ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH ORDELL MURRAY,

APPELLANT

APPELLATE CASE NO. 2014-000051

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting involuntary incriminating statements obtained by the Mount Pleasant Police Department in violation of *Miranda* and the fruit of the poisonous tree doctrine?

2. Did the trial court err in denying the Appellant's motion for a directed verdict in the armed robbery because there was [1] no identification of the Defendant, and [2] no evidence linking him to the scene other than his statement?

STATEMENT OF THE CASE

In April of 2012, the Charleston County Grand Jury indicted Kenneth Murray for armed robbery, indictment #2012-GS-10-2229. On October 30, 2013, Murray proceeded to a jury trial before the Honorable Knox McMahon. (R. p. 1.) Murray was represented by Assistant Public Defenders, Alicia V. Penn and Megan Kehrlich, and the State was represented by Assistant Solicitors, Jennifer Shealy and Alexander J. Ziegler. (R. p. 1). On November 1, 2013, the jury returned a verdict of guilty and Judge McMahon sentenced Murray to 28 years. (R. p. 487, lines 20-24). Murray filed timely motion to reconsider was filed on November 8, 2013, and denied on January 6, 2013. A timely notice of intent to appeal was filed on January 7, 2013. This appeal follows.

STATEMENT OF FACTS

On July 22, 2011 at 11:30 p.m., an armed robbery occurred at Pizza Hut. It was closing time and two suspects entered into the Pizza Hut. Two customers had just exited before the first suspect entered into the store and place a wooden stake in the door propping it open. Minutes later, allegedly a second person entered. However, the suspect did not speak, and was not seen by anyone. The suspects ran out the store after obtaining money from the cash register but were unsuccessful in obtaining money from a safe located in the Pizza Hut.

On July 28, 2011, policer officers executed a search warrant at 2627 Linen Lane, Mount Pleasant. During the execution of the search warrant[1], Appellant Kenneth Murray was arrested for possession of cocaine. Sergeant Hembree testified that when he saw Murray, he took Murray into custody. (R. p. 69, lines 22-25). Sergeant Hembree placed Murray into handcuffs, but they remained at 2627 Linen Lane for about an hour. (R. p. 70, lines 9-10, 14-25). Sergeant Hembree testified that he verbally advised Murray of his *Miranda* rights but did not get a signed waiver form at the home. (R. p.71, line 15). Sergeant Hembree executed a search warrant at 2627 Linen Lane with the SWAT Team and it was "not practical" to have the forms with him. (R. p. 71, lines10-13). Further, Murray was silent "for portions of" the attempts to talk with him and "offered nothing of value." (R. p. 72, lines 1-5). Subsequently, Murray was taken to the Mount Pleasant Police Department ("MPPD").

[1] Mount Pleasant SWAT team executed a search warrant for items related to an armed robbery at the Golden Bowl Chinese Restaurant on May 27, 2011. Three other people were linked to this robbery. A BB gun was found. It does not appear that the other things sought were found. The State only introduced the BB gun into evidence over an objection.

At approximately 1:00 p.m., Murray was placed in the investigator's suite in an interview room. (R. p.72, lines 11-12). Sergeant Hembree testified that the interview purposed was in reference to several recent armed robberies in the Mount Pleasant area including the Pizza Hut robbery. (R. p. 54-55, lines 16-25, 1-8). The interview room within the investigator's suite had a desk, several chairs, no windows, no phone, no clock, no bathroom, and no water. (R. p.72, lines 18-25). Murray remained handcuffed in that interview room for 11 hours. (R. p.74, lines12-25). Sergeant Hembree was in and out of the room. (R. p. 75, line 7-10). However, Murray was not free to go in and out as he was under arrest. (R. p. 54, lines 1-5; See also R. p. 75, lines 10).

Sergeant Hembree did not provide a written waiver of *Miranda* rights to Murray at MPPD. (R. 9). However, Sergeant Hembree testified that the "standard procedure would have been as soon as we entered the room. That's what the, the practice of the police department is."[2] (R. p. 76, lines 12-18)[3]. When cross examined "[d]id he (Murray) originally not want to talk to you?" Sergeant Hembree replied, "He never said that he didn't want to talk to me. He was just quiet, more of a listener. I guess, like a listener, he did answer some questions." (R. p. 76, lines 1-4).

Murray testified that he invoked his Miranda rights. Murray did not want to talk and wanted his attorney. (R. p. 95, lines 12-14). Murray testified Sergeant Hembree accused him of the Piggly Wiggly robbery (R. p. 95, lines 21-25). Murray was in the room with Sergeant Hembree with the door closed. (R. p. 96, lines 22-24). Further, he querred that Sergeant Hembree was "so aggressive." (R. p. 99, lines 4-7). Sergeant

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[2]There was no time on the waiver form like the statement form. (R. p. 76, lines 19-23). The State did not enter into evidence a signed waiver of rights that confirmed that Sergeant Hembree advised Murray of his Miranda rights. Further, Sergeant Hembree did not sign as witness to the waiver of rights forms on July 28, 2011.

