(9)

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2011-201486

THE STATE

RESPONDENT,

V.

DERELL GREEN,

APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6307

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
OT Wallace Building
101 Meeting Street, Suite 400
Charleston, South Carolina 29401

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2011-201486

THE STATE

RESPONDENT,

V.

DERELL GREEN,

APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6307

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
OT Wallace Building
101 Meeting Street, Suite 400
Charleston, South Carolina 29401

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to suppress appellant's coerced inculpatory statement to the police since appellant was a fourteen-years-old youth with Attention Deficit Hyperactivity Disorder who was in special education classes, and he was handcuffed to a chair for hours, and left handcuffed alone in a small room for at least an hour and a half where an investigator admitted appellant's demeanor showed he was overwhelmed after the police did not believe his first statement?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in admitting Appellant's two statements when Appellant was advised of his Miranda rights, there was no evidence that he did not understand those rights, the record supported the trial court's conclusions that the statements were given voluntarily, and even if there was error in admitting the statements, any such error would have been harmless because of the overwhelming evidence of guilt presented at Appellant's trial?

STATEMENT OF THE CASE

Appellant Derell Green, who was fourteen years old at the time of the shooting, was initially charged in the Family Court in Charleston County. The State filed a waiver petition to have Appellant's murder charge transferred to the Court of General Sessions. After a hearing held before the Honorable Judy L. McMahon, Family Court Judge on August 25-26, 2010, jurisdiction was transferred from the Family Court to the Court of General Sessions for the murder charge Appellant faced. At that hearing, Appellant was represented by Megan Ehrlich, Esquire, and David Haselden, Esquire. The State was represented by Assistant Solicitor Anne B. Seymour, Esquire, of the Ninth Judicial Circuit. Judge McMahon ordered jurisdiction be transferred on September 1, 2010.

Appellant filed a motion to reconsider the transfer of jurisdiction on September 1, 2010. That motion was heard by Judge McMahon on October 21, 2010. It was also denied.

On August 22-25, 2011, Appellant was tried by a jury for the murder of Larry Maybank. Appellant was tried in the Charleston County Court of General Sessions before the Honorable J.C. Nicholson, Jr., Circuit Court Judge. Megan Ehrlich, Esquire, and Lorelle Proctor, both Assistant Public Defenders for the Ninth Judicial Circuit, represented Appellant. The State was represented by Douglas Bruce Durant, Esquire and Jennifer K. Shealy, Esquire, both Assistant Solicitors for the Ninth Judicial Circuit. On August 25, 2011, Appellant was

convicted of murder. (R. p. 630). On September 1, 2011, Appellant was sentenced to forty years confinement for the murder conviction.

Before this Court is Appellant's direct appeal of his murder conviction. He requests this Court reverse his conviction and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his conviction.

STATEMENT OF FACTS

On February 5, 2010, Appellant Darrell Green shot the victim, Larry Maybank twice, killing him. One of the gunshot wounds was to the hip, and was not life threatening. (R. p. 565). The fatal shot went into the victim's body through his right back near the armpit area. (R. p. 565). The bullet went through his body, going through a rib in the back on the right, through the right lung and through a number of great vessels, further through the heart and trachea, continuing between the collar bone and first rib. Id. The bullet stopped in the pectoralis muscle in the front of the chest. Id. The victim died from that gunshot wound because he bled out. (R. p. 575).

Appellant and the Victim Attended the Same School

On the morning of the shooting, both Appellant and the victim attended the same school in North Charleston. Appellant was a regular student at the school, and the victim was at the school as part of a program for students who attended other schools in the school district. (R. pp. 216-17). The students in the program did not interact with the general student body at the school; they were segregated during the school day. (R. p. 218). On February 5, 2010, both the general student body and the students in the program were dismissed from school at approximately 12:30 p.m. (R. p. 219).

The Morning of the Shooting

Jacquintas Washington, another student in the same program as the victim at the school, was friends with the victim. (R. pp. 238, 239). Jacquintas

testified that after school, he and the victim walked to the bus together because they rode the same bus. (R. p. 243).

Rashawn testified that he ran into Appellant on the way to school that morning, and he walked with Appellant to school. (R. pp. 288-89). Rashawn noted that all students were required to go through metal detectors at the school. (R. p. 289). He did not know if Appellant went through the metal detectors that morning. (R. p. 289).

Antonio, another student at the school, testified he knew both Appellant and the victim. (R. pp. 317-18). Antonio was friends with Appellant, who was a few years older than him. (R. p. 318). He also knew Daqone by his nickname. (R. pp. 318-19). He knew Daqone did not go to the same school. (R. p. 319). Antonio did see Appellant on the morning of the shooting, and he saw him go through the metal detectors. (R. p. 321). Shalaine J., another student at the school, gave a statement to police in which she said Appellant had shown her a gun on the way to school that morning. (R. pp. 655-56). .

