STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2013-001036

THE STATE,

Respondent,

v.

KASHAUN BANKS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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The Trial Court correctly determined that Appellant's confession was admissible where the State met its burden of showing the confession was voluntary, and any error is harmless since the confession was not admitted into evidence.

STATEMENT OF THE CASE

On December 12, 2011, the Charleston County Grand Jury indicted Appellant Kashaun Banks on one charge of armed robbery. Appellant confessed to the crime. Tr. p. 65, ll. 5-8. On April 22, 2013, a hearing was held pursuant to Jackson v. Denno to determine the voluntariness of Appellant's confession. The Court ultimately determined that the confession was voluntary. Tr. pp. 139-142, ll, 22-14. Appellant was tried before a jury on April 23 through April 25, 2013, and although the State did not introduce Appellant's confession as evidence in the case, he was convicted as charged. The Honorable Kristi Lea Harrington sentenced Appellant to twelve years imprisonment with the South Carolina Department of Corrections.

ARGUMENT

I.

The Trial Court's ruling of the admissibility of Defendant's confession pursuant to Jackson v. Denno is not appealable because it is not a final ruling and is not preserved for appellate review.

Appellant contends that the trial court erred in ruling his confession was admissible on the grounds that it was not voluntary and that he invoked his right to terminate the custodial interrogation.

It is well established that statements elicited during interrogation are admissible if the prosecution can establish, by a preponderance of the evidence, that the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694 (1966), State v. Washington, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988). In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the United States Supreme Court held that a defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of the statements to the jury. State v. Salisbury, 330 S.C. 250, 271, 498 S.E.2d 655, 666 (1998); State v. Creech, 314 S.C. 76, 84, 441 S.E.2d 635, 638 (Ct. App. 1993).

The process for determining whether a statement is voluntary is bifurcated, and involves determinations by both the trial judge and the jury. State v. Miller, 375 S.C. 370, 381-382, 652 S.E.2d 444, 450 (Ct. App. 2007). Initially, the trial judge must conduct an evidentiary hearing in the absence of the jury, commonly referred to as a Jackson v. Denno hearing. At this phase of the proceedings, the State must show the statement was voluntarily made by a preponderance of

the evidence. Id., 375 S.C. at 382, 652 S.E.2d at 450. "Part of the State's burden during this hearing is to prove that the statement was voluntary and taken in compliance with Miranda." Creech, 314 S.C. at 84, 441 S.E.2d at 639. If the trial court determines the State met its burden, the statement may be submitted to the jury where its voluntariness must be established beyond a reasonable doubt. Id. "Once the trial judge determines that the statement is admissible, it us up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made." Miller, 375 S.C. at 383, 652 S.E.2d at 451.

On April 22, 2013, a Jackson v. Denno hearing was held to determine the admissibility of the Appellant's confession. The trial court ultimately found that the confession was voluntary, and accordingly, admissible. Notwithstanding the admissibility of the confession, the State did not admit the confession as evidence in the case. Appellant now challenges the trial court's ruling of the admissibility of the confession at the pre-trial evidentiary hearing, despite the fact that the confession was not subsequently admitted as evidence in the case, and accordingly, had no bearing on the verdict rendered. Moreover, the trial court's ruling in a Jackson v. Denno hearing is not final, and therefore, not appealable.

The purpose of the Jackson v. Denno hearing, like any motion *in limine,* is to prevent disclosure of potentially prejudicial matter to the jury. State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See Id. "[M]aking a motion *in limine* to exclude evidence at the beginning of a trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." State v. Moses, 390 S.C. 502, 511, 702 S.E. 2d 395, 400 (Ct. App 2010), quoting State v. Forrester, 343 S.C. 637, 642, 541

S.E.2d 837, 840 (2001). A pre-trial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Smith, 337 S.C 27, 32, 522 S.E.2d 598, 600 (1999).