Hembree continued to question Murray. Sergeant Hembree threatened him with a bullet "[h]e say found on my porch and told me that he was gonna call the Feds and try to get me 15 years and I needed to know something about the crime." (R. p. 90, lines 6-15; See also R. p. 99, lines 9-16). Further, Murray testified that Sergeant Hembree kicked chairs. (R. p. 90-91, lines 22-25; 1-4; See also R. p. 96, lines 11-14). Hembree invaded Murray's personal space. (R. p. 101, lines 22-25).

During the in camera hearing, Detective Buncum testified that he advised Murray of his *Miranda* rights and obtained Murray's written and signed waiver of rights. Detective Buncum was the only witness to the waiver of rights. (R. Ex. # 4).[4] Murray testified that Detective Buncum advised him of his rights. (R. p.105, lines 12-25). Murray testified that he "got in the interview room about three o'clock" and he informed Detective Buncum he "didn't know nothing about nothing and I don't want to speak to nobody." (R. p. 106, lines 11-23). Detective Buncum testified he was the person to build a rapport with Murray. (R. p. 124, lines 15-19). Detective Buncum described Murray as "someone who didn't want to talk to someone at that time." (R. p.125, lines 19-20). Detective Buncum testified he spoke with Murray for one hour. (R. p.135, lines 9-13).

Later that night, Sergeant Hembree took a written statement from the Murray at 11:15 p.m. (R. p. 75, line 5, R. Ex. # 8).[5] The first statement read:

> *This the statement of Kenneth Oredell Murray, taken by Sgt. Justin Hembree of the Mount Pleasant Police Dept.* ***I offered Mr. Murray a Pepsi, and he accepted it at 23:25****. I was just the* ***lookout in the Piggly Wiggly robbery,*** *and I had a* ***22 revolver****.*
>
> *Q: What Piggly Wiggly are you referring to?*

[4] Det. Buncum only testified in the Pre-trial hearing. Note that Det. Buncum's advisement page is 1 of 1 pages and Buncum did not obtain a statement from the Murray at any point on July 28, 2011.
[5] No video was made of Murray providing the statement. (R. p. 79, lines 1-20).

A: Piggly Wiggly at the IOP Connector.

Q: How much money did you get?

A: Five Hundred dollars.

Q: Is the Piggly Wiggly robbery the only robbery that you have committed?

A: Yes

Q: What clothes were you wearing during the robbery?

A: ***Black pants, Black short sleeved shirt, and whit long sleeve shirt****.*

Q: What did you do with the clothes from the robbery that you were wearing?

A: I threw them out in the woods in Hamlin.

I apologize. (emphasis added).

Murray testified that he was forced to sign the statement by Sergeant Hembree. (R. p. 92, lines 1-9; See also R. p. 101, lines 17-20). The second witness to Murray's July 28, 2011 statement was Captain McCarthy.[6] (R. Ex. # 3). However, Murray testified that Captain McCarthy only came in when he was crying.[7] (R. p. 102, lines 17-24). Sergeant Hembree testified that Murray signed the statement, and was given a "Pepsi" at 11:25 p.m. (R. p.78, lines 3-7). Murray was not provided any other food during the 11 hours. (R. p.78, lines 10-20).

On August 2, 2011, approximately four days later, Sergeant Hembree testified Murray contacted Sergeant Hembree on via telephone. Murray said he wanted to speak with Sergeant Hembree about the events on July 28, 2011. Murray said he called Sergeant Hembree because "he wanted to know about the confession if he made it." (R.

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[6] Captain McCarthy only testified in the Pre-trial hearing regarding the August 2, 2011 statement. The record does not contain any testimony regarding the July 28, 2011 statement.

[7] The testimony that indicates that Murray was crying referred to August 2, 2011.

p. 92, lines 12-15, 18-23). Sergeant Hembree arranged Murray's transportation from the jail to the station.

Before meeting with Sergeant Hembree, Murray made an identification of a suspect, #3 at 9:30 a.m. related to Piggly Wiggly robbery.[8] (R. Ex. # 8). The interview was conducted from 10:00 a.m. until 12:19 p.m. Sergeant Hembree offered Murray a smoke break immediately and met with Murray in an interview room. (R. p. 77, lines 6-7). Sergeant Hembree immediately completed the written advisement of rights form with Murray (R. p. 77, lines 8-9, R. 3).

At 12:19 p.m., Sergeant Hembree had Sergeant Helms show Murray a Photographic Lineup Admonition and photos.[9] (R. Ex. # 3). After showing the photos, Sergeant Helms testified that Murray did not identify anyone and Helms informed Hembree. (R. p. 385, lines 3-9). At 12:31 p.m., Sergeant Helms testified that "Sergeant Hembree came into the room and asked Murray if he was clear about what the was telling him, and asking him if he would look at the lineups again understanding that the two packets were specific to the Pizza Hut robbers. Kenneth said yes." (R. p.356, lines 9-16). Sergeant Helms show the same Photographic Lineup Admonition and Photos to Murray. (R. Ex. # 4). For the second time, Sergeant Helms testified that Murray did not identify anyone again. (R. p. 389, lines 9-10).

