THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Edgar J. Dickson
Appellate No.: 2012-212566
Indictment Nos.: 2011-GS-38-0114, 0124

The State..... Respondent

vs.

Darius Ransom-Williams.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Darius Ransom-Williams ("Appellant") was indicted under 2011-GS-38-0114 and -0124 for burglary in the first degree and attempted murder. Appellant was tried July 16-18, 2012, in Orangeburg County. A jury found Appellant guilty of burglary in the first degree and assault and battery of a high and aggravated nature (ABHAN). Appellant was sentenced to an aggregate term of thirty years' imprisonment.

During the pendency of this appeal, there were significant delays in the delivery of the trial transcript. Almost a year after the trial, the trial's court reporter's tapes and notes were delivered to Court Administration for their handling. After the tapes were transcribed, it was discovered that tapes were missing and portions of the present tapes were inaudible—resulting in no transcription of a Batson v. Kentucky, 476 U.S. 79 (1986) hearing and the closing arguments of both the solicitor and trial counsel. This Court granted a motion for remand and reconstruction on December 11, 2013. The reconstruction hearing was held before the Honorable Judge Dickson in Orangeburg County on January 3, 2014. Judge Dickson issued an Order, filed January 22, 2014, finding the reconstructed proceedings should be included in the record on appeal and that the transcript was sufficient for appellate review. Appellant timely served a Rule 59(e), SCRCP, Motion for Reconsideration and Supporting Memorandum on January 27, 2014. By order filed January 31, 2014, Judge Dickson denied the Motion for Reconsideration.[1]

STATEMENT OF THE FACTS

On July 25, 2011, George Harrison ("Harrison" or "Victim"), a sixty-one-year-old gentleman, was attacked in his home in Orangeburg County. (Transcript p.93, line 18-

[1] It should also be noted that the Reconstruction Transcript was not delivered until over seven (7) months after the Reconstruction hearing.

p.94, line 14; p.96, lines 21-25). Harrison lived on a lot where three (3) trailers were situated in close proximity, with Harrison's trailer being first in the row of trailers, Travis Smart ("Smart") residing in the second trailer, and Warren Jennings ("Jennings") residing in the third trailer. (Id. at p.96, lines 9-14; p.108, lines 7-11; p.124, line 11-p.125, line 18). Harrison testified that upon his return from the neighborhood store, he opened his door and someone "grabbed [him] and pulled [him], hit [him]," and caused him to fall to floor before he gave the assailant his money—$20.00—and his phone. (Id. at p.96, line 20-p.97, line 15; p.165, lines 21-22). Harrison testified he attempted to flee from his attacker to seek help from Jennings, but his attacker continuously hit him with an axe handle and pursued Harrison out the front door and for about fifty feet as he crossed the yard to Jennings' trailer. (Id. at p.100, lines 14-17; p.113, line 4-p.117, line 15). This account was uncorroborated, as Officer Kertcherside, who investigated the crime scene, testified the trail of blood leaving Harrison's home to Jennings' home was in ninety-degree droplets indicating the blood was merely dripping off Harrison, not that Harrison was being attacked as Harrison moved towards Jennings' home. (Id. at p.209, lines 3-14).

Jennings sought police assistance, and while waiting for help, Harrison told Jennings what occurred at his home. (Id. at p.127, lines 3-p.129, line 15). Importantly, Harrison did not tell Jennings he knew his attacker. Id. Additionally, the police incident report does not indicate that Harrison told the police he knew his assailant when he was providing the police with a description of the assailant. (Id. at p.178, lines 5-20).

Although the assailant was wearing a mask, Harrison testified the mask fell during the attack and he recognized his assailant as someone he had seen before at

Smart's home. (Id. at p.98, lines 23-p.99, line 10). Harrison did not report this fact to the police at the time of the incident. (Id. at p.178, lines 21-25; p.272, lines 9-17). Despite testifying that he had been hit about the head "forty to fifty" times with an axe handle, that he could not recall how he got to the hospital, that he was unconscious for twenty days, and that he suffered a fractured skull, Harrison positively identified Appellant as the assailant in court. (Id. at p.99, line 19-p.100, line 24; p.103, lines 6-23). Ultimately, Harrison was in the hospital for fifty days and has residual impairments from his attack including being often light-headed, with hearing and speech difficulties. (Id. at p.103, line 23-p.105, line 25).

