minutes. Detective Morgan brought back Appellant water and asked if he needed anything else. Thereafter, Appellant asked if he would be charged even though he did not initiate any of the sexual activity. Appellant wrote a statement, which blamed Victim for the sexual activity that occurred. Appellant denied any culpability on his part. (State's Exh. 3 from Hearing (DVD).)

Approximately two hours and thirty-five minutes into the second interview, Appellant stated that he had been treated professionally, not coerced or threatened, and was offered breaks. About nine minutes later, Appellant stated that he told the truth because it was the right thing to do not because he was coerced or threatened. Around two hours and fifty-five minutes into the second interview, Appellant took a break for approximately five minutes. (State's Exh. 3 from Hearing (DVD).)

When Appellant returned from the break, Detective Morgan brought up the allegations made by Victim 2. Appellant denied touching or doing anything sexual with Victim 2. (State's Exh. 3 from Hearing (DVD).)

Approximately three hours and ten minutes into the second interview, Detective Morgan reminded Appellant that he cannot offer Appellant a deal. Additionally, Detective Morgan stated that he was not threatening Appellant in any way. Thereafter, Detective Morgan told Appellant that Victim gave a different story. Thus, Detective

Morgan believed there was more sexual activity that occurred than what Appellant admitted. Once again, Detective Morgan reminded Appellant that he needed to be truthful. Around three hours and sixteen minutes into the second interview, Detective Morgan reminded Appellant of the other case that he worked on where the defendant molested six and seven year old girls and received the maximum sentence. However, Detective Morgan told Appellant that he was not saying that would happen to Appellant. (State's Exh. 3 from Hearing (DVD).)

Thereafter, Appellant continued to deny the allegations made by Victim 2. When Detective Morgan tried to end the interview, approximately three hours and eighteen minutes into the second interview, Appellant admitted that he let Victim perform oral sex on him in Victim's bedroom. However, Appellant once again denied the allegations made by Victim 2. Towards the end of the second interview, Appellant denied having sex with Victim; he only admitted to oral sex. (State's Exh. 3 from Hearing (DVD).)

Trial

On November 18, 2012, Appellant proceeded to trial. Before the trial began, the trial judge denied Appellant's motion to suppress Appellant's statements. (Tr. p. 5.)

Testimony of Victim

On one occasion, Appellant forced Victim to the floor and performed digital penetration on Victim. (Tr. p. 53.) Victim told her mother, but Appellant continued to live in the house with Victim. (Tr. pp. 53-54.) On another occasion, Appellant came into Victim's room, pulled her clothes down, and touched her legs. (Tr. pp. 54-55.) Victim told her mother of this occurrence, but Appellant continued coming into Victim's room. (Tr. p. 55.) At one point, Victim started placing a dresser in front of her door and wearing blue jeans to bed so that Appellant could not bother her. (Tr. pp. 55-56.)

In November of 2007, Appellant came into Victim's room while Victim was sleeping and pulled down her clothes. (Tr. p. 56.) Thereafter, Appellant put his penis inside Victim's vagina. (Tr. p. 56.) Victim called her aunt to tell her what happened, and Victim's aunt called the police. (Tr. p. 57.)

Testimony of Brenda Izarra

On November 14, 2007, Izarra interviewed Appellant. (Tr. p. 74.) Izarra was present when Detective Aldredge read Appellant his rights under Miranda. (Tr. p. 74.) Appellant denied the allegations Victim made against him. (Tr. p. 75.) In fact, Appellant grabbed himself on the crotch and said he was not an average sized man. (Tr. p. 79.) Thus, if he had touched Victim, then she would have been "torn up." (Tr. p. 79.)

Testimony of Gina Odom

Victim's mother testified that during the therapy session with Gina Odom, a contract therapist with the Children's Advocacy Center in Spartanburg, Victim denied the sexual abuse by Appellant. However, at trial Odom testified that Victim never recanted the allegations she made against Appellant. (Tr. p. 185.) In fact, according to Odom, Victim disclosed the sexual abuse to her and Victim's mother during the counseling session. (Tr. p. 185.) Further, Odom testified that Victim's mother did not support Victim in this matter. (Tr. p. 185.)

ARGUMENT

I.

The trial judge properly admitted Appellant's statements into evidence after determining Appellant made the statements knowingly and voluntarily under the totality of the circumstances.

Appellant contends the trial judge erred in admitting his statements to law enforcement into evidence. However, viewing the totality of the circumstances, Appellant made the statements knowingly and voluntarily. Detective Morgan did not threaten Appellant or promise Appellant anything in return for a confession. Further, even if this Court were to find that Detective Morgan's comments were a threat or a promise, Appellant's will was not overborne by the comments. Accordingly, as Appellant's will was not overborne and his statements were freely and voluntarily made, the trial court properly admitted Appellant's statements into evidence, and its ruling was fully supported by the evidence. Thus, Appellant's conviction and sentence should be affirmed.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). On appeal, the trial judge's decision as to the voluntariness of a statement will not be reversed unless the ruling was so erroneous it constituted an abuse of discretion. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). "When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance

of the evidence, but simply determines whether the trial court's ruling is supported by **any evidence**." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (emphasis added).