At 12:57 p.m., Sergeant Helms testified, "Sergeant Hembree asked Murray if he understood the lineups were related to the Pizza Hut robberies, he (Murray) said yes, and then Sergeant Hembree asked, in my (Sergeant Helms) presence, if Kenneth was being truthful?" (R. p. 356, lines 21-24). Sergeant Helms observed Murray begin to cry and

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[8] It is unclear in the record as to who set up this photographic lineup since Murray was said to be the initiator for the August 2, 2011 interview with Sergeant Hembree.

[9] Sergeant Hembree was not present during the photographic lineups.

stated he was scared. (R. p. 390, lines 10-14). Sergeant Hembree asked Kenneth if he recognized the any other subjects in the photographic lineup. (R. p. 356, lines 4-6). Sergeant Helms showed Murray the same Photographic Lineup Admonition and photos. (R. Ex. # 5). Murray made an identification of a suspect (Major) #2. (R. Ex. # 5). Murray testified that he cried because he was forced to pick out people and he had no choice. (R. p. 23, lines 21-24).

Sergeant Helms testified that each time he instructed Murray, concerning the procedure, prior to viewing any photographic lineup.[10] Sergeant Helms had no knowledge of the case. (R. p. 379, lines 10-12). Further, Sergeant Helms informed Sergeant Hembree after each photographic lineup the results. (R. p 385, lines 7-8; See also R. p. 386, lines 2-3).

After four hours, Sergeant Hembree obtained a signed statement from Murray and Captain McCarthy witnessed Murray sign the statement. (R. Ex. # 2). Captain McCarthy did not witness Murray waive his rights and it is unclear whether she heard Murray provide verbally the statement to Sergeant Hembree. (R. Ex. # 7).

The trial court stated, "in determining whether a statement was voluntarily given, the court must determine the totality of the circumstances surrounding the giving of the confession. As I understand it, the motion to suppress is focused on the August 2, 2011 statement that was given to Sergeant Hembree. (R. p.141, lines 18-23).

> *"They're four questions that the court must answer. The first question, did the defendant make this statement. This statement being Court's Exhibit No.2. I find that the State has proven, by preponderance of the evidence, that he did make this statement. The testimony by the officer, Sergeant Hembree, was that he wrote the statement. It is indicated on the statement this is the written statement of Kenneth*

[10] Sergeant Helms showed Murray two separate photographic lineups three times each related to the Piggly Wiggly and the Pizza Hut robberies.

Oredell Murray written by Sergeant Justin Hembree. It is signed in two spots by Mr. Murray indicating first I have read or have had read to me the foregoing statement, which has been freely and voluntarily made by me. It is true and correct to the best of my knowledge, the defendant's signature and the two witnesses on that, and he also indicates I have received a copy of the above statement and his signature. The second question is whether or not he was administered his Miranda warnings before he was questioned by law enforcement." (R. p.142, lines 1-16).

"Well, I'll start from the most recent and work my way backward. As I look at the Court's Exhibit No. 1, that is the Mount Pleasant Police Department advisement of rights to Kenneth O. Murray dated 2 August 2011. It appears that those rights were advised to Mr. Murray by Sergeant Justin Hembree.

There are four sentences numbered one, two, three, and four. To the left there's a line. The Officer testified he advised him of those rights. There initials appears K. M.by—to the left of each one of those numbers.

At the bottom of – two-thirds of the way down it says I fully understand each of these rights which have been explained to me. Signed by Kenneth Murray, dated 8/2/2011, and witnessed by Sergeant Hembree. Therefore, a waiver of rights. I fully understand each of these rights which have been explained to me, and having these in mind, I wish to waive these rights. No threats, force, or promises of any kind of have been made to me by anyone to induce or cause me to waive these rights and answer questions. Of course, there's no question, from the testimony between Sergeant Hembree and the defendant himself, that he, the defendant, initiated this conduct, this contact with Sergeant Hembree. Sergeant Hembree did not initiate that. It's uncontradicted in the record and defendant agreed with that."

(R. p. 142-143, lines17-25, 1-16).

The court looked at the statement given by Murray, which is Court Exhibit No. 4, which was a Mount Pleasant Police Department advisement of rights given to Murray. The court noted that all the basic information was the same as on Court Exhibit No. 2, except Court Exhibit No. 4 lacked a phone number. (R. p. 143, lines 17-23). Further, Buncum testified he advised Murray of his rights, that Buncum testified Murray appeared nervous as most people do when confronted by law enforcement and that Murray understood

those rights, that he signed that he understood those rights, and that he signed a waiver of those rights. (R. p. 143-144, lines 24-25, 1-6). The court addressed the "good guy" approach and cited *Miller v. Fenton*, 479 U. S. 989, 1986, "holding confessions admissible despite interrogating officer's support in an encouraging manner aimed at winning appellate' s trust in making him feel comfortable about confessing." The court also cited *Beckwith v. United States*, 425 U.S. 341, "interrogator had sympathetic attitude, but confession was voluntary." (R. p. 144-145, lines17-25, line 1). The court noted that Murray was advised of his rights three times. (R. p. 145, lines 8-12).

The court disagreed with that Murray's characterization of Buncum's convenient memory versus Murray's convenient memory. (R. p. 145, lines13-23). The court saw no reason to go into the factors because the court found no credibility. (R. p. 145, lines 24-25). The court found that both Sergeant Hembree and Buncum testified that Murray "did not ask for a lawyer, did not—he did not invoke his right to remain silent." (R. p. 145-146, lines 25, 1-2). Captain McCarthy also confirmed that she was in there and her observation of him.[11] (R. p. 146, lines 2-3).