Appellant was apprehended several hours later with the assistance of a gentleman named Derrell Jenkins ("Jenkins"). (Id. at p.159 line 1-p.160, line 5). Jenkins indicated he knew Appellant through their mutual friend, Smart. (Id. at p.144, lines 5-10). At trial, Jenkins testified that he spoke to Appellant several times on the day of the incident. (Id. at p.146, line 22). Jenkins indicated his conversations earlier in the day with Appellant involved Appellant asking to borrow money and Jenkins telling Appellant he would loan him the money later in the day. (Id. at p.146, line 21-p.147, line 12). Jenkins further testified Appellant contacted him a third time, later in the day, stating he "had hit somebody across the head and left them leaking" and that he had done a "lick."[2] (Id.; p.162, lines 4-7). Jenkins testified he initially did not want to get involved, but decided to go to Smart's home to see what happened, and upon his arrival on Smart's street, he observed Sherriff's Department vehicles. (Id. at p.149, lines 7-18). Jenkins contacted the police, explained his earlier interactions with Appellant, and offered to assist the

[2] Later testimony defined the street term, "lick" as "somebody who is getting ready to perform some type of robbery." (Id. at p.246, lines 15-19).

police in apprehending Appellant. (Id. at p.150, line 13-p.160, line 19). Jenkins suggested he would pretend to pick Appellant up and then have the police "randomly stop [them] and pick him up." (Id.) When Appellant was apprehended, the amount of money he possessed "wasn't close to Twenty-five Dollars." (Id. at p.268, line 12-p.269, line 22).

Deputy James Thorpe ("Officer Thorpe") of the Orangeburg County Sherriff's Department responded to the scene of Harrison's attack and later transported Appellant to Investigations Headquarters after his apprehension. (Id. at p.163, lines 2-9; p.164, line 11-p.166, line 14; p.167, lines 6-16). Importantly, Officer Thorpe testified that after he transports individuals in his patrol car he always searches his back seat, including lifting the seat cushions up. (Id. at p.168, lines 1-7; p.177, lines 4-6). After Officer Thorpe transported Appellant, he searched his back seat and found nothing. (Id. at p.177, lines 4-9). However, two days later, Officer Thorpe found a broken cell phone under the cushion of his back seat. (Id. at p.168, line 24-p.169, line 14; p.177, lines 4-12). Victim identified the cell phone as belonging to him.

Investigator William Ketcherside ("Ketcherside") of the Orangeburg Sherriff's Department also responded to the scene of Harrison's attack. (Id. at p.182, line 25-p.183, line 7; p.184, lines 6-10). Investigator Ketcherside processed the scene for fingerprints, DNA, footwear impressions and blood spatter analysis. (Id. at p.183, line 16-p.211, line 17). The axe handle, which appeared to have blood on it, was recovered from Harrison's home. (Id. at p.194, lines 7-19). Investigator Ketcherside also recovered the cell phone, which appeared to have blood on it, from Officer Thorpe's patrol car and placed it into evidence for DNA testing. (Id. at p.200, line 23-p.203, line 25). Investigator Ketcherside testified that the phone was positioned in Officer Thorpe's car such that if Officer Thorpe

had pulled the back seat up after he transported Appellant he would have seen the cell phone. (Id. at p.212, lines 3-16). Officer Ketcherside also collected DNA samples from Appellant and Victim for comparison to the DNA specimens collected from the crime scene and the cellphone. (Id. at p.204, line 18-p.207, line 6).

The South Carolina Law Enforcement Division ("SLED"), who analyzed the evidence recovered from the crime scene, was unable to recover any DNA from the axe handle. (Id. at p.220, line 16-p.221, line 4). No fingerprints were recovered from the back door or any interior or exterior door knobs of Harrison's home. (Id. at p.196, line 125-p.197, line 5). The DNA on the cellphone was a mixture of at least two individuals—the major contributor being Victim and the minor contributor's profile was insufficient for comparison. (Id. at p.224, line 17-p.226, line 5). SLED's analysis of the samples provided to them revealed **no** DNA from Appellant was present at the crime scene, on the weapon, or on the cellphone. (Id. at p.232, lines 1-18).

Lieutenant James Shumpert ("Shumpert"), the supervisor of the Criminal Investigations Division of the Orangeburg County Sheriff's Office, was the state's last witness and testified as to his involvement in the investigation of this incident. (Id. at p.241, lines 5-16; p.242, lines 8-11). Shumpert was the officer who coordinated with Jenkins for the apprehension of Appellant. (Id. at p.243, line 19-p.245, line 9). After the "traffic stop," Appellant was detained, subjected to a Terry[3] frisk, and transported to the Criminal Investigation office. (Id. at p.245, line 10-p.246, line 6).

Over objection,[4] Shumpert testified regarding the contents and circumstances surrounding three "statements" he obtained from Appellant. (Id. at p.240, lines 5-14).

[3] Terry v. Ohio, 392 U.S. 1 (1968).

[4] A Jackson v. Denno hearing, pursuant to Jackson v. Denno, 378 U.S. 368 (1964), was held prior to trial and will be discussed more fully in Issue II *infra*.

Shumpert testified that once Appellant arrived at the Criminal Investigations Division, Shumpert advised Appellant of his Miranda[5] rights, had Appellant sign an advisement of rights form, and attempted to interview Appellant. (Id. at p.246, line 24-p.249, line 17). At that point, Appellant informed Shumpert he had no knowledge of the incident and requested an attorney ("Statement 1") and asked to speak to Jenkins.[6] (Id. at p.249, line 18-p.250, line 6; Defendant Affidavit dated 07/25/2011, 9:52 p.m., State's Trial Exhibit 1). Shumpert discontinued his questions, allowed Appellant to speak with Jenkins per Appellant's request, and then facilitated Appellant's transport to the Orangeburg County Detention Center. (Transcript p.250, line 10-p.251, line 5).

