STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAWANDA ALLEN,

APPELLANT

Appellate Case No. 2010-172506

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court abused its discretion by admitting appellant's confession where appellant was threatened that she would be charged with murder if she did not "come straight," since a confession that is procured as a result of a threat is not admissible?

STATEMENT OF THE CASE

Appellant was indicted by the Williamsburg County Grand Jury for the offences of murder, burglary in the first degree, and criminal conspiracy. R.474. Her case was called to trial on August 30, 2010, before the Honorable Clifton Newman, and a jury. Kimberly Barr and Doward Harvin were the assistant solicitors. Verdell Barr represented appellant. R. 39.

At the conclusion of the trial, the jury found appellant guilty on all three (3) counts. R. 470, l. 17-23. Judge Newman sentenced appellant to forty-five years imprisonment for murder, and he imposed concurrent sentences of thirty years for burglary in the first degree and five years for criminal conspiracy. R. 472, l. 13 – 473, l. 4.

This appeal follows.

ARGUMENT

The court abused its discretion by admitting appellant's confession where appellant was threatened that she would be charged with murder if she did not "come straight," since a confession that is procured as a result of a threat is not admissible.

Relevant Facts

The suppression hearing was held before Judge Newman on August 23, 2010. R. 1. As will be seen infra, appellant's son, Ronald Mack, pled guilty to the murder and received a fifty year prison sentence. R. 389, l. 1 – 390, l. 25. Appellant's boyfriend, Kelvin Bowen, was also later convicted in the murder. This Court can take judicial notice from the SCDC website that he received a ninety-nine year sentence for murder.

Williamsburg County Sheriff's Office Investigator Pamela Lail was assigned to the murder case involving the victim, Kenyon Dorsey. He was murdered on April 15, 2009. R. 8, l. 14 – 9, l. 1. Lail testified that appellant was later arrested in Maryland and transported back to Williamsburg County.

Lail interrogated appellant on May 28, 2009. R. 9, ll. 4-14. The interrogation began at 10:30 a.m. Appellant had been arrested for accessory before and after the fact of murder. She was not charged with murder. R. 10, l. 12 – 11, l. 4.

Lail testified on direct-examination during the suppression hearing that appellant was read her Miranda[1] warnings and that she understood them. R. 13, l. 14 – 16, l. 21. Specifically, Lail denied she threatened appellant "in any way." R. 16, ll. 10-13. Lail also said appellant never requested an attorney during the one-hour interrogation. R. 16, l. 23 – 17, l. 18. Lail related that appellant ultimately confessed to driving her boyfriend from Maryland "and being the driver so-to-speak for this murder." Lail said appellant also

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

implicated her son, Ronald Mack, her boyfriend Kelvin Bowen, and Antonio McClary. R. 18, ll. 3-11.

On cross-examination, defense counsel focused on threats that were made to appellant. Lail acknowledged that appellant was originally charged with accessory before and after the fact of murder, but she maintained that appellant ultimately being charged with murder was the charging decision of the solicitor's office. R. 20, ll. 2-16. As will be seen infra, Lail admitted the obvious during appellant's trial: That the police department and the solicitor's office work very closely on these cases.

Lail acknowledged during the interrogation that Detective Collins told appellant "that she needed to come straight." Lail acknowledged they thought appellant was lying to them at that point during the interrogation. R. 21, ll. 12-25. Lail maintained appellant was "just roaming and rambling on," and that she would not tell the police what really happened. R. 22, ll. 8-24.

Lail admitted that appellant was told she needed to come straight or she could be charged with murder. Lail denied that telling appellant she could be charged with murder if she did not "come straight" was a threat. R. 22, l. 25 – 24, l. 11. Appellant was told "**don't let us have to change your charge to murder, so you need to tell us exactly what happened**. I have been sitting here listening to you roam on about what happened. All that is good, but you're here, so let's start on the fourth, which is a Saturday, when Kenyon got killed that night." R. 24, l. 18 – 25, l. 17. (emphasis added).

On re-direct examination, Lail said that the statement of co-defendant Antonio McClary was the basis for her arrest warrants for appellant and her son. R. 28, ll. 2-19.

Defense counsel Barr argued that appellant had been threatened "at least twice" during the interrogation. He noted that appellant was threatened if she did come straight that

accessory charges would be upgraded. Defense counsel argued at the point appellant was threatened "the statement took a different turn at that point." R. 30, l. 11 – 31, l. 11.

The solicitor argued that the penalty for being an accessory before the fact of murder was the same as the penalty for murder and that appellant could read and write. The solicitor continued to stubbornly deny that appellant had been threatened into confessing. R. 31, l. 12 – 32, l. 11. Defense counsel Barr responded that appellant was threatened, and that appellant gave her confession out of the fear of the threat. R. 32, l. 14 – 33, l. 7.

Judge Newman ruled appellant had been given her Miranda rights and ruled by a preponderance of the evidence that appellant's statements were made freely and voluntarily tendered. R. 33, l. 12 – 37, l. 9.

The trial

The decedent's mother, Annette Dorsey Bradshaw, testified Kenyon was seventeen-years-old when he died. R. 42, l. 14 - 43, l. 19. Bradshaw and Kenyon were the only people living in their house at the time of the murder. Bradshaw knew appellant's son, Ronald Mack. R. 43, ll. 15-25.