Here, based upon developments at trial, the State elected to not present Appellant's confession as evidence. Accordingly, there is no final ruling on the admissibility of the confession, and the pre-trail ruling on the admissibility of Appellant's confession is not preserved for appellate review. Moreover, Appellant effectively received the relief he sought in the Jackson v. Denno hearing; the confession was not presented to the jury. There is no issue for the appellate court to decide where, as here, a defendant receives the relief requested. State v. Parris, 387, S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010).

II.

The Trial Court correctly determined that Appellant's confession was admissible where the State met its burden of showing the confession was voluntary, and any error is harmless since the confession was not admitted into evidence.

Appellant argues the trial court abused its discretion in ruling his confession admissible because he: (1) was a minor; (2) had a tenth grade education and suffered from learning disabilities; (3) his mother was not present, and his request to call his "sister[1]" was refused; (4) was induced by misrepresentations regarding Appellant's future ability to join the military; and (5) he invoked his right to remain silent. Appellant's arguments are without merit, as the record in this case is replete with evidence supporting the trial court's determination that Appellant's confession was voluntary and admissible.

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (Ct. App. 1998). "In criminal cases, appellate courts are bound by the fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008). "When reviewing a trial court's ruling concerning voluntariness, this 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." Id., quoting State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

[1] Appellant testified that although he requested to call his sister, his intention and desire was to contact his fiancé. Tr. P. 118, ll.16-22.

"In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." Moses, 390 S.C. at 512, 702 S.E.2d at 400. "The main purpose of Miranda is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." Id. "In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." Id., 390 S.C. at 513, 702 S.E. 2d at 401. Our courts have considered the following factors in analyzing the totality of the circumstances surrounding a confession: "background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice of the accused of his constitutional rights; threats of violence; direct or indirect promise, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as deprivation of food or sleep." Id., 390 S.C. at 513-514, 702 S.E. 2d at 401. This list is not exclusive, nor is any single factor dispositive; "each case requires careful scrutiny of all surrounding circumstances." Id.

It is well established that both minors and juveniles have the capacity to make voluntary confessions, even of capital offenses, without the presence or consent of counsel or other responsible adult. In re Williams, 265 S.C. 295, 300, 217 S.E.2d 719, 722 (1979). Minors have the capacity to make voluntary confessions "without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on

a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." Jenkins v. State, 265 S.C. 295, 300, 217 S.E.2d 719, 722 (1975). The heart of the inquiry is "the ability or capacity to comprehend the meaning and effect of the waiver or statement." In re Williams, 265 S.C. at 300, 217 S.E.2d at 722. "Courts generally do not find a juvenile's confession involuntary where there is no evidence of extended intimidating questioning or some other form of coercion." State v. Parker, 381 S.C. 68, 88, 671 S.E.2d 619, 629 (Ct. App. 2008).

Appellant's age, learning disability, tenth grade education, and absence of a parent do not undermine the voluntariness of his confession, where an analysis of the totality of the circumstances indicates that Appellant understood his rights and the meaning and effect of his statement, and where there is no evidence of prolonged detention, lengthy interrogation, deprivation of sleep or food, or otherwise coercive or improper police conduct. In fact, the record in this case reflects that law enforcement undertook conscientious efforts to ensure that Appellant understood his rights. Lieutenant Hill read to the Appellant each section of the Miranda warnings from the waiver form, after which Appellant initialed each section indicating his understanding. Tr. p. 60, ll. 9-25. Officer Hill further testified that at no time did Appellant ever indicate any difficulties in understanding his rights, nor did he appear to have any such difficulties. Appellant himself testified that he understood that he did not have to say anything without an attorney present, and had a cognizant exchange with Lieutenant Hill. Tr. p. 120, ll. 22-24; p. 124, ll. 14-18. Additionally, Appellant admitted to previous arrests, and accordingly, had some familiarity with arrest process. Tr. p. 111, ll. 16-19. And, while a "juvenile's request for a parent may be considered when determining the voluntariness of his confession," it is notable that at age 17, Appellant was not a juvenile, and made no request to speak with a parent.