Shumpert testified that the next day he was contacted by Appellant's mother, whom he had had previous professional interaction based on her employment at the Orangeburg County Jail, who informed him Appellant wished to speak with him. (Id. at p.251, line 10-p.252, line 5). As a result of their conversation, Shumpert met Appellant's mother at the Bamberg County Detention Center where Appellant had been transferred.[7] (Id. at p.252, lines 1-19). Shumpert testified he inquired as to whether Appellant wanted to speak with him and that Appellant answered affirmatively, so he proceeded to get a statement from Appellant. ("Statement 2"). (Id. at p.252, line 24-p.255, line 9). In Appellant and Shumpert's handwriting, the content of Statement 2 is as follows:

> Mr. George kum [sic] to me after he was bruise and battery [sic] up he ask me to kall [sic] I tried but the phone I had was not working, so tell him [sic] to go to the next door neighbor and they will assit [sic] you. I was walking out to my Aunt and stay there about 2

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

[6] "Statement 1" is a misnomer in that Appellant did not actually give a statement the first time; however this reference is for convenience and ease of differentiation of the three interactions Shumpert had with Appellant and the distinct results of each.

[7] Appellant was transferred based on his mother's employment at the Orangeburg County Jail. (Id. at p.15, lines 1-5).

> hours [sic] The person who have done it was a guy tre [sic], dez [sic] and another character who they kall [sic] scrap [sic] I had nothing to do with it all I been trying to do is got home to my 2 daughters and couldn't even do that [sic] there was no withness [sic] no one around I just assume they did it because of how they was acting and you know actions speak louder than words.
> Q: Did you use George Harrison's Phone to call Derrell?
> A: yes
> Q: Did you call him at 7:05 p.m. and told him to pick you up from Lil Cricket?
> A: yes
> Q:Do you own a Red Bandana?
> A: yes
> Q: Did you ask to speak to me?
> A: yes

(Defendant Affidavit dated 07/26/2011 at 1:38 p.m., State's Trial Exhibit 2; Transcript p.255, line 15-p.258, line 24). Shumpert testified the main body of the statement and the responses after the "A" listings were in Appellant's handwriting and that Shumpert had written the "Qs" and the questions listed thereafter. Id. Shumpert testified that following his receipt of Statement 2, he told Appellant's mom and Appellant that Appellant was not telling him the truth (Id. at p.259, lines 7-17). Shumpert testified he knew Appellant was not being truthful based on the evidence he had learned from Ketcherside. (Id. at p.259, lines 16-19). On cross-examination, Shumpert testified he knew Appellant was not telling the truth based on the information he had and that he specifically told Appellant's mother he knew it "was a lie because Deputy Thorpe had found the cell phone in the back of his car." (Id. at p.276, lines 10-18). This testimony was in spite of the fact that the cell phone was not found in the back of Deputy Thorpe's car until the day after Statement 2 was taken—on July 27, 2011. (Id. at p.264, line 13-p.265, line 12; p.281, line 15-p.283, line 24).

Some twenty (20) minutes later and after Shumpert confronted Appellant telling

Appellant he was lying, Appellant provided another statement ("Statement 3"). (Id. at p.259, line 20-p.261, line 18). Statement 3, in Appellant's handwriting reads:

> I [sic] Darius Ransom is [sic] 21 [sic] I have high blood pressure [sic] an Enlarge Heart, [sic] a siss [sic] and a tumer [sic] on my right kidney [sic] I went threw [sic] a bad situation [sic] I just flip [sic] I never a day in my life put my hands on anyone [sic] I am truly sorry and ask for your forgiveness. I went in Mr. George house waitn [sic] 4 [sic] him to use his fone [sic] again and all of a sudden I hit em [sic] 4 to 5 times [sic] scare I was crying and left a guy name tre [sic] has his fone [sic] and a kouple [sic] of dollars [sic] all I have been threw [sic] was just trying to get home to my gurls [sic] We went threw [sic] the back door and that was that. I'm sorry for the pain and suffering I have put Mr. George and my family [sic].

(Defendant Affidavit dated 07/26/2011, 2:00 p.m., State's Trial Exhibit 3; Transcript p.261, line 14-p.263, line 8). Shumpert admitted he never inquired as to Appellant's educational background. (Transcript p.274, lines 18-20).

The jury found Appellant guilty of first-degree burglary and assault and battery of a high and aggravated nature. (Id. at p.319, lines 2-13).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008). "The court is bound by the trial court's findings of fact unless they are clearly erroneous." Id. "The admission or exclusion of evidence is left to the sound discretion of the trial judge." State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). "A trial judge's evidentiary rulings will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." Id. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Brockmeyer, 406 S.C. 324, 751, 751 S.E.2d, 645, 653 (2013).

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. Parker at 74, 671 S.E.2d at 622. 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. Id. "In criminal cases, appellate courts are bound by 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." Id. (citing State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997)). On appeal, "[w]hen reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." Id. (citing State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)).