The court turned to the second question, whether or not Murray was administered his Miranda warning before he was questioned by law enforcement officers. It was on August 2, 2011 when he initiated contact. It was on July 28, 2011 in writing, and on July 28, 2011 verbally by, by two different officers. (R. p. 146, lines 4-9). The third question, has the State proven by preponderance of the evidence, he knowingly and intelligently waived his Constitutional rights. (R. p. 146, lines 10-14).

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[11] The court ignored that Captain McCarthy testified she was only in the room on August 2, 2011 for about 10 minutes of the 3-4 hours that Murray was at the police station. Captain McCarthy never testified about the July 28, 2011 statement she witnessed. (R. p. 116, lines 16-10 and R. 122, lines 9-15).

The court addressed the issue of Murray's voluntariness and provide the factors the court must consider. Those factors were: [1] totality of the circumstances surrounding the defendant's giving of the statement; [2] his youth; [3] his education or lack thereof; [4] low intelligence; [5] lack of any advice of the accused's Constitutional rights; [6] length of detention; [7] repeated and prolonged nature of questioning; and [8] use of physical punishment such as depravation of food or sleep.[12] (R. p. 146, lines 15-24).

The court first considered that Murray "requested to speak with Sergeant Hembree. Murray claimed he was threatened, [Sergeant Hembree] was up in his face, and was kicking chairs around, and he thought that would be a good idea and he thinks that's credible. The court thought the request defeated his position as to July 28, 2011." (R. p. 146-147, lines 25, 1-7).

The court considered Murray's education and ability to understand his rights and waiver thereof. Specifically, that Murray was in special education since the 7th grade. The court stated "to me that's like collateral damage. Collateral damage is still damage. Special education is still education. High school diplomas, college degrees, extent of education, that doesn't measure intelligence. Mr. Murray was able to track questioning both from his attorney and from the solicitors. While on the stand, his responses were reasonable and appropriate and he seemed to understand the questions and give what he considered to be appropriate, although I think it would be in, no[n]credible testimony." (R. p. 147, lines 14-19).

[12] Trial court noted, "no one factor is determinative, but each case requires careful scrutiny of all surrounding circumstances." (R. p. 146, line 22-24).

As to the August 2, 2011 detention length, the court found that it was three hours with a smoke break. He was talking. Then there's half of the talking, there's the writing of the statement at his request. (R. p. 147, lines 20-25). The court found that the State met its burden, and Murray knowingly and intelligently waived his Constitutional rights. (R. p. 148, lines 2-6). Further, the court found at no point during the period of time leading up to this statement that was given that Appellant was not given Miranda or that he ever invoked any of his Miranda rights. The August 2, 2011 statement was admissible.

Murray made the second challenge, as to the motion to suppress, that the statement was fruit of the poisonous tree; therefore, the evidence must be excluded if it would not have come to light before the illegal actions of the police and the evidence has been obtained by exploitation of the illegality. (R. p. 148-149, lines 15-25, 13-16).[13] The Court found that the statements were not fruits of the poisonous tree.

Murray requested to clarify the record as to the interrogation of Murray the first day he was arrested on July 28, 2011. Murray wanted clarification as to the court's ruling that if Murray questioned along those lines he would open the door. (R. p. 194, lines 14-25). The court noted that the ruling was as to the motion in limine. Further, that the State would have to timely object. (R. p. 195, lines 7-14, 19-25).

In the State's case-in-chief, Sergeant Justin Hembree was called to the stand. At that point, Murray renewed his previous objection as to his invoking Miranda rights to counsel, the statement was not voluntary, the statement was the unlawful fruit of the poisonous tree from a search warrant lacking probable cause, and therefore, the introduction of this statement violates Murray's Fourth, Fifth, Sixth, and Fourteenth

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[13] The court asked if Murray's position was based upon *Wong Son.*

Amendments. (R. p. 290, lines 8-18). The court denied the motion and renewed its previous rulings. (R. p. 290, lines 22-23).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Williams*, 405 S.C. 263, 273, 747 S.E. 2d 194, 200 (S.C. App. 2013) (citing *State v. Baccus*, 367 S.C. 41, 625 S.E. 2d 216, (2006)). Thus, an appellate court is bound by the trial court's factual finding unless they are clearly erroneous. *Id.* 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 v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct.App.1999) (citing *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. *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). The jury must determine whether the statement was freely and voluntarily given beyond a reasonable doubt. *Washington*, 296 S.C. at 55-56, 370 S.E.2d at 612. On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion. *State v. Von Dohlen*, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996). 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).

ARGUMENT

1. The trial court err in admitting involuntary incriminating statements obtained by the Mount Pleasant Police Department in violation of [1] *Miranda and [2] Wong Son.*

The first statement on July 28, 2014 should have been suppressed primarily because Murray was in custody at the time of the statement. Whether a suspect is in custody is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning.