After School

Jacquintas testified he remembered passing a group of four people as they left school. (R. p. 243). One of those individuals was Appellant, but he didn't know the others. He knew them from seeing them at school. He also noted that Appellant was wearing a camouflage jacket and khaki pants, and another in the group was wearing all black. (R. pp. 244-45). Jacquintas also testified that there was no interaction between the victim and the group of four. (R. pp. 245-46).

Rashawn testified that they got out of school sometime between 12 and 12:30 that afternoon. (R. p. 290). When he went outside, he saw Daqone, who was wearing all black clothing. (R. p. 290). Rashawn noted that Appellant was wearing the same thing as Rashawn was wearing, except Appellant was also wearing a green jacket. (R. pp. 291-92). Rashawn also noted that Antonio showed up by the group. (R. p. 292). As all four were standing together, Rashawn saw the victim and someone else walk past them. (R. p. 292). He noted that he did not hear anyone say anything to the two, and he saw no interaction between the two groups. (R. pp. 292-94). Their group of four eventually started walking in the same direction as the victim and his friend. (R. p. 294).

Antonio indicated that after school, he saw the victim and his friend walk by Antonio, Rashawn, Appellant, and Daqone. (R. p. 323). Antonio also stated that he saw no interaction between his group and the victim.[1] (R. pp. 323-24). According to Antonio, Appellant was wearing a camouflage jacket, and Daqone was wearing a black shirt and black pants. (R. pp. 325-26).

After the victim and his friend walked past the group, Antonio stated that his group started walking in the same direction. (R. p. 329).

The Shooting

When the victim was shot, Jacquintas indicated that he saw Appellant following them. (R. pp. 247-48). He noted that the three other guys were further back and were closer to the school. (R. pp. 248-49). Jaquintas testified that he

[1] In his statement to Detective Kramitz, Antonio indicated that there was some "mean mugging" between the two groups. (R. pp. 328-29).

knew Appellant was the one who shot the victim because when he turned around, he saw Appellant shooting at the victim. (R. pp. 249-50, 272). He was not sure how many times Appellant shot the gun; he knew it was definitely more than once and it may have been three times. (R. p. 250).

Rashawn testified he saw Daqone pass Appellant something, but he was not able to identify what was passed between the two. (R. p. 294). Rashawn asked Daqone what he brought, and Daqone said nothing. (R. p. 294). Rashawn stopped, and Daqone told Rashawn and Antonio to back up. (R. pp. 295-96). The two backed up and headed back in the direction of the school. (R. p. 295). Rashawn testified that he saw Appellant pull out the gun. (R. p. 296). Appellant shot once, and then Rashawn ran. (R. p. 296). Rashawn noted that he had fired the shot at the victim. (R. p. 296). He heard other shots. (R. p. 296).

Antonio noted that Appellant and Daqone pulled away from the other two, and Antonio believed they were going to fight with the victim and his friend. (R. pp. 329-31). Antonio testified that while they were standing there, he heard gunshots. He saw Appellant pull out the gun and start shooting. (R. p. 331). Specifically, Appellant was shooting at the victim, who at that time was near the laundromat. (R. p. 332). In his statement to police, Antonio had indicated that Daqone gave Appellant the gun.[2] (R. p. 333).

[2] Antonio later testified that he believed Daqone was the one who gave Appellant the gun because he knew that neither he nor Appellant nor Rashawn could have taken the gun to school. (R. p. 348). Antonio also stated that he never actually saw the gun. (R. p. 348).

After the Shooting

Afterwards, Jaquintas saw Appellant run to the opposite side of Bonds Avenue, and he saw him run cross the street. (R. p. 251). Jacquintas was also able to identify Appellant in a photo lineup, and he was able to describe to law enforcement where Appellant lived. (R. pp. 259-262, 278-79).

Rashawn noted that after the shooting, he ran back by the school, and then ran to his grandmother's house. (R. p. 296). Antonio also indicated that he ran home after the shooting. (R. pp. 334-35).

Vadrein Simmons, who was picking up her son from the school as it got out around 12:30, testified that on the day of the shooting, she saw two guys walking ahead of another group of three. (R. pp. 357-60). She indicated that one guy ran in front of her car, and she almost hit him. (R. p. 360). She saw a gun in the guy's hand, and he was wearing a camouflage jacket. (R. pp. 360, 361, 373, 374). Simmons testified that she saw him shoot towards the bushes with the gun, but she did not see anyone else until she drove up the road. (R. p. 361). When she pulled up, she saw the victim laying on the ground. (R. p. 362).