Analysis

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444. Prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, he has a right to an attorney, and an attorney will be appointed to him prior to any questioning if he desires one and cannot afford one. Id. at 479. Once those warnings are given to a suspect and the suspect is afforded an opportunity to exercise his rights, the suspect may knowingly and intelligently waive those rights and make a statement. Id.

However, a confession or statement by a defendant is not admissible unless voluntarily made. State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). If a defendant is advised of his constitutional rights and then chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence that the defendant voluntarily waived his rights. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990). "The process for ascertaining whether a statement is voluntary is bifurcated because the process involves determinations by both the trial judge and the jury." State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008). Pursuant to the bifurcated process, the trial judge must first determine in an evidentiary hearing whether the State proved the statement was voluntarily made by a preponderance of the evidence

and then, if the trial judge finds the State met its burden, the statement is submitted to the jury where its voluntariness must be proven beyond a reasonable doubt. Id.

The critical factor in an evaluation of the voluntariness of a defendant's statements is whether the defendant's will was overborne when he confessed. State v. Von Dohlen, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996); see also Miller v. Fenton, 796 F.2d 598, 604 (3rd Cir. 1986) ("We emphasize that the test for voluntariness is not a but-for test: we do not ask whether the confession would have been made in the absence of the interrogation. Few criminals feel impelled to confess to the police purely of their own accord, without any questioning at all."). "If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." Saltz, 346 S.C. at 136, 551 S.E.2d at 252.

When considering the voluntariness and admissibility of a defendant's statements, the trial judge should examine the totality of the circumstances under which the statements were made, including the characteristics of the accused and the details of the interrogation, to determine whether the State has met its burden of proof. State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980). Factors to be considered in the totality of the circumstances analysis include: (1) the age of the accused; (2) the educational level and intelligence of the accused; (3) the accused's knowledge of his constitutional rights; (4) the length of the accused's detention; (5) the nature of the questioning and whether it was repeated and prolonged; and (6) the presence or absence of the use of punishment, including deprivation of food or sleep. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

Notably, "[t]he mere existence of threats, violence, implied promises, improper influence, or other coercive police activity, however, does not automatically render a

confession involuntary. The proper inquiry 'is whether the defendant's will has been 'overborne' or his 'capacity for self-determination critically impaired.'" United States v. Braxton, 112 F.3d 777, 780 (4th Cir. 1997). Accordingly, a threat or promise in connection with a confession does not render a confession per se involuntary. See Arizona v. Fulminante, 499 U.S. 279, 285 (1991); Rose v. Lee, 252 F.3d 676, 685 (4th Cir. 2001). Instead, courts look at the totality of the circumstances when determining whether or not a confession was unconstitutionally coerced. Lee, 252 F.3d at 685.

In State v. Osborne, our Supreme Court held that the defendant's statements were involuntary and inadmissible because the police threatened the defendant on numerous occasions. State v. Osborne, 301 S.C. 363, 366, 392 S.E.2d 178, 179 (1990). The officers told the defendant that "she would be charged with 'withholding evidence' if she did not make a statement." Id. at 365, 392 S.E.2d at 179. Additionally, the officers told the defendant that her previous statement "did not 'fit the facts' and therefore she must make another statement or face charges for 'withholding evidence.'" Id. The Court noted that the defendant was advised of her right to remain silent but then told she would be charged with a crime if she withheld evidence. Id. at 367, 392 S.E.2d at 180. Because the threats were of such a coercive nature, the defendant's statements were inadmissible. Id. 366, 392 S.E.2d at 179.

In Rochester, our Supreme Court held that the defendant's statement was voluntary and admissible. Rochester, 301 S.C. at 200, 391 S.E.2d at 246. The polygraph examiner told the defendant that he knew the defendant was lying, and "'it would be certainly, probably, in his best interest to tell the truth.'" Id. at 199, 391 S.E.2d at 246. Our Supreme Court reasoned that the polygraph examiner's statement was not a promise

of leniency because the statement was "not on its face an inducement or hope of lighter punishment." Id. at 200-01, 391 S.E.2d at 247.

A. Wolves Comment

In this case, the evidence and testimony presented during trial established Appellant's statements were knowingly and voluntarily made under the totality of the circumstances.

Regarding the circumstances under which the statements were made, the State presented testimony establishing Appellant, who was thirty-eight years old at the time of the interview, was informed of his rights, appeared to understand those rights, waived those rights, and signed a waiver of rights form before he was interviewed by Detective Morgan. Although the interview was rather lengthy, the interview itself was conducted in a non-confrontational manner. Appellant had a break for an hour or two in between the two interviews and was given food. Further, Appellant was offered breaks throughout the course of the interview. Moreover, Appellant's demeanor throughout the video appeared to be calm and relaxed.

Detective Morgan told Appellant numerous times that he was in no way threatening Appellant or promising Appellant anything. In fact, during the interview, Appellant noted that he had not been threatened or promised anything. As for the wolves comment made by Detective Morgan, the comment was more akin to the comment in Rochester. Detective Morgan was merely pointing out that it was in Appellant's best interest to tell the truth.