It is an objective determination, that is, would a reasonable person have believed he was in custody. *State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003). On appeal, the trial court's findings as to custody must be upheld where they are supported by the record. *Id.* In *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering Miranda warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:

1) the completeness and detail of the question and answers in the first round of interrogation;
2) the timing and setting of the first questioning and the second;
3) the continuity of police personnel; and
4) the degree to which the interrogator's questions treated the second round as continuous with the first.

State v. Navy, 688 S.E.2d 838, 386 S.C. 294 (2010); *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

[T]he statements must be suppressed unless "curative measures" were taken. As examples of curative actions, Justice Kennedy suggested a substantial break in time and circumstances between the pre-warning statement and the warned, or an additional warning before questioning resumes that the pre-warned statement is not admissible. *State v. Williams,* 405 S.C. 263, 747 S.E.2d 194 (S.C. App., 2013).

When the Defendant contests the timing of the Miranda warnings, the defendant triggers an analysis pursuant to *State v. Navy*, and the issue of whether he intelligently and voluntarily waived his right to remain silent prior to making a statement is in question. *State v. White,* (S.C. App. 2014). *See State v. Miller,* 375 S.C. 370, 380, 652 S.E.2d 444, 449 (Ct. App. 2007) (finding the "intelligent waiver mandate" is in addition to the voluntariness requirement of Miranda). The trial court cannot simply find the defendant's statement was freely and voluntarily given and the jury will be able to hear the statement. When a defendant challenges the timing of the Miranda warnings with the taking of his statement as a *Navy* violation, the trial court is charged with making a factual finding as to whether the interrogative procedure through which the statement was obtained comported with *Navy*. *State v. White,* 410 S.C. 56, 762 S.E.2d 726 (S.C. App., 2014).

Prior to trial, Murray moved to suppress the statements because the two statements were involuntarily rendered under duress. (R. p. 137, lines 16-18).

1) During the *Jackson v. Denno* hearing, Sergeant Hembree testified policer officers executed a search warrant at 2627 Linen Lane, Mount Pleasant. Kenneth Murray was arrested and placed into custody. (R. p. 69, lines 22-25). They remained at 2627 Linen

Lane for about an hour. (R. p. 70, lines 9-10, 14-25). Sergeant Hembree testified that he verbally advised Murray of his Miranda rights and did not get a signed waiver form at the home. (R. p.71, line 15). At that point, Murray did not want to talk and provided nothing of value.

Murray testified that he was at the house, which belonged to his uncle, and Sergeant Hembree took Murray upstairs, asked him questions and accused him of robbery. (R. p. 95, lines 17-22). Murray testified that he was arrested and transported to the Mount Pleasant Police Station. Murray testified that after he was handcuffed, he told the police officers he did not want to speak. (R. p. 87, lines 16-20). When he arrived at the police station around 3:00 p.m., Murray told Corporal Buncum he wanted to speak to his lawyer or someone. (R. p. 88, lines 12-13). Murray testified that Buncum would not [1] contact Murray's lawyer, [2] suggested that he knew Murray's family, and [3] stated that he would contact Murray's father. Murray testified Buncum did not allow Murray to speak with his father. Murray testified he was in the room with Sergeant Hembree with the door closed and Sergeant Hembree was "so aggressive." (R. p.99, lines 4-7). Sergeant Hembree continued to question Murray despite Murray saying he did not want to talk. Murray testified that Sergeant Hembree threatened him with a bullet "[h]e say found on my porch and told me that he was gonna call the Feds and try to get me 15 years and I needed to know something about the crime." (R. p. 90, lines 6-15; See also R. p. 99, lines 9-16). Further, Murray testified that Sergeant Hembree kicked chairs. (R. p. 90-91, lines 22-25; 1-4). Hembree invaded Murray's personal space. (R. p. 101, lines 22-25). Murray was held so long that he began to doze off to sleep, was not offered any food or water until he made a statement.

Murray felt he was being tortured. (R. p. 90, lines 16-24; R. p. 91, lines 1-4, See also R. p. 91, lines 10-18).

Buncum testified he spoke with Murray for an hour. The record is unclear as to when Sergeant Hembree started interviewing Murray. Buncum testified that he remained in the interview room trying to make Murray feel more comfortable and loosen him up to talk. Both Sergeant Hembree and Detective Buncum testified that Murray's demeanor was quiet.

After approximately seven hours, 11:15 p.m., Sergeant Hembree reduced to writing the first statement. Captain McCarthy, who did not provide any testimony about the July 28, 2011 statement in the hearing, witnessed.

At some point between July 28, 2011 and August 2, 2011, Murray contact Sergeant Hembree from the jail via telephone. On August 2, 2011, Sergeant Hembree arranged for Murray's transport to the police station. Once at the police station, Murray identified from a photographic lineup, suspects in a robbery outside of this case and, suspects in this case. Further, Murray provided the second statement that the court admitted over Murray's objection. (R. Ex. # 2). The second statement Murray gave Sergeant Hembree:

> *This is the written statement of Kenneth Oredell Murray, written by Sgt. Justin Hembree. In the robbery of Pizza Hut at six mile road on 17, I had a b.b. gun that ya'll found under my mattress. Bootsie had a 9 mm gun. Bootsie was around the neighborhood and asked me if I wanted to go with him on it. We went in Pizza Hut, I think there was about three people inside. We robbed them, and left. We got like $200. We were parked on the side of the building in a blue Mitsubishi, a newer model. Bootsie drove us away after the robbery. We were parked at the dealership next door. We left there and went back to my house on Linnen Lane.*