ARGUMENT

I. The trial court erred in finding the inclusion of the reconstructed proceedings made the record sufficient for appellate review.

Following the trial of this matter, a timely notice of appeal was filed and a transcript ordered. Several months later, through no fault of Appellant's, the court reporter still had not produced the transcript. Ultimately, Court Administration retrieved the tape and notes from the court reporter and transcribed what portions of the transcript it could. Unfortunately, the Batson[8] motion and closing arguments were not transcribed. This Court ordered a reconstruction hearing. (Reconstruction Order; Reconstruction Transcript). The Batson motion was reconstructed from the Court's and counsels' strike lists and notes. (Reconstruction transcript p.5, line 21-p.21, line 10; Judge Dickson's

[8] Batson v. Kentucky, 476 U.S. 79 (1986).

Order filed 1.22.14). The Solicitor and Public Defender attempted to reconstruct their closing arguments by reading their respective closing argument outlines into the record. (Reconstruction Transcript p.21, line 11-p.51, line 11) However, this attempt does not create a sufficient record for appellate review because it does not reflect any objection(s) made during the closing arguments at trial.

A defendant complaining of a defective transcript is entitled to a new trial if the defendant "establishes that the incomplete nature of the transcript prevents the appellate court from conducting meaningful appellate review." See Adams v. H.R. Allen, Inc., 397 S.C. 652, 656-57, 726 S.E.2d 9, 12 (Ct. App. 2012) ("[T]he reconstructed record must allow for meaningful appellate review."). Therefore, "before a defendant can establish that he is entitled to a new trial on the basis of an inadequate reconstructed record, he must identify a specific appellate claim that [an appellate court] would be unable to review effectively using the reconstructed record." Id. at 325, 644 S.E.2d at 273.

Here, the reconstructed record is insufficient for appellate review. As argued during the hearing, the reconstruction is woefully deficient in presenting an adequate review of the closing arguments. (Reconstruction Transcript p.57, line 1-p.61, line 16).

On appeal, the appellate court must review the impropriety of a solicitor's closing argument in the context of the entire record. See Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The appellant has the burden of proving he did not receive a fair trial because of an alleged improper argument by the solicitor. See Humphries v. State, 351 S.C. 362, 373, 570 S.E. 2d 160, 166 (2002). Here, Appellant can never meet this burden because the reconstruction of the closing arguments does not fully and accurately demonstrate what transpired during the closing arguments. Merely reading the

closing argument outlines, as was done in this case, cannot capture the full extent and context of the closing argument. As conceded by the Solicitor during the reconstruction hearing, "I don't really see any way I can word-for-word attempt to come back and say what I said to the jury a year and a-half ago." Id. at p.23, lines 6-8. Furthermore, the reading of the outlines does not reflect any objections or arguments related thereto for appellate review. Accordingly, Appellant cannot raise any issues related to the solicitor's closing arguments or whether the trial court correctly ruled on any objections made during closing arguments because the record is incomplete. No reconstruction could sufficiently cure this error and Appellant is forever precluded from raising any errors related to the solicitor's closing argument at his trial. This is the specific appellate claim–prejudicial statements made by the solicitor–that this Court is unable to review.

That neither trial counsel nor the trial judge can recall objections made during the closing arguments is not proof that the objections did not occur. Over one year has passed since the trial of this matter. Memories are unreliable. Further, the purpose of transcribing records is so that appellate courts do not have to rely on memories and conjecture as to what transpired during trial. Accord State v. Ladson, 373 S.C.320, 326, 644 S.E.2d 271, 274 (Ct.App.2007) (finding a defendant established prejudice and demonstrated that the reconstructed record did not allow for meaningful appellate review "for a host of reasons" including "[t]he court reporters delay in disclosing the lack of transcript made a bad situation worse as the passage of time clearly dimmed the recall of the participants.").

Because of the deficiencies in the reconstruction, Appellant is deprived of the opportunity to present any arguments regarding the propriety of the solicitor's closing

arguments on appeal. Therefore, the reconstruction of the closing argument is not adequate to provide this Court with a record sufficient for appellate review and Appellant must be granted a new trial. See also United States v. Rivera, 444 Fed.Appx. 774, 779 (5th Cir. 2011) ("If a defendant is represented by different counsel on appeal than at trial, the absence of a substantial and significant portion of the record is sufficient to warrant reversal for a new trial.") (internal citations omitted); United States v. Selva, 559 F.2d 1303, 1306 (5th Cir. 1977) (reversing a conviction because the transcript did not contain the closing arguments made by either counsel and information about the closing argument was unavailable to the attorney on appeal); Jones v. State, 780 So.2d 218 (Fl. Ct. App. 2001) (finding the omission of the State's closing argument compels the grant of a new trial, reasoning that an improper closing argument, standing alone, can be grounds for reversal, and the appellant was prejudiced "by the incomplete transcript because his appellate attorney is incapable of reviewing the State's closing argument to determine the presence or absence of reversible error.").

Accordingly, the trial court erred in finding the record was sufficient for appellate review and this matter must be remanded for a new trial.