Kenyon and Mack had been friends. However, Bradshaw said she became angry when she learned Mack had stayed at her house one night while she was working. She worked the night shift and she did not like others besides Kenyon in her house when she was not home. R. 44, l. 1 – 46, l. 16.

Bradshaw had allowed her daughter to borrow her car on the night of the murders. The inference was that the robbers or murderers probably did not think she was at home. She remember Kenyon came home about 1:30 a.m. on the night of the shooting. She told Kenyon he better not complain in the morning because they had to go to Palm Sunday service. R. 53, ll. 3-23.

Bradshaw remembered Kenyon only said: "Ok Ma," and he started watching television while sitting in a chair. R. 53, l. 23 – 54, l. 8.

Bradshaw testified that she woke up because she heard a noise that sounded like firecrackers. It was 2:20 a.m., and she yelled two or three times for Kenyon. However, he did not respond. Bradshaw testified she could hear people running from the house. She noticed blood on Kenyon, and she ran out the back door to her mother's next door house telling them: "Somebody just shot Kenyon." R. 54, l. 6 – 56, l. 25.

When Bradshaw ran outside, she looked back and saw a dark colored SUV or "some kind of small sport truck" speeding away. R. 65, l. 4 – 66, l. 1.

Pamela Lail testified about her interrogation of appellant at trial. Lail said she actually went to the murder scene on April 15, 2009. R. 295, ll. 1-7. Lail said after the murder they did not know that appellant's son, Ronald Mack, "had a prior problem" with the decedent. However, the police did know from the GSR report that Mack had washed his hands with bleach recently. R. 299, l. 4 – 300, l. 3.

Lail said she learned through her investigation that Mack was no longer a student at Kingstree High School. He was now attending school in Maryland. R. 298, l. 1 – 310, l. 15.

Eventually arrest warrants were issued for appellant, her boyfriend, Kelvin Bowen, her son Ronald Mack, and Antonio McClary. R. 311, ll. 18-22. Appellant's son, Mack, pled guilty. R. 312, ll. 1-7.

Lail interrogated appellant on May 28, 2009 beginning at 10:30 a.m. R. 313, ll. 17-23. Her testimony was largely consistent with that of the suppression hearing. The Miranda warnings and confession were admitted over objection. The tape, state's exhibit 45 is now before this Court. The solicitor told the judge before the tape was admitted that "It is not until Page 24 when she really starts to come clean and tell the police about her

involvement with the planning and carrying out of the crime." R. 318, l. 1 – 331, l. 4. Lail claimed appellant showed no emotion during the interrogation "she seemed sort of matter-of-fact almost." R. 332, l. 21 – 333, l. 20. Lail said appellant did not say "a whole lot of anything" during the first twenty or thirty minutes of the interrogation. R. 333, l. 21 – 334, l. 2. Lail said appellant denied being in South Carolina the weekend the decedent was murdered during the first twenty or thirty minutes of the interrogation. R. 334, ll. 3-8.

Lail said appellant eventually admitted she knew what her boyfriend and son intended to do. Lail said this was not clear on the tape of the interrogation. R. 340, l. 10 – 341, l. 17.

On cross-examination Lail acknowledged appellant, at the time of the interrogation, had not been charged with murder but rather accessory before and after the fact of murder. R. 354, l. 22 – 355, l. 14. Lail stuck with her position: "There were no threats involved." R. 356, ll. 6-9.

On the redirect-examination Lail said there was no difference between the penalty for accessory before the fact of murder and murder. R. 367, ll. 5-12.

On re-cross examination Lail admitted a normal person would not know the penalties for the crimes. Barr asked Lail to admit "the officers *actually told her that unless you come straight with us we're gonna charge you with murder.*" Lail now answered: "That's not exactly what they said, no, sir." R. 367, l. 17 – 368, l. 9. Lail admitted that the police department did work jointly with the solicitor's office and did get advice on what the "proper charges" were. R. 370, l. 23 – 372, l. 11.

Ronald Mack

Appellant's son, Ronald Mack, testified he felt betrayed by the decedent because during their drug dealings with the Bloods that the decedent kept coming up short with

money on the drug deals that were being done in Maryland. Mack related that he "was tired" of having to "take up the slack" for the decedent's failures in drug deals. R. 375, l. 5 – 387, l. 13. The two got in a fist fight two weeks before the shooting, and Mack believed Kenyon was responsible for a later incident where Mack was shot at by an unknown person. R. 377, l. 11 – 378, l. 25.

Mack also testified prior to the shooting he only discussed it with co-defendant Bowen. He denied that anyone that he and his mother had a plan to kill the decedent. R. 382, l. 10 – 385, l. 24. Mack insisted on cross-examination by the solicitor that although appellant was outside the house, she did not know what was going inside the house. R. 390, l. 19 – 391, l. 13.

In his closing argument defense counsel told the police threatened appellant and she was scared when she gave her inculpatory statement. "Now a layperson doesn't know whether or not you're gonna get 5 years, 10 years, or 20 years for a crime. She afraid, so they get the detectives to tell her, look, thus far you're just being charged with accessory but now if you're not forthcoming we're gonna charge you with murder. Now I think that's a threat . . ." R. 427, ll. 4-25.