The trial court did not make a finding as to whether Murray was in custody. Despite testimony that the SWAT team executed a search warrant for the purpose of

finding another individual regarding another robbery at Golden Bowl, the trial court took no issue with: [1] Murray was arrested for possession of cocaine; [2] Sergeant Hembree questioned Murray about the Mount Pleasant robberies, not cocaine; [3] Murray provided incriminating statements regarding two robberies; and [4] Murray was arrested approximately eleven hours later on the Piggly Wiggly robbery but did discuss the Pizza Hut robbery. (R. p. 54, lines 17-25, R. p. 56, lines 1-8; R. Ex. # 10). Subsequent to the trial, Murray filed a motion to reconsider the sentencing. In the motion, it appears that the State had jail records of Cleveland Major's phone conversations, which the State did not present to the court.[14] During these calls Major stated that he wished he had not robbed the Pizza Hut, that he was going to get Murray to write a statement that Murray forced Major to commit the robbery, bragged about how he would get his case dismissed, and that Major was going to assault Murray. Murray wrote the Solicitor's office. Murray's school records revealed that he had an IQ of 75. (R. Ex. 13, p. 2-3).

Murray presented in the *Jackson v. Denno* hearing, information regarding his education. Murray testified that he was 27 years at the time of this trial. He went through 12th grade.[15] (R. p. 85, lines 16-20). Murray testified he was disabled and could not understand some things very well in school. Murray had trouble with his homework, got in trouble in class, had problems understanding in his classes. (R. p. 85, lines1-19). Murray testified he began attending special education classes in the seventh grade and school was hard for him. (R. p. 85-86, lines 20-25, 1-11). Murray worked with his father

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[14] The State did not call Cleveland Major to testify but listed him as a witness for the State.

[15] Murray has an IQ of 75 according to his school records. (R. Ex. 13- Motion for Reconsideration). (An IQ of 70 is considered mentally retarded and that is a range of 15 points that would be considered border-line mentality retarded.)

doing plastering and had been working with him since Murray was younger. (R. p. 94, lines 20-25; R. p. 95, lines 1).

The trial court consideration of Murray's education and did not consider special education[16] as an impediment to Murray's ability to understand his rights. "Special education is still education. High school diplomas, college degrees, extent of education, that doesn't measure intelligence."[17]

Sergeant Hembree testified he was in and out of the interview room during the time he interrogated Murray about the robberies, which began at the house where Sergeant Hembree verbally advised Murray of his *Miranda* rights. R. p. 71, line 15). The trial court did not consider the questioning at the home as repeated and prolonged questioning that overcomes the will of Murray, and the eleven hours at the station resulting in an inculpatory statement in the robbery.

Murray was held in the first interview regarding robberies in Mount Pleasant for approximately eleven hours without food or water in a room without windows, a phone, and in handcuffs that were only changed to reposition his hands in front of his body. (R. p. 74, lines 12-25). Sergeant Hembree was in and out of the room and Murray was not allowed to leave. (R. p.54, lines 1-5, See also R. p. 75, lines 7-10). It was a tactic to send in Detective Buncum in to "loosening up" Murray. (R. p.124, lines 15-19). Sergeant

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[16] "Special Education" refers to services given to students with disabilities through *the Individuals with Disabilities Education Act*, better known as IDEA. Students in special education require significant modifications in their educational programs; they may need extensive remediation, smaller-group settings, adaptations to their workload, a slower-paced curriculum, or other adjustments to suit their abilities and limitations as determined by a team of educators and parents working together. The team develops an *IEP*, or Individualized Education Program (or Plan), a legal document that spells out exactly what the school will do and what goals have been set for the student. Students in special education may be taught in a regular classroom with supports, a self-contained classroom, or a special school for students with similar disabilities.

[17] Trial court observed Murray's testimony. (R. p. 85, lines 5-25 through p. 113, lines 1-16).

Hembree testified that he did not offer any food or water to Murray, except a Pepsi, from 1 p.m. until 11:15 p.m. (R. p.78, lines 3-7). Sergeant Hembree testified he would have made a written notation if food or water were offered to Murray. (R. p. 78, lines 17-20).

2) Murray's second challenge to admission the involuntary statement based on the fruits of the poisonous tree based upon *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 and search warrant at 2627 Linen Lane. Murray's statements should have been suppressed as the fruit of the unlawful search of the poisonous tree.

Wong Sun held that evidence must be excluded if it would not have come to light but for the illegal actions of the police and the evidence has been obtained by exploitation of that illegality. *Id.*

Murray presented the search warrant from July 28, 2011 and argued that it was insufficient in that it does not establish probable cause. (R. p. 149, lines 13-17). It was conclusory and provided no information about the source's credibility other than to say that the source is credible. (R. p. 150, lines 1-4). In review of the search warrant, Murray questioned how or why the police thought guns would be in the house. (R. p. 150, lines 5-6). Murray specifically pointed out that police relied on a general statement that a suspect lived at 2627 Linen Lane. (R. p. 150, line 7). Murray pointed out that Murray was arrested in the house, and from there all things flowed, all statement are obtained from that initial arrest. (R. p. 150, lines 5-11). Murray argued that the confidential informant, who provided independent information did not say he saw: [1] the specific kind of gun; [2] a gun with this characteristic, and/or [3] a gun with certain characteristic

used in this robbery at this house. (R. p. 167, lines 7-9). However, the statement was guns are always there. (R. p. 167, lines 9-10). And, in addition, the victims of this robbery do not identify the gun as the gun pointed at them on that night at Pizza Hut. (R. p. 166-167, lines 23-25; 1-14).