II. In the alternative, and should this Court find the record is sufficient for appellate review, the trial court erred in admitting Appellant's confession because the confession was obtained in violation of Appellant's constitutional rights.

At trial, Statements 1, 2, and 3 were published to the jury. A Jackson v. Denno hearing was held prior to the commencement of trial and the trial judge erred in determining the statements were admissible.

During the hearing, the judge heard testimony from Shumpert, Appellant's mother, Janet Williams ("Mother"), and Appellant. Shumpert's testimony largely

mirrored the testimony he later delivered at trial, summarized supra; however, a few portions are specifically relevant to this section. (Transcript p.9, line 12-p.34, line 1). First, Shumpert unequivocally testified that Appellant never communicated to him that he wished to speak with him; rather, the communications came via Appellant's mother. (Id. at p.23, lines 2-25). Shumpert further testified he was aware Appellant requested an attorney, but did not know whether Appellant had ever received an attorney, that Shumpert made not efforts to get him an attorney prior to Shumpert's interrogation which yielded Statements 2 and 3, and that Shumpert did not ask Appellant again if he wanted a lawyer before he began the interrogation which yielded Statements 2 and 3. (Id. at p.24, line 3-p.25, line 3; p.30, line 5-p.31, line 16). Shumpert also testified that when he initially entered the room to speak with Appellant, Mother also entered the room with Shumpert and another officer. (Id. at p.26, line 16-p.27, line 6). Shumpert testified he told Appellant something to the effect of "Your mom stated you wanted to speak to me." (Id. at p.27, lines 7-25). Shumpert further testified he was aware of Mother's health issues.[9] (Id. at p.32, lines 6-10).

Mother's recollection of the events markedly differed from that of Shumpert's. Mother testified that Shumpert called her the morning of July 26, 2011, to inform her that Appellant had been arrested the night before. (Id. at p.40, line 8-p.41, line 1). Mother than went to the jail to speak with Appellant and following that conversation, called Shumpert. (Id. at p.41, lines 2-10). Mother testified she contacted Shumpert of her own volition and that Appellant was not aware that she would contact Shumpert. (Id. at p.35, lines 1-21; p.37, lines 12-18; p.41, lines 16-20). Mother further testified that she knew Shumpert and wanted him to talk to Appellant because she felt "[Appellant] would tell

[9] Mother had recently been released from the hospital.

him the truth." (Id. at p.37, lines 8-21; p.42, lines 19-22). Mother also testified that she spoke with Appellant, and informed Appellant that Shumpert was coming to "get the truth out of him." (Id. at p.35, line 22-p.36, line 25). Mother further testified that initially, when Appellant was brought to speak to her, Shumpert, and the other officer, Appellant indicated he did not want to speak to Shumpert but that Mother told Appellant that "yes he would" talk to Shumpert and tell Shumpert the truth. (Id. at p.38, line 3-p.39, line 16; p.43, lines 7-13).

Appellant also testified at the hearing, stating he did not ask Mother to contact Shumpert on his behalf. (Id. at p.47, lines 10-15; p.52, lines 18-23). Appellant further testified that when he was brought to speak to Shumpert, his mother and another officer were present, and that Mother told him to tell Shumpert the truth—begging him to tell the truth. (Id. at p.48, lines 7-17). Appellant further testified he was never asked again if he wanted a lawyer and that he initially told Shumpert he did not wish to speak with him. (Id. at p.54, lines 1-23). With regard to Statement 3, Appellant testified Shumpert forced him to write the statement by telling him what to say. (Id. at p.56, line 13-p57, line 19). He said Shumpert told him to include the health conditions to help him get a more reasonable bond. (Id.)

Based on the testimony, the Court found Appellant received his Miranda rights and that his statements were voluntary and admissible. (Id. at p.59, lines 6-10; p.73, lines 5-21). With regard to whether the statements complied with the mandates of Edwards v. Arizona, 451 U.S. 477 (1981), the trial court found there was no police-initiated interrogation after Appellant invoked his right to counsel in the matter. (Id at p.72, lines 7-25). Rather, the Court found, *the interrogation was initiated by Mother* and "affirmed

and voluntarily reopened by dialogue with the [Appellant]." (Id. at p.73, lines 1-4) (emphasis added).

The trial court's admission of the confession was improper and in violation of Appellant's Constitutional rights. "A confession is like no other evidence." Arizona v. Fulminante, 499 U.S. 279, 296 (1991). A confession is often the most probative and damaging evidence that can be admitted against a defendant. Id. Therefore, "[a] criminal defendant is deprived of due process if his conviction is founded, in whole, or in part, upon an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964)).