State v. Register, 323 S.C. 471, 477, 476 S.E.2d, 133, 157 (1996). Here, the record supports the trial court's determination that Appellant understood his rights and knowingly, freely, and voluntarily waved those rights. Indeed, the trial court specifically noted that the Appellant demonstrated an understanding of his rights by engaging in an intelligent discussion with Lieutenant Hill, in which Appellant pointed out that he should have been Mirandized upon his arrest. Tr. p. 140, ll. 4-16.

The trial court had the opportunity not only to hear the audio recording of the exchange between Appellant and Lieutenant Hill, but also to observe Mr. Banks' demeanor while testifying. After the Denno hearing, the trial court opined: "I have listened to the actual audio of the interview, and I have observed Mr. Banks. I have listened to the testimony by Mr. Banks, one of the most articulate individuals and appropriate individuals that I've seen in a while in my courtroom." Tr. pp. 139-140, ll. 24-4. In denying the motion to suppress the confession, trial court "considered the age of Mr. Banks, his lack of education or his intelligence," and found that

> his demeanor here and on the audio were impeccable. He answered and was articulate with the Sergeant and the Detective and corrected him when he needed to be corrected. There seemed to be a lot of back-and-fourth banter between the two. He was given his constitutional rights. He indicated that he knew he was entitled to be given them. It was a relatively short interview.
>
> Tr. p. 142, ll. 2-11.

Next, Appellant argues that his confession was induced by a police misrepresentation regarding his future ability to join the military. Appellant argues that Lieutenant Hill told Appellant he would not be able to join the military if he did not confess to the armed robbery. Appellant misrepresents Lieutenant Hill's testimony. In fact, Lieutenant Hill testified that he told Appellant that it was unlikely that he would be able to join the military with a robbery conviction. Tr. pp. 67-68, ll. 22-3. On cross examination, Lieutenant Hill was asked "if he told

the truth about robbing an Exxon, how would he get into the military?" Tr. p. 85, ll. 15-16. Lieutenant Hill responded that "I can't tell you that he would or he wouldn't, and I never told him that he would or wouldn't. I told him he wouldn't get into the military if he had a robbery conviction." Tr. p. 85, ll. 17-20. Officer Hill explained that the statement was intended to encourage Appellant to be truthful. Tr, p. 68, ll. 4-14.

"Coercive police activity is a necessary predicate to finding a statement is not voluntary." State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). "Sufficiently coercive conduct normally involves subjecting the accused to an exhaustingly long interrogation, the application of physical force or the threat to do so, or the making of a promise that induces confession...Isolated incidents of police deception...and discussions of realistic penalties for cooperative and non-cooperative [behavior]...are normally insufficient to preclude free choice." Parker, 381 S.C. at 91, 671 S.E.2d at 630-631, quoting United States v. Mendoza-Cecelia, 963 F.2d 1467, 1475 (11th Cir 1992) *abrogated on other grounds*. "A statement 'induced by a promise of leniency is involuntary only is so connected with the inducement as to be a consequence of the promise.'" Id., quoting State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005). A statement simply conveying that it would be in the defendant's best interest to tell the truth is not a promise of leniency. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990).

In this case, there is absolutely no evidence of a long interrogation, physical force, or the threats of physical force as is required to render a confession involuntary. Moreover, Lieutenant Hill's statement was a truthful one; the court acknowledged that "it's very common knowledge that a felony conviction makes it very difficult, if not impossible to get into the military." Tr. p. 141, ll. 16-18. The court correctly found that the statement was not a promise of leniency in

exchange for a confession, but merely a statement of realistic consequences of an armed robbery conviction, conveying that it would be in the Appellant's best interest to tell the truth. Tr. pp. 141-142, ll. 10-1.