Kaylyn Heyward, who was transporting a car to the school's parking lot around the time of the shooting, testified that she saw two boys running as she was driving towards the school. (R. pp. 381-83). One was heavy-set and was wearing a white shirt and khaki pants. The other was wearing a shirt, khaki pants, and a camouflage jacket. (R. pp. 382, 384). She noted the one with the camouflage jacket ran in front of the car she was driving, and she saw he had a gun in his hand. (R. pp. 382-83).

Discoveries Made during the Police Investigation

A SLED expert in firearms and tool mark identification determined that the projectile that killed the victim was fired by either a .38 or .357 magnum firearm. (R. p. 555). He noted that approximately 18 different types of firearms could have fired the projectile, and all but one of those types were revolvers. (R. pp. 557-58). No shell casings or projectiles were found at the scene. (R. pp. 408-09).

After the shooting, law enforcement was informed of Appellant's address. Detective Alan Kramitz and Sergeant Reynolds, another detective on the case, both responded to Appellant's home. (R. pp. 427-28). Kramitz indicated that two other detectives met them at Appellant's address, and the North Charleston Police Department's high-risk warrant service team had also responded to that location. (R. p. 430). Initially, law enforcement got no response from anyone when they knocked on the door of the residence. (R. pp. 430-31). Appellant's father and mother eventually arrived at the residence, and they allowed Detective Kramitz and Detective Reynolds into the home. (R. p. 431). Appellant and Daqone were in the residence, sitting on a couch in front of a TV in the living room. (R. p. 434). Kramitz testified that he informed Appellant's father that Appellant was a suspect in a shooting, and they would be taking him into custody. (R. pp. 431, 434).

Appellant gave two statements to law enforcement. In his first statement, which began around 3:55 p.m., Appellant denied any involvement in the shooting. (R. pp. 451-455). He stated that he did not have a gun that day, or

that he fired a gun that day. (R. p. 454). In his second statement, which began around 7:45 p.m., Appellant admitted that his first statement was not truthful. (R. p. 463). In the statement, Appellant indicated that he had been jumped by the victim and some others a few weeks prior to the shooting. (R. p. 463). Appellant saw the victim after school. (R. p. 464). He noted that the victim had been mean mugging him. (R. p. 464). Appellant stated that he went and got a gun that he had hidden in an abandoned house. (R. p. 465). He described the gun as being a .38 revolver. (R. pp. 465, 466). Appellant told Detective Kramitz that he walked up behind the victim and started shooting. (R. p. 465). He indicated that he did not know how many times he fired the gun, but he thought it may have been four or five times. (R. p. 465). After the shooting, Appellant ran home. (R. p. 465). Appellant stated that he threw the gun into a vacant lot as he ran. (R. p. 466).

Law enforcement was unable to recover the firearm or the camouflage jacket that Appellant wore on the day of the shooting. (R. pp. 468-69).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE APPELLANT'S STATEMENTS AT TRIAL. APPELLANT WAS READ HIS MIRANDA WARNINGS AND SUBSEQUENTLY WAIVED THEM; THE TOTALITY OF THE CIRCUMSTANCES SUPPORTED THE TRIAL COURT'S DETERMINATION THAT THE WAIVER WAS VOLUNTARY.

Standard of Review

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct.App.2007) (citing State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977)). "If admitted, the jury determines whether the statement was freely and voluntarily given beyond a reasonable doubt." Arrowood, 375 S.C. at 365, 652 S.E.2d at 441.

> The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the giving of a confession. Dickerson v. U.S., 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). When considering the voluntariness of a statement, the court and jury should consider "not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (omitting internal citations). Misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible. Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). "Coercion is determined from the perspective of the suspect." [State v.] Miller, 375 S.C. [370,] 386, 652 S.E.2d [444,] 452 [(Ct.App.2007)].

State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "A statement may be held involuntary if induced by threats or violence, or if obtained by any direct or implied promises, or if obtained by the exertion of improper

influence." State v. Register, 323 S.C. 471, 478, 476 S.E.2d 153, 158 (1996) (citing State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)).

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. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996); Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct.App.1999). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Arrowood, 375 S.C. at 366, 652 S.E.2d at 442; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct.App.2005). Accordingly, the appellate courts are "bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law." Reed, 333 S.C. at 685, 511 S.E.2d at 401 (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Testimony and Argument at Jackson v. Denno Hearing

At the hearing, Detective Kramitz testified that he explained to Appellant's parents that Appellant and Daqone would have to go to the North Charleston Police Department due to allegations regarding a shooting they were

investigating. (R. p. 22). Kramitz further indicated that he asked both Appellant's mother and father to come to the precinct with him, and both refused. (R. p. 22). Kramitz also stated that he offered to give Appellant's parents a ride to the police station, and both declined. (R. p. 23). Kramitz also indicated that he explained why he was handcuffing both Appellant and Daqone.

Appellant was taken to an interview room in the Detective's Division at the North Charleston Police Department. (R. p. 23). The room was described as having one table and two chairs. (R. p. 23).