In this case, Appellant's confession was the single and strongest piece of evidence from which the jury could determine his guilt. Without the confession, the State had little evidence to establish Appellant's guilt. Specifically, Victim's testimony surrounding the incident was undercut by his inaccurate recollection of the events after suffering severe head injuries and forensic evidence which strongly contradicted his story, and Jenkins' testimony was merely speculation as to what he thought may have happened. Without Appellant's confession, the jury had little evidence on which to convict Appellant. The confession here, taken in violation of Appellant's constitutional rights, discloses motive and means and profoundly impacted the jury. See Fulminante at 296 ("While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession such as that given by Fulminante to Sarivola, the risk that the confession is unreliable, coupled

with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless."); See U.S. v. Johnson, 400 F.3d 187 (4th Cir. 2005) (after finding a statement was improperly admitted, the Fourth Circuit reasoned the admission was harmless error because the confession was not a full confession in which the defendant disclosed the motive for and means of the crime).

Additionally, this issue further illustrates the devastating impact of not having a true transcript of the closing arguments because this Court cannot accurately determine how much the State's case rested on the confession and the weight the State afforded to the confession when arguing its case to the jury.

a. The trial court erred in admitting Appellant's confession because it was obtained in violation of the mandates of Edwards v. Arizona.

The Fifth Amendment's privilege against self-incrimination, made applicable to the States via the Fourteenth Amendment, provides an individual who has been accused of a crime the right to consult with an attorney and to have the attorney present during a custodial interrogation. In re Tracy B., 391 S.C. 51, 60-61, 704 S.E.2d 71, 75 (Ct. App. 2010). Therefore, "[a]n accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication*, exchanges, or conversations with the police." Edwards 451 U.S. at 484-85 (emphasis added); State v. Henderson, 286 S.C. 465, 334 S.E.2d 519 (Ct. App. 1985) (recognizing that once the right to counsel has been asserted, questioning of the suspect must cease until counsel is either obtained for the suspect or retained by him; only in instances when the suspect initiates subsequent conversations or communications with the investigating

authority is a waiver of the right to counsel possible).

> If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional circumstances.

McNeil v. Wisconsin, 501 U.S. 171, 177 (1991). "Police officers simply cannot continue to question a suspect despite his request for counsel 'in the hope that he might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.'" Johnson, 400 F.3d at 194 (citing Smith v. Illinois, 469 U.S. 91 (1984)). The United States Supreme Court has determined that two elements be examined to determine whether the police have obtained a statement in violation of Edwards. Johnson at 193.

> A court must determine whether the accused actually invoked his right to counsel. If he did, the court must determine who initiated the further discussion that yielded the eventual statement. If an accused, after invoking his right to counsel did not initiate further discussions with the police or knowingly and intelligently waive the right he had invoked, any statement procured by the police is inadmissible at trial.

Id. (citing Smith at 95)).

After Edwards and Smith, some jurisdictions have recognized "that defendants can, after invoking their Fifth Amendment right to counsel, reinitiate contact with the police via a third party." Tracy at 63; 704 S.E.2d at 77; see e.g. VanHook v. Anderson, 488 F.3d 411, 428 (6th Cir. 2007) (holding when police receive information from a third party which might evince a willingness and a desire to talk by the suspect, this is enough to justify a limited inquiry with the suspect to confirm or disaffirm that belief); United States v. Michaud, 268 F.3d 728 (9th Cir. 2001) (holding that defendant initiated

communication with police where defendant's cellmate told police that defendant wanted to speak to someone "about a murder"); Ex parte Williams, 31 So.3d 670, 683 (Ala. 2009) (holding that under Edwards an accused can initiate further interrogation through a third party). The United States Supreme Court and the Fourth Circuit have not addressed this issue, so this issue is arguably unsettled. However, this Court addressed a similar situation in Tracy; however, the circumstances of Tracy are distinguishable from the case *sub judice*.

In Tracy, this Court found the Edwards rule did not mandate suppression of the appellant's statements to the police. Tracy at 51,704 S.E.2d. at 71 The appellant in Tracy was picked up for questioning related to a shooting. Id. After appellant was advised of his rights he informed the detective he wished to speak to a lawyer. Id. The detective ceased conversation and left the appellant alone. Id. The detective returned to escort the appellant to change from his football clothes to more comfortable attire and the appellate subsequently asked to speak with his mother. Id. Thereafter, the appellant's mother went to the interview room, spoke to the appellant for five to ten minutes, and as she left the room she told police her son "wanted to talk to [them]." Id. When police re-entered the room, police told the appellant his mother told him he wanted to speak to him, and asked the appellant if he wanted to talk. Id. The appellant stated he did want to talk and proceeded to ask the police questions related to the incident. Id. Eventually, the appellant gave a formal statement implicating himself in the shooting. Id. At trial, the appellant moved to suppress the inculpatory statement, contending the statement was not voluntarily made, emphasizing appellant's age and educational level, and that he had invoked his right to counsel prior to making his statement. Id. The trial court disagreed,

and allowed the statement to be admitted and considered by the jury. Id.

This Court analyzed the issue under Edwards and its progeny, as well as distinguishing the case from State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004), where this Court found a police officer's contact with a defendant after he had invoked his right to counsel violated his Sixth Amendment right to counsel. Id. Although analyzing different rights—the Fifth and Sixth Amendments—this Court concluded that Edwards' protections extend to both rights, the facts of Anderson were closely related to the facts of Tracy, and that the reasoning was instructive on the issue. Id.