Discussion

In State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990), Osborne was told she would be charged with "withholding evidence" if she did not make an honest statement. The Sheriff admitted that Osborne was told if she withheld information she could be charged with a crime. The Sheriff also acknowledged Osborne was told that fact from the beginning of the interrogation.

Our Supreme Court found Osborne was clearly distinguishable from State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990), where the polygraph examiner told the

defendant it would be in his best interest to tell the truth. Osborne was given a new trial because her statement should have been suppressed because it was the result of a threat.

Coercive police activity is a necessary predicate in 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 extracted by any sort of threat or promises, however slight, or improper influence is a coerced statement. See Hutto v. Ross, 429 U.S. 28 (1976).

In State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987), our Supreme Court held that a statement was not voluntarily given where the defendant was told if he gave a statement the investigating officer would guarantee him that he would not seek the death penalty.

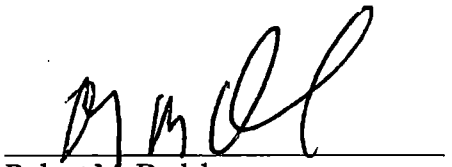
Here, Lail admitted that it was not reasonable for appellant to know that the punishment for accessory before the fact to murder was the same as that of murder. Further, appellant submits many people believe the death penalty is an available punishment for any murder.

If the threat in State v. Osborne rendered the confession inadmissible -- and it did – then the confession here based on the threat of being charged with murder if appellant did not "come straight" was likewise inadmissible.

CONCLUSION

Based on the foregoing argument, appellant's convictions should be reversed in this case and remanded for a new trial.

Respectfully submitted,



Robert M. Dudek
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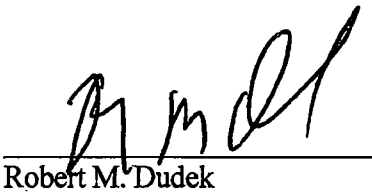
This 27th day of March, 2013.

CERTIFICATE OF COUNSEL

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

March 27th, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
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THE STATE,

RESPONDENT,

V.

TAWANDA ALLEN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of March, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of March, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
The Honorable Clifton Newman, Circuit Court Judge
Appeal Case No. 2010-172506

THE STATE,

RESPONDENT,

vs

TAWANDA ALLEN,

APPELLANT.

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court abused its discretion by admitting appellant's confession where appellant was threatened that she would be charged with murder if she did not "come straight," since a confession that is procured as a result of a threat is not admissible?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in admitting Appellant's statement at trial when Appellant was read her Miranda warnings, Appellant waived those warnings, the totality of the circumstances supported the trial court's determination that the waiver was voluntary, and there was no evidence the Appellant's will was overborne by the investigator's comments during the interrogation?

STATEMENT OF THE CASE

On August 30-September 1, 2010, Appellant Tawanda Allen ("Allen") was tried by a jury for the murder of Kenyon Dorsey, first-degree burglary, and for criminal conspiracy. Appellant was tried in the Williamsburg County Court of General Sessions before the Honorable Clifton Newman, Circuit Court Judge. Verdell Barr, Esquire, represented Appellant. The State was represented by Kimberly V. Barr, Esquire and Doward Harvin, Esquire, both Assistant Solicitors for the Third Judicial Circuit. On September 1, 2010, Allen was convicted of murder, first-degree burglary, and criminal conspiracy. (R. p. 470). She was sentenced to forty-five years confinement for the murder conviction; thirty years confinement for the burglary conviction; and five years confinement for the conspiracy conviction, all to be served concurrently. (R. pp. 472-73). Before this Court is Appellant's direct appeal of all three convictions. She requests this Court reverse her convictions and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm her convictions.

STATEMENT OF FACTS

On April 4, 2009, Appellant Tawanda Allen ("Appellant") drove her then boyfriend, Kelvin Bowen, Jr.,[1] from Glen Burnie, Maryland to Kingstree, South Carolina. They picked up her son, Ronald Mack, and one of his friends, Antonio McClary, on the early morning of April 5, 2009. Appellant then drove the group to the residence of Annette Bradshaw and the victim, Kenyon Dorsey. Mack, Bowen, and McClary went into the house, and then shot and killed the victim. The victim died as a result of a shotgun wound and three gunshot wounds. (R. p. 277). Appellant then dropped her son and his friend back at the house from where they were picked up, and she drove Bowen back to Maryland. (R. pp. 126-27, 383, 411, 520-21, 525).

Ronald Mack and Kenyon Dorsey's Relationship Before the Shooting

The victim and Ronald Mack were once friends. (R. pp. 44, 122). According to the victim's mother, Mack had spent at least one night at her home. (R. p. 48). She also testified that Mack and the victim would hang out after school playing basketball, going to the car wash, or running to Mack's family's gift shop in Kingstree. (R. pp. 71-2). The victim, who had his own vehicle, also drove Mack around from place to place. (See R. pp. 51, 68). Ms. Bradshaw also testified that she became aware that the victim stopped speaking with Mack approximately one month before the shooting. (R. pp. 48-49). Quadir Wilson, a friend of Mack's, testified that Mack and the victim were not friends on the day of

[1] Bowen was known to many of the witnesses as by his nickname, "Callie" or "Cali," which was based on the fact that he had lived in California at some point in time.

the shooting because of something the victim may have said to Mack. (R. p. 122). Mack testified that he and the victim had issues regarding drug money. (R. pp. 375-77). Mack claimed that at some point in time after the two initially had confrontations regarding drug money, he believed the victim attempted to attack him in a shooting at a park in Conway. (R. p. 378). That led Mack to contact Bowen about assistance in killing the victim. (R. p. 379).