Kramitz described the process he utilized in advising Appellant of his constitutional rights. (R. pp. 25-27). Kramitz indicated he explained the rights to Appellant in the way he did because Appellant was fourteen. (R. p. 27). Kramitz noted that Appellant did not appear to be confused at all, and Appellant did not request any further explanation. (R. p. 27). Kramitz also testified that Appellant did not appear to be under the influence of alcohol or any intoxicants, and it appeared Appellant understood what Kramitz was saying. (R. pp. 27-28). Kramitz further testified that he had no problems understanding Appellant, and nothing in Appellant's conduct reflected that he did not understand Kramitz's explanations. (R. p. 28).

Kramitz further testified that he wrote the statement for Appellant. (R. p. 30). In taking the statement, Kramitz would first write down the question; he would then ask Appellant the question and would subsequently write down Appellant's response. (R. p. 30). Kramitz indicated that he did not promise Appellant anything, did not threaten him in any way, and did not threaten

Appellant's family. (R. p. 30). He did not inform Appellant that things would go easier on Appellant if he just talked. (R. p. 30). Kramitz noted that he always tells people he interviews to tell the truth. (R. p. 31). After the statement was completed, Kramitz read it back to Appellant, offered Appellant a chance to read the statement, and asked Appellant if the statement reflected what happened. (R. p. 31). After that, Appellant signed each page, and Kramitz signed as a witness. (R. p. 31). Kramitz noted that Appellant essentially denied any involvement in the shooting in the first statement. (See R. p. 32).

Kramitz estimated the first interview took approximately one and one-half hours to complete. (R. p. 32). He noted that Appellant was left alone in the interview room afterwards. Kramitz would check in on Appellant periodically to see if he needed a bathroom break, needed something to eat, or needed something to drink. (R. p. 33). Kramitz also noted that Captain Sturkie and Detective Miller went in to talk to Appellant around 7p.m. (R. pp. 34-36).

Captain Sturkie agreed that he and Detective Miller entered the interview room around 7p.m. (R. p. 57). Sturkie was already aware that Appellant had been Mirandized. (R. p. 58). Sturkie testified that Appellant was very calm, and seemed to be collected and understood what was going on. (R. p. 58). Sturkie also noted that Appellant did not appear to be intoxicated or under the influence of anything. (R. p. 58). Sturkie testified that Appellant did not appear to be confused, and it appeared Appellant was able to understand what Sturkie said to him and vice-versa. (R. p. 59). He described the conversation they had as lasting approximately twenty to twenty-five minutes. (R. p. 59). Sturkie also

indicated that it appeared to him that Appellant wanted to tell them what really happened.[3] (R. p. 59).

Sturkie indicated that he was sitting beside Appellant, he placed his hand on Appellant's shoulder in a fatherly type way, and he encouraged Appellant to tell the truth. (R. pp. 59-60, 69). After that, Appellant told the two detectives about an altercation he had with the victim several weeks before the shooting in which the victim had allegedly stolen a gold chain from Appellant. (R. p. 61). Appellant also told them about the confrontation that led to the shooting. (R. p. 61).

Sturkie testified that he did not promise Appellant anything for his statement. (R. p. 63). He did not threaten Appellant, did not offer leniency, and did not threaten Appellant's family. (R. p. 63). Appellant never invoked his right to remain silent, and Appellant never asked for an attorney or for his mother. (R. p. 63). Sturkie also noted that after he and Miller talked with Appellant, they informed Kramitz that Appellant was ready to talk. (R. p. 61). Kramitz subsequently went back into the interview room and took a second written statement from Appellant. (R. pp. 62, 36).

Detective Miller testified that he and Sturkie did go into the interview room around 7 p.m. (R. p. 71). He noted that Sturkie did more of the talking, but Miller talked with Appellant about being forthcoming and telling the truth. (R. p. 71). Miller also indicated that he basically informed Appellant they knew he was not

[3] During cross-examination, Sturkie specifically indicated that Appellant's lip was quivering, and he saw that as a physical sign that Appellant wanted to tell the truth. (R. p. 67).

telling them the truth, and that they knew what really happened. (R. p. 71). Miller testified that they made no promises to Appellant, they offered no leniency, and they did not tell him that everything would be okay if he just told the truth. (R. p. 72). Miller also testified that nothing about his demeanor indicated that Appellant did not know what was going on. (R. p. 72). Appellant never said he did not want to answer questions, and he did not request a lawyer or his mother. (R. p. 72). Miller confirmed Sturkie's testimony about putting his hand on Appellant's shoulder to comfort Appellant, and Appellant started confessing to what he did afterwards. (R. pp. 73, 76). Miller noted that when Appellant started confessing, Miller went to find Kramitz. (R. p. 73). Miller also indicated that he and Sturkie were in the interview room for maybe one-half an hour. (R. p. 74).