Next, Appellant argues that he invoked his right to remain silent by saying "[t]hat's my final word." The right to remain silent must be invoked unambiguously. "A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that avoid[s] difficulties of proof and...provide[s] guidance to officers on how to proceed in the face of ambiguity. Otherwise, if an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'" Moses, 390 S.C. at 512, 702 S.E.2d at 400, quoting Berghuis v. Thompkins, 560 U.S. 370, 130 S.Ct. 2250, 2261, 176 L.Ed.2d 1098 (2010).

Lieutenant Hill testified that in the course of the interview, he asked Appellant, "did you go to the Exxon and point the BB gun at those clerks," and that Appellant answered "[n]o, sir." Tr. p. 68, ll. 17-19. Lieutenant Hill then asked if that was his "final word," to which Appellant responded "[t]hat's my final word." Tr. p. 68, ll. 20-21. Lieutenant Hill testified that in the context of the conversation, he interpreted Appellant's saying "[t]hats my final word" as an indication that he was not going to change his response or offer any additional information in response to that particular question. Tr. Pp. 68-69, ll. 22-4.

The South Carolina Supreme Court addressed a strikingly similar situation in State v. Aleskey, 343 S.C. 20, 538 S.E.2d 248 (2000), and found that the statement "that's all I've got to say" was not an unequivocal invocation of the right to discontinue questioning. The court

reasoned that the statement was ambiguous, and could have indicated a desire to end questioning, but could just have easily been interpreted as a statement that he had finished his explanation of the matter. Aleskey, 342 S.C. at 31, 538 S.E.2d at 253-254. Appellant argues that Aleksey is distinguishable because the court "relied heavily" on the fact that after the alleged invocation of the right to discontinue questioning, Aleskey reinitiated communication with the police. Appellant's argument is misplaced. In fact, the Court does not discuss Aleskey's reinitiating conversation with police in connection with the holding of case, but only in dicta noting that even if the statement were interpreted as an unequivocal invocation of the right to remain silent, Aleskey would have waived the right by initiating further discussions. The court noted that "even if the statement is interpreted to be an invocation of appellant's right to remain silent, it is uncontroverted that appellant himself reinitiated conversation with the agents after the tape recorder." Id. It is well established that dicta is not the court's decision, and is not binding authority. Nash v. Tindall Corp. 375 SC 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007).

The trial court analyzed the voluntariness of Appellant's statements in compliance with due process requirements, based upon factual findings supported by evidence presented at the Jackson v. Denno hearing, and correctly determined that Appellant's will was not overborne, and that he confession was knowingly, intelligibly, and voluntarily made. Accordingly, there is no abuse of discretion and the conviction and sentence should be affirmed.

Furthermore, any error in the determination of admissibility would be harmless. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). Indeed, an error even of a

constitutional magnitude may be harmless if, considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt the error complained of did not contribute to the verdict obtained. State v. Creech, 314 S.C. 76, 86, 441 S.E.2d 635, 640 (Ct. App. 1993), citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Here, there can be no argument that Appellant was prejudiced by the court's ruling, and indeed, Appellant does not raise any such argument. Thus, the trial court's error in ruling the confession voluntary, if any, was harmless in that the allegedly prejudicial material was not presented to the jury, and accordingly had no bearing on the verdict[2].

[2] *See* McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[Whatever doesn't make any difference, doesn't matter.").

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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March 14, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2013-001036

THE STATE,

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Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the same Designation of Matter to be Included in the Record on Appeal as Appellant.

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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March 14, 2014

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STATE OF SOUTH CAROLINA

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Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2013-001036

THE STATE,

Respondent,

v.

Kashaun Banks,

Appellant.

PROOF OF SERVICE

I, Ellen 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:

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1508 Washington Street
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Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 14th day of March, 2014.

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RE: State v. Kashaun Banks
Appellate Case No. 2013-001036

Dear Counsel:

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

Sincerely,

Kristin Simons

Kristin M. Simons
Assistant Attorney General
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KMS/erd
Enclosures

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