Ms. Bradshaw indicated that she was unaware that the victim was a member of a gang. (R. pp. 72-3, 77). However, Ronald Mack testified that the victim was indeed a member of a gang, and that the victim also would sell drugs with Mack from time to time. (R. p. 375).

Night of the Shooting

Ms. Bradshaw testified that on the day before the shooting, the victim spent the whole day at the beach with friends. (R. p. 50). She noted that the victim returned home around 12:30 a.m. on April 5. (R. p. 51). He did not immediately enter their home; instead he spent about one hour next door with one of the friends with whom he went to the beach. (R. p. 52). The victim did return to his residence at 1:30 a.m. (R. p. 53). Ms. Bradshaw spoke with the victim shortly thereafter. She then went to her bedroom, locked her bedroom door, and went to sleep. (R. p. 54).

Wilson testified that he was out at a club with Mack, McClary, and Dontrey Barr on the night leading up to the shooting. He noted Mack was saying that he was going to get the victim that night. (R. p. 122). Wilson left the club with McClary around 2 a.m. (R. p. 122-23). He and McClary met up with Mack and

Barr at Barr's house. (R. p. 123). Wilson testified that in response to a question from McClary, Mack indicated that he was going to be doing something. (R. p. 123). McClary and Mack changed into dark clothes. (R. pp. 124-25). They left shortly thereafter. Wilson saw Mack and McClary leave, but neither Wilson nor Barr went with the other two. (R. p. 126). Wilson did not see Appellant that night. (R. p. 132).

According to Appellant's statement, she and her boyfriend, Kelvin Bowen, drove down from Maryland on the night of April 4, 2009. (R. pp. 504-05; State's Ex. 45). Appellant noted that Bowen had put the shotgun and a 9mm handgun in her vehicle before they left Maryland. (R. pp. 505-07; State's Ex. 45). Bowen placed the handgun under the driver's seat of the vehicle, and he placed the shotgun in a coat that he laid in the back/trunk area of the vehicle. (R. pp. 506-07; State's Ex. 45). While the two were on the road, Appellant and Bowen received several phone calls from Mack, specifically asking when they would be arriving. (R. pp. 505, 507; State's Ex. 45). During one of those calls, Mack requested that the two pick him up from Barr's house when they arrived in Kingstree. (R. p. 507; State's Ex. 45).

In her statement, Appellant indicated that she and Bowen arrived in Kingstree approximately 1:50 a.m. (R. p. 508; State's Ex. 45). When they arrived at Barr's house, Mack and McClary came out of the house and walked towards Appellant's vehicle. (R. p. 509; State's Ex. 45). Appellant indicated that Bowen was initially concerned about McClary's presence, and Bowen pulled the handgun from under the driver's seat. (R. p. 509; State's Ex. 45). When the two

walked out, Appellant retook the driver's seat. McClary sat in the front passenger seat; Mack and Bowen sat in the back seat. (R. p. 509; State's Ex. 45). According to Appellant, Bowen and Mack then had a discussion about whether the victim was home alone; Mack had indicated that the victim was alone because his mother's truck was not at home. (R. pp.509-10; State's Ex. 45). Appellant drove the four to the front of the victim's house. (R. p. 510; State's Ex. 45).

As per Bowen's instructions, Appellant turned her vehicle around to face towards the main highway, turned her lights off, and parked. (R. pp. 510-11; State's Ex. 45). Bowen, Mack, and McClary all exited the vehicle, went down the road, and went into the victim's house. (R. p. 511; State's Ex. 45). Appellant stated that she heard two gunshots approximately ten to fifteen minutes after the three left her vehicle. (R. pp. 511, 514; State's Ex. 45). Appellant also relayed what Bowen told her about what occurred inside of the house.

> He [Bowen] said we got up to the porch, and walking up the steps, and I guess it makes noise, and when they got up to the porch that there was screen door, and they opened the screen door, and they pushed the door but the door wouldn't open so Tony was going to kick the door in Callie said no, no, tum and see if the door opens. I don't know who turned the knob or whatever, he didn't say, but whoever turned it the door opened up, and being that Ronald used to hang with Kenyan so much I guess he knew the setup of the house. He said Ronald went in first, and he said Ronald went straight for Kenyan's room. He said Tony went like in the living room putting all sorts of clothes and wrapping himself up in clothes.
>
> ...
>
> He said he saw something laying across the bed, a cover or something, but there was no one in that bedroom. He said Tony must have went toward the kitchen, and Callie said Tony waved at him and said someone is sitting in the kitchen or where ever. I

> know he said he was sitting in front of the TV. He said Tony waved at him, and Ronald was coming back down the hall because he went straight to Kenyan's room, and Ronald came back down the hall and Callie said he waved and said right here. He said he pointed right here, right here. He said Ronald had the handgun, and Ronald came in and stood in the front of Kenyan and shot him once. He said no, he knew that he's probably not dead so that's when he took the gauge and he shot him.
>
> ...
>
> He said his eyes were closed and he had headphones on his ears. He said but when Ronald shot Kenyan, there was some sound that he made, and he said no, he's not dead, and he said that's when he shot him with the 10 gauge.