In Anderson, the defendant was arraigned for murder and completed documentation requesting the services of a public defender. Anderson at 518, 593 S.E.2d at 822. Later that day, the defendant's aunt visited him at the police station and after the visit the aunt suggested to the investigating police officer that he go talk to the defendant again. Id. The officer went to talk to the defendant, read him his Miranda warnings, asked him if anything had changed, and the defendant subsequently made a self-incriminating statement. Id. This Court distinguished Anderson from Tracy, finding that in Anderson the aunt merely suggested to police that they go talk to the defendant, not that the defendant himself wanted to talk to them. Tracy at 63, 704 S.E.2d at 77. In contrast, this Court reasoned, after speaking with Appellant, the mother in Tracy informed police the appellant wanted to talk to them. Id. Thus, this court held that "while Anderson arguably did not reinitiate contact via his aunt, [the appellant in Tracy] did reinitiate contact through his mother." Id.

This Court further found its conclusion was supported by the purposes of the Edwards rule—which is not necessarily a constitutional mandate, but a judicially

prescribed prophylaxis. Id. (citing Maryland v. Shatzer, 559 U.S. 98 (2010)). "As such, it is justified only by reference to its prophylactic purpose." Id. Indeed, the purpose behind the Edwards rule is to prevent the police from badgering a defendant into waiving his previously asserted Miranda rights; "the rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." Tracy at 65; 704 S.E.2d at 78 (citing Michigan v. Harvey, 494 U.S. 344 (1990); Minnick v. Mississippi, 498 U.S. 146 (1990)). Therefore, this Court reasoned the actions by police could not be characterized as "coercive." Tracy at 65. Specifically, this Court noted police asked the appellant if he wished to speak to police after his mother told police he wanted to talk to them, there was no evidence police pressured the appellant into implicating himself, police allowed the appellant to change clothes and gave him a drink, the appellant was advised of his Miranda rights before any further questioning, and the investigating officer testified he did not make the appellant any promises to tell the family court judge about the appellant's cooperation. See Tracy at 65-66; 704 S.E.2d at 78.

The facts and circumstances herein clearly demonstrate the trial court erred in finding the confession was obtained in accordance with Edwards and its progeny. The trial court specifically found that the police contact was reinitiated by Mother and not Appellant. Consequently, the trial court then abused its discretion in allowing the confession to be admitted because the law clearly states that the contact has to be reinitiated by the defendant himself. See Brockmeyer, at 340, 751 S.E.2d at 653 ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."). Even if the contact comes through a third-party, the contact must be at the behest of the defendant. Appellant, Mother, and

Shumpert testified that Mother told police to speak with Appellant.

The facts herein more closely resemble the Anderson case rather than Tracy. A crucial factor in this analysis is that it is undisputed, and found by the trial court, that Appellant did not reinitiate the interrogation by police. Mother's actions of telling Appellant to tell Shumpert the truth and telling Shumpert to get the truth out of Appellant are more closely akin to the aunt in Anderson rather than the mother in Tracy. Mother testified that when Shumpert approached Appellant regarding a statement, Appellant indicated he did not want to speak to Shumpert and Mother told Appellant he had to speak to Shumpert. There is overwhelming evidence Mother initiated the subsequent interrogation. The trial court correctly made this finding. However, having found Mother reinitiated the contact, the trial court committed reversible error by finding the statement was admissible. A finding that anyone but Appellant reinitiated the contact with police forecloses any possibility that the statements were admissible. See Johnson, at 194 ("Police officers simply cannot continue to question a suspect despite his request for counsel 'in the hope that he might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.'") (citing Smith, at 91).

Additionally, there was no break in custody or any other circumstances authorizing police to interrogate Appellant without the presence of his requested attorney. See Id., McNeil, at 77. During Appellant's first encounter with Shumpert, he requested an attorney. Appellant should have been constitutionally protected from subsequent police interrogation without the presence of his attorney. Instead, Mother's interference was inappropriate and it was improper of police to rely on her statements to serve as a waiver

of Appellant's constitutional rights. It is impermissible for Mother or any third-party to waive Appellant's constitutional rights. However, because police acted on Mother's purported waiver of Appellant's rights, the police violated Appellant's rights when they obtained Statements 2 and 3. Anything obtained after the impermissible re-initiation of the interrogation was inadmissible at trial. As argued by trial counsel, if Shumpert had any issues or concerns about whether Appellant wished to speak to him, such an inquiry should have been addressed to Appellant's requested attorney.

Further, there is evidence of police coercion in this case. The interaction between Shumpert and Mother, who was recently released from the hospital, in the presence of Appellant created a tense, charged, coercive environment for Appellant. Appellant testified to the stress he felt, especially seeing his mother standing before him crying and her admonishing him to tell the truth. Appellant was also told the police did not believe him.

The trial court abused its discretion by improperly admitting Appellant's confession.

b. The trial court erred in admitting Appellant's confession because the confession was not voluntary.