As to obtaining a search warrant for 2627 Linen Lane, Detective Michele Bacon testified she began investigating the Gold Bowl robbery that occurred on May 27, 2011. (R. p. 151, lines 9-18). She and another officer interviewed the victims in the case. (R. p. 152, lines 1-2). Detective Bacon described the crime as two suspects entered from the back –door of the restaurant and one was armed with a handgun. "The suspects were— one had on all black clothing. The other one was wearing a little bit of camouflage. They both had their faces covered. They entered the business and advise the employees to—I think that they motioned with the gun just to open the register. So, they, the victims opened the register, gave them the money and they also went underneath the counter and gave them some money bags containing receipts and other paperwork related to the store and the two suspects then fled out the back-door." (R. p. 152, lines 5-16). She testified that she had an occasion to interview a suspect in the Chinese restaurant robbery. (R. p. 152, lines 21-24). She interviewed a suspect, who implicated himself as participant in the Golden Bowl robbery and two other suspects. (R. p. 153, lines 3-9). She testified she prepared a search warrant based on that suspect's interview for the residence of Jarrett Graddick. (R. p. 153-154 lines 18-25, 1). She testified as to procedure for getting the magistrate to sign the search warrant. (R. p. 155-156, lines 1-25). Bacon testified that there were three search warrants for each suspect and the address for Graddick came from the database at the Police Department. (R. p. 156-157, lines 24-25, 14-19). Lastly,

Bacon testified that Graddick was not a credible source and that the location had guns in the house. (R. p. 166, lines 7-8).

2. Did the trial court err in denying the Appellant's motion for a directed verdict of acquittal where the State evidence only raised a suspicion of guilt because [1] there was no identification of Murray linking him to the scene and [2] the state cannot solely rely on Murray's involuntary statement?

"On appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State." *State v. Odems,* 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "[I]f there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *Id.*

The court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion the trial judge shall consider only the existence or non-existence of the evidence and not its weight.

A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also *State v. Williams*, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 452–53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *State v. Bostick,* 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984); *State*

At the end of the State's case-in chief, Murray motioned for a directed verdict pursuant to Rule 19 based on no identification of Murray and no evidence linking him to the scene other than his involuntary statement. (R. p. 404, lines 19-24). The trial court denied the motion ruling that there was an abundance of direct and substantial circumstantial evidence. (R. p. 405, lines 2-16).

At the close of the State's case, direct and circumstantial evidence of Murray's guilt had been presented. However, in the light most favorable to the State, no evidence linked Murray, including footprints from Pizza Hut countertop and BB gun found at the residence, to the crime scene. Aside from Murray's statement, the witnesses that testified were Ellington, Bouani, Mitchell, Son, Magie Stephenson, Hembree, Helms and Haupt. None of the witnesses described the second suspect and some could not confirm if there was a second suspect.

Desmonde Ellington, Pizza Hut Manager, testified that two people with gray sweaters, black pants, sweaters over their heads with only mostly chin area of their face observed, both suspects were black who robbed the store. (R. p. 207, line 16, p. 208, lines 3-9, lines 15-25). When the first suspect came in the store, the cook and driver went straight to the floor. (R. p. 209, lines 24-25). The first suspect pointed a gun in their faces. (R. p. 210, line 15). The suspects drove off in a purplish and bluish Suzuki Forenza coming from Baker Motor Company. (R. p. 216, lines 1-3). He never describes the second suspect.

Ann Son testified that she worked at the Village Cleaners next door on the right to the Pizza Hut. (R. p. 227, lines 1-2). Over Murray's objection, she testified that Village Cleaners had a video of the entrance of the Pizza Hut from her surveillance cameras in

the store. (R. p. 227, lines 5-25).[18] She testified she observed on the video two suspects approached the Pizza Hut with nothing their hand but a two by four. She did not observe the two suspects inside the store. However, due to a virus on her computer, the video was not available.[19] She testified from her memory but was not sure that her memory was correct. Prior to the robbery there were two individuals in the store. Also, Ellington did run out of the Pizza Hut after the suspect or suspects.

Fouad Bouani, former Pizza Hut employee and eye witness, testified that the first suspect came in with a shirt over his face, a wooden stake and jumped on the counter top. (R. p. 262, lines 8-10, See also p. 267, lines 24-25, p. 268, lines 1-4). He testified that he was face down, could not see nothing and he moved to the ground near the sink. (R. p. 260, lines 8-9, 19-22, p. 261, line 6). **He never saw the second guy**. (R. p. 261, lines 7-9). The gun was pulled on everyone. (R. p. 263, lines 18-20). He testified that the suspect had on a trench coat with something sticking out that looked like a gun and wearing black pants and shoes. (R. p. 264, lines 14-17, p. 269, lines 12-17). However, he did not provide any information about a trench coat in his statement that night. (R. p. 266, lines 1-2, p. 269, lines 16-25, p. 270, lines1-5). **He could not see anyone come in the door from this location in the kitchen** (R. p. 265, lines 8-1).