Further, even if the wolves comment could be construed as some type of threat, Appellant's will was not overborne by the comment. In fact, Appellant did not confess to

the crime immediately after Detective Morgan made the wolves comment. Instead, Appellant blamed Victim for performing oral sex on Appellant while he was sleeping.

Notably, immediately before Detective Morgan made the wolves comment he told Appellant: "James, there has been sexual contact between you and [Victim]. You have been involved in having sex with her. Thus, Appellant's statement regarding Victim performing oral sex on him while he was asleep was most likely the result of Detective Morgan telling Appellant that he knew Appellant was lying, not the wolves comment.

Further supporting the voluntariness of the statement, Appellant responded appropriately to the questions asked of him during the interview, appeared to fully understand the questions being asked of him, and denied committing the alleged acts while blaming Victim for any inappropriate behavior. Cf. State v. Pendergrass, 270 S.C. 1, 8-9, 239 S.E.2d 750, 753 (1977) ("In this case, appellant, a man with a twelfth grade education who had previously served time in jail, signed a written express waiver of his right to counsel. The voluntariness of the waiver can be discerned from the fact that the statement which followed it was self-serving and was an attempt on appellant's part to cast the blame on his co-defendant.").

In addition, Detective Morgan's comment regarding another defendant receiving the maximum sentence was neither a threat nor a promise of a lesser sentence if Appellant confessed. In fact, around thirty-two minutes into the second interview, Detective Morgan reminded Appellant that it was important for Appellant to be completely honest. "I'm not telling you that if you do this then you're going to get this kind of deal . . . I do not have any kind of power at all to make deals." Detective Morgan explained that he was going to tell Appellant about things he had seen in his experience. Detective Morgan stated: "None of this is designed to tell you that you should do this or

you should do that. Those are choices you are going to have to make." Thereafter, Detective Morgan told Appellant that he believed that more sexual activity occurred between Victim and Appellant. (State's Exh. 3 from Hearing (DVD).)

Approximately thirty-nine minutes into the second interview, Detective Morgan told Appellant he "really [does not] believe that [Appellant] would have done these things without [Victim] initiating it. But the fact is there has been a lot more happened between you." Thereafter, Detective Morgan urged Appellant to tell the truth. Approximately forty-one minutes into the second interview, Detective Morgan told Appellant about a defendant who eventually told the truth. That defendant molested children that were six and seven years old and ultimately received the maximum sentence for each child, and the sentences ran consecutively. (State's Exh. 3 from Hearing (DVD).)

Approximately one hour and twenty-four minutes into the interview, Detective Morgan asked Appellant if he wanted to provide a corrected statement. Appellant stated that he did want to provide a corrected statement, and that he was "not trying to do no 30 or 60 years. . . ." Detective Morgan told Appellant that he was not threatening Appellant with 30 or 60 years. The case he described earlier involved younger girls. Moreover, Detective Morgan told Appellant multiple times that he did not have the power to offer Appellant a deal. Thus, Detective Morgan made it clear to Appellant that he was not threatening Appellant with any type of sentence, and he did not have the power to offer Appellant any type of deal. (State's Exh. 3 from Hearing (DVD).)

Interestingly, the only non-self-serving statement Appellant made was when Detective Morgan tried to end the interview, which was hours after Detective Morgan made the wolves comment. Notably, even after Detective Morgan made those comments,

Appellant refused to confess to touching Victim 2 inappropriately. If Appellant's will was so overborne by Detective Morgan's comments, then Appellant would have confessed to touching Victim 2 as well.

Looking to the totality of the circumstances surrounding Appellant's statements, nothing presented during trial suggested Appellant's will was overborne at the time he made the statements. See Von Dohlen, 322 S.C. at 244, 471 S.E.2d at 695 ("The pertinent inquiry is, as always, whether the defendant's will was 'overborne.'"). Instead, the testimony presented by the State along with the actual recording of the interview itself established Appellant's statements were knowingly and voluntarily made after Appellant was informed of and waived his rights.

Therefore, the trial court properly admitted Appellant's statements into evidence after determining the statements were knowingly and voluntarily made, and its ruling was fully supported by the evidence and testimony presented during trial. See Arrowood, 375 S.C. at 369, 652 S.E.2d at 443 ("The trial judge's determination is not in error if there is any evidence in the record to support it."). Accordingly, Appellant's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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February 28, 2014

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RE: State v. James Irby - Appellate Case No. 2012-213028

Dear Mr. Dudek:

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

Sincerely,

Julie Kate Keeney

Julie Kate Keeney
Assistant Attorney General
S.C. Bar # 100145

JKK/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
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THE STATE,

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vs.

JAMES IRBY,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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STATE OF SOUTH CAROLINA

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Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 28th day of February, 2014.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

February 28, 2014

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. James Irby - Appellate Case No. 2012-213028

Dear Mr. Dudek:

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

Sincerely,

Julie Kate Keeney

Julie Kate Keeney
Assistant Attorney General
S.C. Bar # 100145

JKK/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services