The statements were also inadmissible because they were not freely and voluntarily given. "A statement obtained as a result of a custodial interrogation is inadmissible unless the subject is advised of and voluntarily waived his rights." State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007) (citing Miranda v. Arizona, 384 U.S. 439, 498-500, (1966)). If a suspect is advised of his Miranda rights, but makes a statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived. Id.

The voluntariness is in addition to the intelligent waiver mandate of Miranda. Miller at 380, 652 S.E.2d at 449. A statement is not admissible unless it is voluntary. Id. Courts have reasoned that, "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege [against self-incrimination] is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution." Lefkowitz v. Cunningham, 431 U.S. 801, (1977).

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary [statements] not only because of the probable unreliability of [statements] that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a [statement] out of an accused against his will," and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Jackson, at 65-66.

The trial judge must examine the totality of the circumstances surrounding the statement to determine whether the State carried its burden in showing the statement was made voluntarily. Miller at 389, 652 S.E.2d at 450. "The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the given statement." Id. (internal citations omitted). "The due process test takes into consideration the totality of the circumstances—both the characteristics of the accused and the details of the interrogation." Id. (citing Dickerson v. United States, 530 U.S. 428, 434, (2000)). Some factors which may be considered in the totality of the circumstances analysis include police coercion, length of the interrogation, its location, its continuity, and the

defendant's maturity, education, physical condition, and mental health. See Withrow v. Williams, 507 U.S. 680, (1993). Additionally, it is proper to consider the presence of third-parties in examining whether a defendant's will has been overborne. See e.g. Spano v. New York, 360 U.S. 315 (1959) ("The use of Bruno, characterized in this Court by counsel for the State as a 'childhood friend' of petitioner's is another factor which deserves mention in the totality of the situation. Bruno was the one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade to adolescence. It was with this material that the officers felt that they could overcome petitioner's will.").

Here, the record is devoid of any consideration of the above factors by the trial judge. The trial judge's finding was limited to stating Appellant received his Miranda rights; that he understood those rights, and that he voluntarily made the statements. (Transcript p.59, lines 6-10; p. 73, lines 12-15). The trial judge's ruling is not based on the evidence in the record. Had the Court accurately considered the relevant factors, the court would have determined Appellant's statement was not voluntary and was the result of coercive police activity. Moreover, Mother's presence and insistence that Appellant speak to the police was not appropriately weighed by the trial court in analyzing the totality of the circumstances. Much like the police in Spano, the police used the bond of mother and child to improperly overcome petitioner's will.

"Coercive police activity is a necessary predicate to finding a statement is not voluntary." Colorado v. Connelly, 479 U.S. 157 (1986). "Coercion is determined from the perspective of the suspect." Illinois v. Perkins, 496 U.S. 292, (1990). "A statement may not be extracted by any sort of threats or violence, [or] obtained by an direct or

implied promises, however slight, [or] *obtained by the exertion of improper influence*." Miller at 386, 652 S.E.2d at 452 (citing State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)) (emphasis added).

As noted above, the presence of Mother and her actions are evidence of improper exertion over Appellant to get him to confess. Unlike in Tracy, there is "evidence to suggest the police used Appellant's mother as an agent to obtain her son's confession." Further, Shumpert testified he never inquired into Appellant's educational background, nor did the State present any evidence of Appellant's educational background. Given the numerous spelling, grammatical, and contextual errors in Statements 2 and 3, it is not far-fetched that Appellant's educational background may be limited.

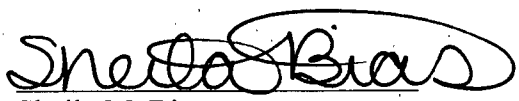
C. The trial judge's error in admitting the statements was not harmless.

The trial judge's error in admitting the statements was not harmless. See Henderson, 286 S.C. at 470, 334 S.E.2d at 522 ("Having determined that Edwards barred the admissibility of the defendant's confession, we now consider whether the error was harmless beyond a reasonable doubt. . . . If it was not, reversal is required."). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells v. Halyard, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000) (citing State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998)). As noted above, the admission of the confession was crucial to the jury verdict. Without the confession, the State's evidence included testimony from Victim, who had extensive head trauma and whose testimony was not born out by the forensic evidence, and Jenkins' assumptions. There is no physical evidence linking Appellant to the crime. Further, the inconclusiveness of the State's witnesses' testimony, without the

confessions, leaves a large cavity of reasonable doubt as to Appellant's guilt.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court find the trial court erred in finding the record was sufficient for appellate review and grant Appellant a new trial. In the alternative, Appellant respectfully requests this Court find the trial court erred in admitting the confessions and such confessions were not harmless error—entitling Appellant to a reversal of his convictions.



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September 22, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Edgar J. Dickson
Appellate No.: 2012-212566
Indictment Nos.: 2011-GS-38-0114, 0124

The State .....Respondent

vs.

Darius Ransom-Williams.....Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for Darius Ransom Williams, do hereby certify that I have this date served the foregoing **Appellant's Initial Brief** by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

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Daisy F. Bonds

Dated: September 22, 2014

095-559

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