(R. p. 516, ll 3-17; p. 516, l 24 – p. 517, l 15; p. 517, ll 17-21; see State's Ex. 45).

Appellant indicated in her statement that Bowen told her they were going to shoot the victim during the drive to Kingstree. (R. pp. 520-21; State's Ex. 45). She noted that it had not thought about attempting to talk Mack out of shooting the victim, and she did not think about calling law enforcement to tell them what happened. (R. pp. 520, 521; State's Ex. 45).

Events After the Shooting

Ms. Bradshaw testified that she heard a noise that sounded similar to a firecracker at around 2:20 a.m. (R. p. 55). She got up and went to see what caused the commotion. (R. pp. 55-56). She testified that she heard people running out of her house when she exited her bedroom. (R. p. 56). She found the victim had been shot in the chair where he was sleeping. (R. p. 56).

During her interview, Appellant stated that when the three returned to Appellant's vehicle, Mack got into the front passenger seat, and Bowen and McClary got into the back seat. (R. pp. 514-15; State's Ex. 45). She then drove

the group away from the victim's house. Ms. Bradshaw testified that when she ran to her mother's house next door to get help, she saw a dark colored truck or sports utility vehicle leaving the area. (R. pp. 56, 58, 63-66).

Appellant and Mack talked about school as they drove back to Barr's house. (R. pp. 410, 515; State's Ex. 45). Appellant and Bowen dropped Mack and McClary back at Barr's house. (R. pp. 126-27, 383, 411, 520-21; State's Ex. 45). Mack and McClary changed back into their original clothes. (R. pp. 127, 416). Mack also washed his hands with bleach. (R. pp. 127-28, 416). Appellant and Bowen drove back to Maryland. (R. pp. 383, 411, 525; State's Ex. 45).

Discoveries Made during the Police Investigation

One cartridge casing was found on the floor in the kitchen. (R. p. 85). Further, two shotgun shells were also found in the vicinity of the kitchen. (R. p. 86). A projectile was located underneath the front deck of the house. (R. p. 84). Another cartridge casing was located in the victim. (R. p. 96). Based on the cartridge casings, law enforcement was seeking both a shotgun and a 9 millimeter weapon. (R. pp. 108-09).

A twelve-gauge shotgun, four twelve-gauge shotgun shells, ten nine millimeter rounds of ammunition, two spiral notebooks belonging to Mack, and various documents belonging to Appellant, Bowen, and Mack were retrieved from Appellant's apartment in Maryland. (R. pp. 156-59, 184-202, 209-11). Two fired projectiles and some shotgun pellets were recovered from the victim's body during the autopsy. (R. pp. 171-72). The firearms and toolmarks examiner testified that the shotgun shells recovered at the crime scene were most likely

fired by the shotgun recovered from Appellant's apartment. (See R. pp. 213-19, 234). The examiner was also able to determine that the fired nine millimeter cartridge casings were all fired by the same firearm. (R. p. 239). However, the examiner was not able to determine if the fired projectiles were also fired from the same weapon because the handgun had not been recovered for examination. (R. pp. 235-36, 240).

Investigator Lail testified that she initially interviewed Ms. Bradshaw and the victim's friend who lived next door. (R. pp. 296-97). During the course of the investigation, Lail also interviewed Wilson, and he provided a statement. (R. p. 304). On May 14, 2009, Lail interviewed McClary. (R. p. 305). Based upon that interview, Lail sought out Mack, Appellant, and Bowen.[2] (R. p. 305). Lail also interviewed Mack's biological father, and he provided Lail with Appellant's name. (R. p. 306). Lail then tracked down Mack's location in Maryland. (R. pp. 308-09). Appellant, Mack, and Bowen were eventually arrested in Maryland by local authorities based upon arrest warrants issued in relation to this case. (R. pp. 308-11).

[2] At that time, Lail was only provided with Bowen's street name, Callie. (R. p. 305).

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE APPELLANT'S STATEMENT AT TRIAL. APPELLANT WAS READ HER MIRANDA WARNINGS AND SUBSEQUENTLY WAIVED THEM; THE TOTALITY OF THE CIRCUMSTANCES SUPPORTED THE TRIAL COURT'S DETERMINATION THAT THE WAIVER WAS VOLUNTARY, AND THERE WAS NO EVIDENCE THAT APPELLANT'S WILL WAS OVERBORNE BY THE INVESTIGATOR'S COMMENTS REGARDING A POTENTIAL MURDER CHARGE.

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)). A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise. State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987)

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).

Discussion at the Pre-Trial Hearing

A Jackson v. Denno[3] hearing was held in this case on Friday, August 23, 2010, the Friday before the trial began. At issue was the admissibility of Appellant's statement to police given on May 28, 2009. At the Jackson v. Denno hearing, Investigator Pamela Lail testified. Lail testified Appellant had been arrested on accessory before the fact and accessory after the fact of murder, accessory before the fact and accessory after the fact for burglary first, and accessory before the fact and accessory after the fact of armed robbery. (R. p. 11). The arrest warrants were served on Appellant in Maryland. (R. p. 11). The interrogation began at 10:38 a.m. (R. p. 10).