Kramitz testified that after he was informed by Sturkie that Appellant wanted to change his statement, Kramitz re-entered the interview room and took another statement from Appellant. (R. p. 36). He conducted the interview in the same way as the first interview. (R. p. 36). The interview started at 7:45 p.m. (R. p. 37). Kramitz testified that he made no threats or promises; he offered no reward, and he offered no promise of leniency in exchange for the statement. (R. p. 38). Kramitz indicated he did nothing to overbear Appellant's will. (R. p. 38). Kramitz testified that the statement took approximately one hour to complete. (R. p. 38). Kramitz testified,

> My first question I asked him was was he truthful and the first thing he said was no, he wasn't.
>
> I asked him to explain what happened and he said he had been involved in a fight with the victim about a month before this incident happened. He went to – he called him by Little T,

> something about a gold chain was stolen from Derell G[redacted]. He said that when he got out of school, Derell and the victim saw each other in the courtyard and they called it "mean mugging" when they give each other scary looks back and forth. He explained that to me.
>
> He said that he had the gun hidden in the house across the street from the school, an abandoned house, and he shot him several times; that the gun was loaded, it was a revolver, a .38 caliber that had five bullets in it, and he said he shot four or five times and then he ran down the street and went home. He jumped some fences.
>
> He told me he had the gun for about a year.

(R. pp. 38, l 22 – 39, l 14).

The defense also presented four witnesses at the Jackson v. Denno hearing. Carol Fila, who oversaw programming and compliance issues for special education classrooms and teachers for the Charleston County School District, testified Appellant was retained in the first grade, and at the time of his arrest, he had an individualized education program because of a learning disability. (R. pp. 84-86). He was receiving pull-out resource services, and his plan called for reading, math, written expression transition, math, written expression, literature, and behavior. (R. pp. 86-87). She also noted that he had been assigned to a day treatment program at MUSC, and the reason for the placement was because of a diagnosis for Oppositional Defiant Disorder. (R. pp. 87-88). During cross-examination, Fila acknowledged that Appellant had an A in English/Language Arts. (R. pp. 90-91). She was unaware that his language scores were historically and consistently average. (R. p. 91). She also indicated that he was discharged from the day program at MUSC because he was violating his plan and he had a negative influence on his peers' behavior. (R. p. 94).

Further, she admitted that in the records regarding his transfer, it was indicated that Appellant was "very capable of doing work at grade level, although he was failing his classes." (R. p. 96, ll 22-4). The records also noted that Appellant did not seem concerned about the consequences of his action, and there was no relationship between his disability and behavior. (R. p. 97). Fila also acknowledged that his previous psychological testing indicated he fell within the average range of intelligence. (R. p. 97).

Appellant's probation officer testified about her involvement in an evaluation of Appellant for the family court waiver proceedings. (R. pp. 99-101). The probation officer indicated that it appeared Appellant did not understand the waiver evaluation form after it was explained to him, and Appellant could not explain the terms of the form when asked. (R. pp. 101-02). The officer did note that she did not know if Appellant understood or not. (R. p. 106). She also acknowledged that she could not tell what his mental state was on the day of the shooting and interview with law enforcement, and she could not tell what he understood or did not understand at that time. (R. p. 108).

Appellant's mother disputed Detective Kramitz's assertion that she and her husband were asked if they would like to go to the station with Appellant. (R. pp. 112, 114). She asserted that they asked if they could go along with Appellant, and the officers said no. (R. p. 112). Further, she testified that she called twice, but no one returned her call. (R. p. 113). Appellant's mother indicated she and Appellant understand one another when they communicate, and his difficulties in school related to his behavior. (R. pp. 115-16). She also

testified that Appellant liked school and liked learning. (R. p. 116). She also noted that Appellant did not have a problem understanding English, and he would ask questions if he did not understand. (R. p. 117).

Appellant testified that he was fourteen and in the eighth grade when he was arrested. (R. p. 119). He indicated that he got special help at school, and at the time of his arrest, he was on medication called Concerta. (R. pp. 119-20). Appellant did not recall what the medication treated. (R. p. 120). Appellant also stated that he was going to counseling, and he thought it may have been to help with his behavior. (R. p. 120). He asserted that he had never been arrested before this incident, although he also acknowledged that he had faced juvenile charges before. (R. p. 123). Appellant indicated he had never been interviewed by police before his arrest in this case. (R. p. 123).

Appellant claimed that the police did not tell him why he was under arrest at his parents' house, and they did not inform him that he did not have to talk or that he could get a lawyer. (R. p. 125). Appellant also discussed going to the interview room at the police station. (R. p. 126). He noted that Detective Kramitz read him the rights paper and asked Appellant to sign it. (R. pp. 127-28). Appellant stated that he did not read the form, and he did not think Kramitz asked him if he understood the statements on the Miranda form. (R. p. 128). Appellant testified that he did not understand the form, but he did sign it because he was told to sign it. (R. p. 128). Appellant noted that during the first statement, Kramitz did not threaten him in any way, and Appellant acknowledged that he denied shooting anyone in the first statement. (R. p. 129).