Lamar Mitchell, Pizza Hut cook, testified a person came in holding a gun. (R. p. 273, line 14). The person place a stick in the door at the corner. (R. p. 273, lines 9-10, lines 21-22). He testified that the person pointed the gun at him. (R. p. 274, lines 15-16).

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[18] Murray objected to Ann Son testifying as to video based on the best evidence rule 1002 and 1004. The video tape was no longer existed and not available for the trial. The trial court relied on *State v. Worthy,* 239 S.C. 449, 123 S.E.2d 835 (1962) (overruled on other grounds) and overruled the objections. (R. p. 227, l. ___).

[19] Robert Magie testified that he was an IT Specialist retrieved the 2011 video form the Laundromat and could not get the video from the computer.

The second person came in and did not say anything. (R. p. 275, lines 20-25). Unlike Fouad Bouani, Lamar Mitchell testified the second person was clearing the till and the first person was getting the safe. **He further testified he did not remember if he told the police whether it was two suspects or one suspects because someone was standing over him.** (R. p. 278, lines 22-25). In the trial, Mitchell testified, **"I'm not sure there's a second guy."** (R. p. 279, lines 14-16, p. 280, lines 7-12). **He could not describe the second guy because he didn't see or hear him.** (R. p. 280, lines 19-25).

Vance Stephenson, Mount Pleasant Police Department, testified he responded to the call at Pizza Hut. (R. p. 282, lines 14-17). He spoke with Fouad Bouani and did not locate any suspects that night. (R. p. 284, lines 19, 25, p. 285, line 1). Stephenson observed the shoe print on the counter and the stick laying on the ground inside of the store. (R. p. 285, lines 4-6). He further observed the surveillance camera facing the drive through on the right side of the business but did not see any other cameras. (R. p. 285, lines 14, 16-18). He that testified Detective Byrd and he walked the scene and notice the surveillance camera (R. p. 285, lines 20-24). Lastly, Stephenson testified there was no other investigation of the robbery that night. (R. p. 285, line 25, p. 286, lines 1-2).

Justin Hembree, Mount Pleasant Police Department, testified he took Murray's statement that implicates Murray in the Pizza Hut robbery. Hembree also arrested the alleged co-defendant, Major. Major pleaded to the Pizza Hut armed robbery prior to this trial. However, Major did not testify at the trial for the State.

Over Murray's objection that was sustained, the State introduced three exhibits through Ray Haupt of Mount Pleasant Police Department. While at 2627 Linen Lane executing a search warrant on July 28, 2011, the police found a Black in color, Powerline

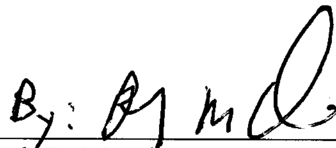
BB gun under the mattress in the front left bedroom. (R. p. 394, lines 8-17). Also, Haupt testified that paperwork belonging to Murray was found in the same room as the BB gun. (R. p. 394, lines 19-21). The State successfully moved the BB gun and photos into evidence. (R. p. 395, lines 17-25, p. 396, lines 20-25).

The State failed to connect Murray to the crime scene. The victims did not identify the BB gun as the gun used in the robbery. The State did not produce any fingerprints from the BB gun that matched Murray's fingerprints. Further, the State did not connect Murray to the crime scene with the footprints from the Pizza Hut countertop. Neither of the State's witnesses identified Murray as the first or second suspect who came into the Pizza Hut that evening and committed the robbery. Lastly, the State listed as a witness, Cleveland Major, but State did not call Major to testify or introduce Major's allocution in the trial that Murray participated in the Pizza Hut robbery with him.

CONCLUSION

Based on the above, the trial court erred in admitting the involuntary incriminating statements obtained from Murray in violation of *Miranda* and *Wong Sun*. Further, the trial court erred when it did not grant Murray a directed verdict of acquittal when the State only raised a suspicion of guilt and was not sufficient to show that Kenneth Murray was guilty of committing the Pizza Hut armed robbery. Thus, appellant should receive a new trial (issue I) or a directed verdict of acquittal (issue II).

Respectfully submitted,



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This 5th day of February 2015.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

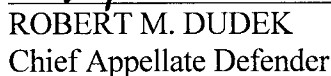
KENNETH O. MURRAY,

APPELLANT

APPELLATE CASE NO. 2014-000051

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of February 2015.



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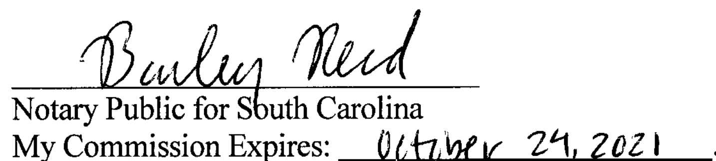
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 5th day of January 2015.



Notary Public for South Carolina
My Commission Expires: October 24, 2021.