According to Lail, Appellant did not appear to be under the influence of any drugs or alcohol. (R. pp. 11-12). She also did not appear to be suffering from any physical or mental conditions, and she could read and write. (R. p. 12). Appellant was read the Miranda warnings. (R. p. 12). Appellant indicated that she understood her rights. (R. pp. 12-14). Appellant was then asked if she wished to waive her rights and speak with the officers at that time. (R. p. 12). Appellant both verbally indicated that she wished to waive her rights, and she indicated in writing that she wished to waive her rights. (R. pp. 12-13).

Lail further testified that she had no concerns about Appellant's ability to understand Lail. (R. p. 16). Lail indicated that she did not threaten Appellant in any way, did not mistreat Appellant, did not withhold medical care, food, bathroom breaks, or anything else from Appellant. (R. p. 16). Overall, the

[3] Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

interrogation lasted approximately one hour. (R. p. 16). Lail also stated that Appellant never requested a lawyer, and she never requested a break. (R. p. 17). No promises were made in exchange for the statement, and Appellant was not threatened in any way if she did not give a statement. (R. p. 17).

During cross-examination, Lail acknowledged that there was a point in time during the interrogation that Investigator Collins told Appellant that she needed to come straight, and told Appellant that she could be charged with murder. (R. p. 21). Prior to that statement by Collins, Appellant had denied being present in South Carolina on the date of the murder. (R. p. 22). Lail testified that the statement by Collins that Appellant could be charged with murder was not a threat to charge Appellant with murder if she did not "come straight" with the investigators. (R. pp. 22-4). Lail stated that Appellant was not given her Miranda warnings again during the interrogation. (R. pp. 25-6).

In arguing the statement was not voluntarily made, Appellant argued as follows:

> [I]t would be the Defense position that we would ask the Court to suppress the May 28th statement of Ms. Tawanda Allen. It would be based on Jackson Denno, and it would be our position that clearly Ms. Allen was threatened at least twice in the taking of this statement. And after being threatened and after being told that she would be placed in a greater position of jeopardy if she was not straight with the investigators and of course the statement took a different turn at that point. Ms. Allen then made statements that to a very large degree incriminating her, and we don't feel as if those statements were necessarily given on a voluntary basis but that they were coerced by the investigators. And it's clear that at that point what the police officers saw as charges that could be substantiated were the accessory charges, and they got no additional information that they didn't already have. And she, even though the time, the potential sentencing may be the same, the charges are distinctly different. The conduct is distinctly different.

> And for those reasons we would ask, Your Honor, that the statement given by Ms. Tawanda Mack Allen not -- on May 28, 2009 -- not be allowed to be a part of this trial.

(R. p. 30, l 12 – p. 31, l 11).

The State responded by arguing that a person charged with accessory before the fact was subject to the same sentence as a principal. (R. p. 31). The solicitor also contended that law enforcement is not required to tell a defendant the possible penalties one is facing, nor are they required to explain specific laws. (R. pp. 31-2). The solicitor went on to argue that Appellant was intelligent, could read and write, and was not threatened or harmed in any way. (R. p. 32). Further, Appellant was advised of her rights, and she knowingly and intelligently her rights, and the statement as given in a voluntary manner. (R. p. 32).

In response, Appellant argued "that once the investigators start to threaten the defendant the defendant is not then sure what might happen, and then the defendant is entitled to be advised as to what might happen at that point. She would be entitled to be told again if this now is a situation that you don't fully understand or you don't fully appreciate, then you're entitled to have a lawyer and even if you can't afford the State has to give you one. And I think that's the situation that was created here at least twice." (R. pp. 32, l 22 – 33, l 7).

Appellant ended his argument by contending a waiver of rights made at the beginning of a statement does not allow law enforcement to do whatever they want in taking a statement after the waiver is made. (R. pp. 35-6).

The trial court found the statement was voluntary.

> Well, the examination of the witness in this case sort of took on a new twist as far as a Jackson v. Denno inquiry because the

> questioning on cross-examination did not center on the voluntariness of the statement itself but on the contents of the statement and whether or not the answers were influenced by the firmness of the interrogation or the interrogation technique. And generally, when a Court looks to whether or not a statement is freely and voluntarily given the Court is not interested in the contents of the statement. The Court is interested in whether or not a statement was made and whether or not the statement was itself was freely and voluntarily and without hearing whatever was said was part of the statement. Because once a statement is freely and voluntarily given, what is said is beyond know the scope of the inquiry as to whether the statement is free and voluntarily. So the Court doesn't then go on and examine the statement itself to test whether each response was free and voluntary and making an assessment that at some point in time it no longer became free and voluntary, but generally just whether the statement itself after being properly advised whether the rights were waived and the statement freely and voluntarily given. I find that the State has established by a preponderance of the evidence that the statements made by the defendant in this case were free and voluntary statements after the constitutional rights as outlined in Miranda versus Arizona and all other subsequent cases were given.

(R. p. 36, l 3 – p. 37, l 9).

At trial, Lail testified Appellant was Mirandized before she gave her statement. (R. pp. 314-15). Lail further testified that Appellant read the waiver of rights form. (R. p. 316). Lail indicated that she was satisfied that Appellant could read, had the ability to understand, and was not under the influence of alcohol or drugs. (R. p. 317). Lail also stated that Appellant did not appear to be suffering from any illnesses or ailments. (R. p. 318). Appellant never asked to stop the interrogation, and she never indicated she wanted to talk with someone. (R. pp. 331-32). Lail described the interview as a matter-of-fact conversation that lacked emotion. (R. pp. 332-33).