Appellant asserted that he did not read the first statement before signing it, and he signed it because he was told to do so. (R. p. 130). Appellant recalled talking with two other people after the first statement, and he claimed they told him they knew did it, and that they had people behind the glass pointing at him as being the shooter. (R. p. 130). Appellant also alleged that the two told him that he would never say daylight unless he told the truth. (R. p. 130). Appellant further asserted that the two told him that if he told the truth, it could help him in court. (R. p. 131). At that point, he told them he did the shooting. (R. p. 131).

During cross-examination, Appellant acknowledged that he knew he did not have to talk to law enforcement, yet he did. (R. p. 139). He also admitted that he was read the rights form. (R. p. 141). He also testified that he did not review the first statement after it was given, and he did not believe he had seen it since giving the statement. (R. pp. 142-44). He admitted his signature was on all of the pages of that statement, and he did not deny that the statement as written was what he told Kramitz. (R. p. 144).

Appellant also confirmed that he was in the interview room by himself for a while after the first statement, and that people checked on him and asked if he needed to use the restroom. (R. p. 145). While Appellant stated that no one asked about food and drink right then, he did get something to eat while at the station, and he was never told he could not have anything to eat or drink. (R. p. 145). When the two detectives came in after he gave the first statement, Appellant noted that they told him that they told him about other witnesses and that those witnesses implicated Appellant. (R. p. 147). Appellant also stated that

neither of the two officers used physical force against him, and he was not afraid of either Sturkie or the other guy. (R. p. 148). Appellant also admitted that no one forced him to sign the second statement. (R. p. 149).

After hearing extensive argument from both parties, the trial court found the statement was voluntarily given.

> The Court as far as the Jackson v Denno and voluntariness of the statement and the granting or the giving of Miranda rights makes the following findings: As far as police coercion, the Court finds no police coercion from any evidence that's been presented.
>
> As the Court said earlier, the length of the interrogation and the length of the confinement was concerning because of the diagnosis of ADHD; however, he was taking medication and there's been no testimony that that diagnosis interfered with his ability to understand the police officers. And from the testimony presented by the defendant in court today, the location of the interrogation and confinement does not convince the Court that there's any -- that affected the voluntariness of it.
>
> The continuity of the interrogation, one started at 3:45 and the other one was at 7:45. The defendant's maturity, education, physical condition, mental health, the Court finds that none of those appear to have affected his ability to be aware of the circumstances, understanding the circumstances, and understanding the advice given by the police officers on the advice of consent rights as signed by the defendant and initialed by each submission by the defendant.
>
> Based on the totality of the circumstances, the Court finds that the statement was voluntarily, freely given and Miranda rights were given.
>
> And the Court is convinced by the preponderance of the evidence, and I so find, that the alleged statement was obtained from the defendant, the defendant was fully advised of his rights under the Fifth and Sixth Amendments of the Constitution of the United States and the defendant was advised of the constitutional safeguards required by Miranda versus Arizona.
>
> The defendant was advised prior to interrogation he had the right to remain silent. The defendant was advised prior to

interrogation he had waived his right to remain silent and made a statement and such statement can and will be used against him in a court of law.

Defendant was advised prior to interrogation he had the right to employ or select an attorney of his own choice. If he did not have the money, funds or resources to employ an attorney, the Court would appoint or provide an attorney for him if he so desired without cost or expense to him and that he had the right to have his attorney present with him at all times in all interviews and interrogations.

The defendant was advised prior to any interrogation he had the right to consult with his attorney before interrogation and defendant was advised prior to any interrogation he had the right to interrupt and terminate the interrogation at any time. He had the further right to stop answering questions at any time during interrogation.

The defendant was advised prior to interrogation that during the interrogation if he desired an attorney, the interrogation would cease until an attorney was provided for him and he'd be given an opportunity to consult with his attorney prior to further interrogation.

That defendant knowingly and intelligently waived his rights to the Fifth and Sixth Amendments of the Constitution of the United States and the constitutional safeguards required by Miranda versus Arizona and that the alleged statement obtained from the defendant was freely and voluntarily given without duress, without coercion, without undue influence, without reward, without promise, a hope of reward without promise of leniency, without threat of injury, and without compulsion or inducement of any kind, and that such statement was a voluntary product of the free and unconstrained will of the defendant.

As the Court makes those findings as to the statement given that started at 3:45 and is marked as State's Exhibit No. 36, the State (sic) also makes the same findings as to the statement given at 7:45 and marked as State's Exhibit No. 37. Those findings are effective as to both statements.