During cross-examination, Lail testified that Collins' statement about a murder charge was not a threat, and Appellant did not see it as one. (R. p. 355).

Lail noted that Appellant did not stop the interview, which was her right to do. (R. p. 355). Lail maintained that no threats were made, and that it was unnecessary to re-Mirandize Appellant after Collins' request for Appellant to come clean. (R. p. 356).

Relevant Facts and Argument

The trial court did not abuse its discretion in admitting Appellant's statement into evidence; the trial court's finding that Appellant voluntarily waived her rights in giving the statement is supported by the record, and there was no evidence indicating Appellant's will was overborne by any coercive action by law enforcement. At issue is whether Appellant was coerced into providing incriminating statements after the following exchange:

> QUESTIONS BY LT. COLLINS:
>
> Q. As a matter of fact Antonio was riding with ya'll, you need to come straight.
>
> A. I'm coming straight.
>
> Q. These are serious charges.
>
> A. Yes, ma'am.
>
> Q. You understand you also can be charged with murder?
>
> A. Yes, ma'am, I understand.
>
> Q. Right now you're not charged with murder. We are giving you the benefit of the doubt. I'm sitting here listening to you, and I have known you for a long time, but you're not telling us the whole story. You were here, and Antonio McClary is in jail. We transferred him yesterday to Georgetown, and he's charged with this murder, because he got in your vehicle with you and Ronald and Callie from Trey's house. Trey and those saw when you picked them up in your vehicle, and saw when ya'll brought them back so you need to be straight. Ronald was on the phone talking to you and Callie

> when he left Club Jordan. He talked to ya'll to find out what time ya'11 were going to get here. You just need to be straight, because yon have been seen here, and saw when Ronald and Antonio got in the car with you. Don't let us have to change your charge to murder, so you need to tell us exactly what happened. I've been sitting here listening to you roam on about what happened. All that is good, but you were here, so let's start on the 4th which is the Saturday that Kenyan got killed that night. You were contacted by your son Ronald, and you and Callie came down here and picked him up right in the front of Trey's house. You need to start when Ronald called you that day. What did he call you for and what was your conversation?
>
> (R. p. 500, l 5 – p. 501, l 15; State's Ex. 45).

Respondent submits that in reviewing the totality of the circumstances, the trial court did not abuse its discretion in finding the statement given by Appellant was made after she voluntarily waived her constitutional rights as enunciated under Miranda v. Arizona. It is uncontroverted that the interrogation lasted approximately one hour. (R. p. 16; State's Ex. 45). The interrogation occurred at the Williamsburg County Sheriff's Office. (R. p. 9; State's Ex. 45). It consisted of a single interview of Appellant. At the time of the interrogation, Appellant was thirty-seven years old. (See R. p. 478; see also State's Ex. 104). While it does not appear that the investigators ascertained Appellant's educational background, they did determine that she appeared to be able to read and write with no problems. (R. pp. 12-16; State's Ex. 45). Lail testified that Appellant did not appear to be under the influence of alcohol or drugs, and she did not appear to be suffering from any physical conditions or mental conditions. (R. pp. 11-12). Lail also indicated that Appellant was employed at the time of the interview. (R.

p. 17).[4] Lail also testified that Appellant was not threatened in any way during the interrogation, and the investigators did not withhold medical care, food, bathroom breaks, or any similar amenities that Appellant may have needed. (R. p. 16). There was no indication the investigators misrepresented any facts during the interrogation. Appellant was clearly advised of her rights prior to making the statement. (R. pp. 10-14; 478; State's Ex. 45). At no point during the interrogation did Appellant either ask to end the interview or request to speak with an attorney. Altogether, Respondent submits the trial court's determination that Appellant's waiver was knowing, intelligent, and voluntary is supported by the record.

Appellant's will was not overborne by any alleged coercive tactic by law enforcement. Respondent submits this case is akin to the factual scenario presented in State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). In Rochester, the defendant was taken to SLED for a polygraph exam. After the polygraph examiner administered the Miranda warnings, the defendant was given three polygraph exams. Id. at 198, 391 S.E.2d at 246. The defendant continuously denied any involvement in the murder about which he was being questioned even though the polygraph examiner told the defendant that he knew the defendant was lying. Id. at 199, 391 S.E.2d at 246. At some point, the polygraph examiner indicated it would be in the defendant's best interest to tell the truth. Id. Sometime thereafter, the defendant gave a detailed confession. Id.

[4] Lail testified that she thought Appellant worked at an ice cream shop, like a Dairy Queen. (R. p. 17). In her statement, Appellant stated she worked for Breyer's Brand Ice Cream in Maryland. (R. p. 477).

The Supreme Court upheld the trial court's admission of the confession in Rochester. The Court specifically noted the polygraph examiner did not promise the defendant anything if he gave a statement, and the examiner's statement "was not on its face an inducement or hope of lighter punishment. Standing alone, the polygraph examiner's comment did not constitute the kind of hope of reward or benefit," as was done in State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987). Rochester, 301 S.C. at 200-01, 391 S.E.2d at 247. "In addition to our finding that appellant's confession was not induced by a promise of leniency, there is sufficient evidence that shows appellant was not worn down by improper interrogation tactics such as lengthy questioning, trickery, or deceit. Appellant's confession was not induced by force, psychological or physical, or by direct or implied threats." Id. at 201, 391 S.E.2d at 247.

Appellant's case is analogous to Rochester in several respects. First, the alleged coercive statement by law enforcement in both cases were made while the interrogator was informing each defendant that law enforcement knew they were not telling the truth. Second, as was the case in Rochester, the statement by Investigator Collins neither promised any leniency for a statement nor implied leniency for cooperation. To the contrary, Collins' statements reflected that at that time, law enforcement believed it had enough information to charge Appellant with murder. In essence, Collins' remark that Appellant should tell them exactly what happened was equivalent to the polygraph examiner's statement that it would be in the defendant's best interest to tell the truth. Further, as was the case in Rochester, there was no indication that any other

elements the trial court would have reviewed under a totality of the circumstances review would support a finding the waiver of rights was involuntary. The interrogation only lasted a little more than one hour. There was no testimony or evidence presented to indicate law enforcement attempted to trick Appellant. There were no threats of force, psychological or physical, or any direct or implied threats. Altogether, the admission of Appellant's statement was not so manifestly erroneous as to show an abuse of discretion. See also Miller, 375 S.C. at 387, 652 S.E.2d at 453 (finding no abuse of discretion when officers and prosecutor told defendant it was in his best interest to cooperate but made no promise of leniency); Saltz, 346 S.C. at 133, 551 S.E.2d at 250 (finding no abuse of discretion in admission of statements given after officer indicated he told defendant "the only way they could help him was for him to tell the truth.").

Appellant's reliance upon State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990), is misplaced. In Osborne, the defendant challenged two of eleven statements she gave over a two and one-half month period. The defendant claimed the statements were coerced because the officers threatened to charge her with "withholding evidence" if she did not make a statement. Id. at 365, 392 S.E.2d at 179. In regards to the first statement, she also asserted that she was told that the first statement she challenged did not "fit the facts" and therefore she must provide another statement or face charges for withholding evidence. Id. In Osborne, both the defendant and the sheriff testified that the defendant was essentially told that she did not have to talk, but if she withheld evidence, she could be charged with a crime. Id. at 365-67, 392 S.E.2d at 179-80. The

Supreme Court concluded that the State failed to meet its burden by a preponderance of the evidence that the rights were voluntarily waived. Id. at 367, 392 S.E.2d at 180.

Appellant's case is distinguishable in several respects. First, Investigator Collins' statements in this case regarding the possibility that Appellant could face a murder charge was neither a promise of leniency in exchange for more information nor a threat of increased punishment if she failed to provide more information. It was merely an assessment of Appellant's potential predicament in light of the information that was available to law enforcement that contradicted Appellant's denials that she was not in the state when the murder occurred. There was no testimony or evidence at either the Jackson v. Denno hearing or at trial that indicated Appellant perceived the statement as anything else. Second, contrary to Appellant's assertions, there was no evidence presented that Appellant believed or had reason to believe she would face some additional punishment if she did not continue speaking with the investigators. As was noted by Investigator Lail at the pre-trial hearing, Appellant actually would not have faced any additional time had she been charged with murder because an accessory before the fact is subject to the same potential sentence as a principal. (R. p. 29); S.C. Code Ann. § 16-1-40. There was no testimony to support Appellant's current contention that she may have believed the death penalty would have been an available punishment had she been charged with murder. In light of the absence of such evidence, and the lack of evidence reflecting that

Appellant felt the questioning was coercive, Respondent submits Appellant's contention is without merit.

State v. Peake, 291 S.C. 138, 352 S.E.2d 487, does not afford Appellant any relief in this case. In Peake, the Supreme Court found that a statement was involuntary when the investigating officer promised the defendant that the solicitor would not seek the death penalty in the defendant's case if he gave a statement. Id. at 139, 352 S.E.2d at 488. The State had failed to meet its burden of showing the statement was not the product of the promise of leniency. Id. Here, the testimony at the pre-trial hearing and at trial indicates that no promise of leniency was made. Nor were there any threats of severe consequences if Appellant chose not to continue with her statement. This is also borne out by the lack of any substantial change of demeanor by Appellant on the audio tape of the statement. (See State's Ex. 45).

Altogether, the trial court did not abuse its discretion in admitting Appellant's statement into evidence. The State established by a preponderance of the evidence that the statement was made after Appellant voluntarily and intelligently waived her constitutional rights outlined in Miranda. Furthermore, there was no evidence indicating that Appellant's will was overborne by any coercive conduct by law enforcement. As a result, Appellant's convictions should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm her convictions in the murder of Kenyon Dorsey, burglary in the first degree, and criminal conspiracy.

Respectfully submitted,

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March 28, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
The Honorable Clifton Newman, Circuit Court Judge
Appeal Case No. 2010-172506

THE STATE

RESPONDENT,

V.

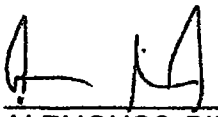
TAWANDA ALLEN,

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 28th day of March, 2013.



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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., SCCID/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 28th day of March, 2013.

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