This Court finds all the above conclusions by a preponderance of the evidence and I therefore find the statements admissible into evidence.

(R. p. 175, l 4 – 178, l 6).

Argument

The trial court did not err in admitting Appellant's statements at trial. Based upon a review of the totality of the circumstances, the trial court's admission of the statements is supported by the record.

"Statements of juveniles are reviewed under the totality of the circumstances." State v. Parker, 381 S.C. 68, 86, 671 S.E.2d 619, 628 (Ct. App. 2008). Multiple factors are considered when deciding whether a statement was made voluntarily. Parker, 381 S.C. at 86, 671 S.E.2d at 628.

> Those potential circumstances include not only the crucial element of police coercion, Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 521, 93 L.Ed.2d 473 (1986); the length of the interrogation, Ashcraft v. Tennessee, 322 U.S. 143, 153–154, 64 S.Ct. 921, 925–926, 88 L.Ed. 1192 (1944); its location, see Reck v. Pate, 367 U.S. 433, 441, 81 S.Ct. 1541, 1546, 6 L.Ed.2d 948 (1961); its continuity, Leyra v. Denno, 347 U.S. 556, 561, 74 S.Ct. 716, 719, 98 L.Ed. 948 (1954); the defendant's maturity, Haley v. Ohio, 332 U.S. 596, 599–601, 68 S.Ct. 302, 303–305, 92 L.Ed. 224 (1948) (opinion of Douglas, J.); education, Clewis v. Texas, 386 U.S. 707, 712, 87 S.Ct. 1338, 1341, 18 L.Ed.2d 423 (1967); physical condition, Greenwald v. Wisconsin, 390 U.S. 519, 520–521, 88 S.Ct. 1152, 1153–1154, 20 L.Ed.2d 77 (1968) (per curiam); and mental health, Fikes v. Alabama, 352 U.S. 191, 196, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957). They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present 694 during custodial interrogation. Haynes v. Washington, 373 U.S. 503, 516–517, 83 S.Ct. 1336, 1344–1345, 10 L.Ed.2d 513 (1963); Brief for United States as Amicus Curiae 19, n. 17; see also Schneckloth, supra, 412 U.S., at 226, 93 S.Ct., at 2047 (discussing factors).

Withrow v. Williams, 507 U.S. at 693-94, 113 S. Ct. at 1754.

> 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. See Goodwin, 384 S.C. at 601, 683 S.E.2d at 507 (citing Dickerson v. United States, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)).

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

State v. Moses, 390 S.C. 502, 513-14, 702 S.E.2d 395, 401 (Ct. App. 2010). "Although courts have given confessions by juveniles special scrutiny, 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. Pittman, 373 S.C. 527, 568, 647 S.E.2d 144, 165 (2007).

Here, the trial court was correct in finding that the statements given by Appellant were voluntary. First, there was no evidence of police coercion. All of the detectives who spoke with Appellant in the interview room indicated that they did not promise Appellant anything in return for his statement, or threaten him or his family in any way, or offer him some form of leniency. (R. pp. 30, 63, 71-72). Appellant acknowledged that no such threats were made. Appellant denied that he felt threatened in any way, and he admitted that no one forced him to sign any statement. (R. p. 148).

Second, there was no evidence presented that the interrogations were excessively long. Detective Kramitz testified that the first statement began at approximately 3:45 p.m. (R. p. 42). The waiver of rights form was signed by Appellant at 3:47 p.m., and Kramitz started taking the first statement at 3:55 p.m. (R. pp. 29, 32). Kramitz testified that the process took approximately one and

one-half hours, and the statement was over some time between 5 p.m. and 5:30 p.m. (R. pp. 32, 33). Both Sturkie and Miller indicated their conversation with Appellant lasted no more than one-half an hour. (R. pp. 61, 74). The second statement took less than one hour to complete. (R. p. 460). Altogether, for the two statements, Appellant was interviewed for no more than three and one-half hours, even when the duration of the conversation between Appellant, Sturkie, and Miller is included. Further, he was not subjected to continuous questioning during the entirety of time in the interview room. Detective Kramitz indicated that the Appellant was not immediately interviewed after he arrived at the police station, and there was at least an hour after he gave his first statement and the time Appellant spoke with Detectives Sturkie and Miller. (R. p. 42, see R. p. 33-34). The amount of time for the interviews was not excessive by any means. See Parker, supra (finding interview of sixteen year old for three and one-half hours did not render statement involuntary); Saltz, 346 S.C. at 135-37, 551 S.E.2d at 252 (finding interview of seventeen year old for between six and seven hours did not render statement involuntary).

The location where the statements were taken supported the trial court's finding they were voluntary. Appellant was interviewed in an interview room at the police station. He was not subjected to harsh conditions. Appellant acknowledged that when he was not being interviewed, detectives check on him and asked if he needed to use the restroom. Further, he was not deprived of food or drink. Detective Kramitz indicated that he asked Appellant if he wanted food or drink, and Appellant confirmed that he was not told that he could not have

food or drink during the entire process. (R. pp. 33, 37, 145). Appellant also admitted that he was provided with food at some point during the process. (R. p. 132).

While Appellant was only fourteen years old and only had an eighth grade education at the time of the interviews, those two factors do not render his statement involuntary. See Pittman, 373 S.C. at 568-70, 647 S.E.2d at 165-66 (fact that defendant was twelve at time of interrogation did not render statement given involuntary); State v. Smith, 268 S.C. 349, 234 S.E.2d 19 (1977) (finding fact confession of thirteen year old defendant was voluntary and admissible); In re Tracy B., 391 S.C. 51, 68, 704 S.E.2d 71, 79 (Ct. App. 2010)(noting fact that defendant only fourteen years old at time statement made does not render statement inadmissible).

Furthermore, Appellant's assertion that the statement should be considered involuntary because Appellant suffers from ADHD is not supported by the record. The trial court was correct in finding that there was no evidence presented that indicated his diagnosis interfered with his ability to understand his conversations with law enforcement. There was no testimony at the Jackson v. Denno hearing reflecting that Appellant's diagnosis would prevent him from understanding his conversations with law enforcement or understanding his rights. To the contrary, the detectives' testimony reflected that it did not appear that Appellant had any difficulty understanding them and vice-versa. Appellant's mother indicated that Appellant did not have any problems understanding the English language, and she noted that if he did not understand something, he

would ask questions. (R. p. 117). Appellant did not indicate in his testimony that he felt overwhelmed by the experience or that he gave either statement as a result of feeling overwhelmed. While Appellant did not mention ADHD, he did note that he was taking the medication because of nervousness, and he did not indicate that his nervousness impacted his ability to understand what was going on during the interviews that resulted in his statements.

Altogether, Appellant the trial court's findings are supported by the record. The testimony at the Jackson v. Denno hearing indicated that Appellant was advised of his constitutional rights, and Appellant's testimony during cross-examination reflected that understood his rights. (R. pp. 23-29, 133-49). As a result, the admission of the statements into evidence was not an abuse of discretion. See Moses, supra. Appellant's conviction should therefore be affirmed.

II. ANY ERROR BY THE TRIAL COURT IN ADMITTING APPELLANT'S STATEMENTS WAS HARMLESS.

Even assuming *arguendo*, the trial court erred in admitting Appellant's statement, the admission was harmless. Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246 (1991)(holding error in admission of involuntary confession is subject to harmless error analysis); Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001)(same); State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621 (1997)(same). In making a determination regarding harmless error, an appellate court will look at the entire record. State v. Miller, 367 S.C. 329, 626 S.E.2d 328 (2006). When guilt is conclusively proven by competent evidence such that no other rational conclusion could be reached, an appellate court will not set aside a conviction for insubstantial errors not affecting the result. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995).

The evidence against Appellant was overwhelming, and guilt was conclusively proven, even without Appellant's statements. Three witnesses testified that they saw Appellant shoot at the victim. (R. pp. 249-50, 296, 301, 331-32). Two of those witnesses were walking with Appellant on the afternoon of the shooting. (R. pp. 294-95, 329-30). The other was able to identify Appellant in a photo lineup and was able to inform law enforcement where Appellant lived. (R. pp. 260-62). Two other witnesses who were driving near the scene of the shooting testified that they saw an individual wearing a camouflage jacket and khaki pants running with a gun near the scene. (R. pp. 357-362, 381-83). The three witnesses who indicated they saw Appellant shoot at the victim all testified that Appellant was wearing a green or camouflage jacket on the day of the

shooting. (R. pp. 244, 291-92, 325). The testimony of all of those witnesses was corroborated by the video from the school's surveillance cameras that was introduced at trial. State's Exhibit 28. Another witness, Shalaine, gave a statement in which she indicated Appellant showed her a gun on the way to school that morning. (R. pp. 655-56). Altogether, the State submits any error in admitting the statements was harmless. As a result, Appellant's conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his conviction in the murder of Larry Maybank.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

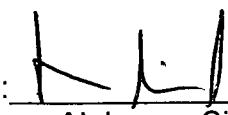
DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
OT Wallace Building
101 Meeting Street, Suite 400
Charleston, South Carolina 29401

ATTORNEYS FOR RESPONDENT

By: 
Alphonso Simon Jr.

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

January 2, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2011-201486

THE STATE

RESPONDENT,

V.

DERELL GREEN,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final 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).

This 2nd day of January, 2014.

ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2011-201486

THE STATE

RESPONDENT,

V.

DERELL GREEN,

APPELLANT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

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

This 2nd day of January, 2014.

ALPHONSO SIMON, JR.
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT